14-1478

To Be Argued By:
ANNE F. THIDEMANN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 14-1478

POLEAN K. WARE,
Plaintiff-Appellant,

-vs-

PATRICK DONAHOE,
POSTMASTER GENERAL,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE DEFENDANT-APPELLEE

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Dominic J. Squatrito, J.) had subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 where the plaintiff-appellant alleged discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. Final judgment on all parties' claims was entered on March 4, 2014. Government Appendix ("GA") 8. On April 29, 2104, the plaintiff filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a). GA 8. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issue Presented for Review

The plaintiff-appellant alleged that the defendant Postal Service discriminated and retaliated against him during his employment. The district court granted summary judgment in favor of the Postal Service because the plaintiff either failed to provide evidence to support a prima facie case of discrimination or retaliation, or plaintiff failed to present evidence that the Postal Service's reasons for its actions were pretext for discrimination. Therefore the questions presented are whether the plaintiff provided evidence sufficient to support a prima facie case of discrimination or retaliation and whether the plaintiff provided evidence sufficient to establish that the Postal Service's legitimate non-discriminatory reasons for its actions were, in fact, pretext for discrimination or retaliation?

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Preliminary Statement

The appellant, Polean Ware, alleged that the Postal Service discriminated and retaliated against him in violation of Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act (ADEA). Specifi-

cally, Ware alleged that he was discriminated against because of his color (black), race (African-American), gender (male), and age (52), and that he was retaliated against because of his Equal Employment Opportunity (EEO) complaint.

After discovery, the Postal Service moved for summary judgment. The district court granted the Postal Service's motion and entered judgment in favor of the Postal Service. The district court granted summary judgment in favor of the Postal Service on a number of Ware's allegations of discrimination and retaliation because Ware failed to provide evidence to support a prima facie case of discrimination or retaliation.

As set forth below, the district court properly granted summary judgment to the Postal Service. With respect to many of his claims, Ware failed to provide evidence that the challenged actions were adverse employment actions, Ware failed to provide evidence of discrimination, or Ware failed to present evidence of a causal connection between the challenged action and Ware's filing of an EEO complaint. The district court granted summary judgment in favor of the Postal Service on Ware's remaining allegations of discrimination and retaliation because Ware failed to present evidence that the Postal Service's offered reasons for the adverse employ-

ment actions were pretext for discrimination. The district court's judgment should be affirmed.

Statement of the Case

This is an employment discrimination case brought by Ware against the Postal Service in 2009. GA 2; GA 25-31. In 2011, the Postal Service moved for summary judgment as to all of Ware's claims. GA 7; GA 32-88. Judge Dominic J. Squatrito granted the Postal Service's motion for summary judgment on March 4, 2014. GA 8; GA 1466. Ware appealed and now challenges Judge Squatrito's decision to grant the Postal Service's summary judgment motion. GA 8; GA 1491-1493.

A. General background

Ware works for the Postal Service in Hartford, Connecticut. GA 36. The Post Office in Hartford has multiple locations and each location is referred to as a branch or station. GA 36. Each branch or station has a branch manager, referred to as a "Manager of Customer Service," who is responsible for running that branch and who, in turn, reports to the overall Postmaster of Hartford. GA 36. The Postmaster is assisted by a "lead" Manager of Customer Service. GA 92.

Ware alleged violations of Title VII and the ADEA. Ware alleges he is a man whose color is

black and his race is African-American. GA 89. In 2008, when the events relevant to this case took place, Ware was 52 years old. GA 89.

B. Ware's background

Ware has worked for the Postal Service in various roles since 1985.[1] GA 89. Although he worked in management from 1985 until his demotion in November, 2008, Ware did not begin to supervise employees until 2001. GA 89. In 2005, Ware was assigned to the East Hartford Main Street branch as Manager of Customer Service. GA 90. Later in 2005, Ware requested, and received, a temporary assignment to the Hartford Processing and Distribution Center, which is a hub that is responsible for routing mail. GA 90. On February 13, 2008, Ware returned to his assignment as Manager of Customer Service for the East Hartford Main Street branch. GA 91.

As the Manager of Customer Service for the East Hartford Main Street branch, Ware report-

[1] The facts set forth herein are drawn from the Postal Service's Local Rule 56(a)1 statement and supporting documentation. Because Ware did not properly respond to the Postal Service's Local Rule 56(a)1 statement, the district court relied on the Postal Service's statement of the facts in deciding the motion for summary judgment. GA 1466-69.

ed to Tom Sullivan, who was the "lead" Manager of Customer Service. GA 92. Sullivan is a white male who was 37 years old in 2008. GA 95. Sullivan reported to Judith Martin, who was the Postmaster of the Hartford Post Office. GA 92. Martin is a white female who in 2008 was 49 years old. GA 95. On occasion, Ware would report to Ron Boyne, who would fill in for Sullivan when Sullivan was out of the office or covering for Martin. GA 92. Ware had never worked for Martin before. GA 92. Ware suspected, however, that Sullivan was jealous of Ware for his prior success at the East Hartford Main Street location. GA 92.

Ware had two subordinate managers ("supervisors"), Geri Yocher and Raymond "Larry" Parmlee. GA 91. Parmlee was replaced by Pam Sizemore in June of 2008. GA 91.

The focus of Ware's allegations is events that took place between February of 2008 (when he returned to the East Hartford Main Street location) and November of 2008 (when he was demoted). During this time period, on May 6, 2008, Ware filed an EEO complaint, alleging that the Postal Service had discriminated against him during this time period. GA 28.

C. The March 7, 2008 pre-disciplinary interview between Ware, Martin, and Sullivan

On March 3, 2008, Martin and Sullivan visited the East Hartford Main Street branch. GA 96. Both Martin and Sullivan observed Ware's employees failing to follow procedure. GA 96. In particular, they observed several of Ware's carriers "casing" (dividing into slots for individual addresses in the carrier's route case) Delivery Point Sequence (DPS) mail, which is mail that has already been placed in carrier walk sequence. GA 96. According to Ware's supervisors, DPS mail should never be cased. GA 96. Sullivan immediately pointed out the casing to Ware. GA 96. Martin instructed all managers in Hartford, including Ware, to stop DPS mail casing. GA 97. Martin was not aware of managers, besides Ware, who failed to stop their employees from casing DPS mail. GA 97.

In response to this incident, Martin and Sullivan conducted a pre-disciplinary interview (PDI) with Ware. GA 96. A PDI is not considered discipline in the Postal Service; rather it is the opportunity for management to ask questions of the individual. GA 96. Ware does not have a clear memory of what happened at the PDI. GA 96.

D. The March 12, 2008 proposed letter of warning

On March 12, 2008, Sullivan issued Ware a proposed letter of warning in lieu of a seven-day suspension. GA 592-94. Sullivan explained that he issued the letter based on his and Martin's observing carriers casing DPS mail on March 3, 2008. GA 98; GA 592-94. When Sullivan asked Ware why he did not immediately instruct the carriers to stop casing DPS mail, Ware said the carrier was casing DPS mail because he had to leave early. GA 98; GA 592. Sullivan and Martin instructed Ware to discipline the carriers for casing DPS mail, but Ware failed to discipline the carriers. GA 98; GA 592-94. Sullivan also stated in the letter that on March 6, 2008, Ware had failed to ensure that all mail was current and any and all delayed mail was delivered immediately. GA 98; GA 592-94.

Ware verbally appealed the letter to Martin. GA 99. After meeting with Ware, Martin reduced the letter from a letter of warning in lieu of a suspension to just a letter of warning. GA 99; GA 595.

E. The May 9, 2008 proposed letter of warning

On May 9, 2008, Sullivan issued Ware a proposed letter of warning in lieu of a fourteen-day

suspension. GA 596. The basis for the letter was that Ware failed to properly perform the duties assigned to him by Martin and Sullivan. GA 596. The letter stated, in relevant part, that Ware had failed to follow Sullivan and Martin's instruction to ensure the accuracy of a linear mail count on several dates. GA 596. Sullivan issued this discipline because Ware's failures caused data integrity issues for the Postal Service. GA 101. Martin explained why Ware's behavior was a problem:

> Mr. Ware's office was going through an individual piece count which means he had a team in his office counting every piece of mail. Mr. Ware was responsible for making sure that those volumes were correctly input into the system. This had to be done precisely and the numbers had to be exact. Mr. Ware failed to make sure this was done right and failed to ensure his supervisor completed his assignment. This caused a data integrity issue while making the adjustments. No other office had these integrity issues.

GA 101.

Ware appealed the letter to Martin. GA 102. Ware claimed he did not know how to properly perform the volume counts for which he was dis-

ciplined. GA 102. Martin removed the proposed letter of warning from Ware's personnel file and provided Ware with an operations support analyst to retrain him on the correct process. GA 102.

F. Ware's use of sick and annual leave time

Ware was generally able to use leave time while working at the Postal Service. For example, he was on leave from the Postal Service April 17-22, 2008 and April 28, 2008. GA 102.

On Friday, May 9, 2008, the same date Sullivan issued the proposed letter of warning in lieu of a fourteen-day suspension, Ware went to a walk-in clinic for stress and anxiety. GA 102. That same day, Ware's doctor wrote a note excusing Ware from work until May 15, 2008 because of high blood pressure. GA 103. Ware called and left messages for Martin and Sullivan over the weekend about the sick leave, and Martin called Ware on Monday, May 12, 2008. GA 103-04. Ware testified at his deposition that, "I wasn't in my normal state of mind, I guess. And [Martin] may have had some concern at that, okay." GA 104. Martin explained that during the call Ware told her he did not want discipline in his file because he wanted to transfer to another state. GA 105. In response, Martin told Ware that his data looked good and that "if he

wanted to get a position in another area he should not stay out of work because it would look unfavorable to anyone reviewing a request for transfer since his absence was immediately following his discipline." GA 105. Ware was cleared to return to work on May 28, 2008, GA 105; according to his timesheet, Ware returned to work full-time on June 2, 2008, GA 633.

Ware challenged the Postal Service's decision to deny him leave in July and August of 2008. On Saturday, July 26, 2008, Ware's delivery unit was scheduled to undergo a "route adjustment." GA 107. The route adjustment process was new and Ware's office was one of the first to undergo the process. GA 107. Ware requested annual leave (vacation time) for July 22 to July 25, 2008. GA 107. Sullivan denied Ware's request for leave for July 24 and 25, but granted it for July 21 through July 23, 2008.[2] GA 109. Sullivan informed Ware of his expectations on Friday, July 18, 2008. GA 109. Sullivan explained that he worked "with him and approved a partial request for July 21 – 23, 2008 so that he could watch his daughter play basketball. I explained

[2] Ware argued he should not have needed to use leave on Monday, July 21, 2008 because he worked as "duty manager" on the prior Saturday, but he never told the Postal Service about this issue until he was later disciplined. GA 107-09.

that he needed to be back in his office on July 24, 2008 to prepare for the route adjustments that were originally planned for July 26, 2008." GA 109. Ware, in turn, told Sullivan he would not be back to his branch until July 25, 2008. GA 109-110.

Ware called the East Hartford Main Street branch on Wednesday, July 23, 2008 to check in and was told that if he failed to report to work the next day he would be marked AWOL (absent without leave). GA 110. In turn, Ware called Martin and asked for annual leave or emergency annual leave for July 24 – 25, which Martin denied. GA 110. Following his conversation with Martin, Ware called Boyne, who was covering for Sullivan, and requested sick leave for Thursday July 24, 2008 to Monday, July 28, 2008. GA 112.

Martin drove to the East Hartford Main Street branch after her conversation with Ware. GA 113. She found that Ware had failed to ensure work was finished that needed to be finished in order to complete the route adjustment. GA 113. Martin decided "due to Mr. Ware's failure to ensure these tasks were assigned to employees for completion, I needed to make the decision to postpone the routes." GA 113. Martin informed the district manager (her boss) and Sullivan that the route adjustment would have to be postponed until the following week because

the necessary tasks were incomplete. GA 113-14. Ware did not return to the office on July 24, 2008, but ultimately did return on July 25. GA 716. Ware ultimately admitted that there were several items that he was solely responsible for prior to the route adjustment. GA 114.

Ware requested annual leave for July 29 – 31, 2008. GA 106; GA 114. Sullivan denied Ware's request for leave, the dates of which immediately preceded the rescheduled route adjustment. GA 114. Sullivan explained that he denied Ware's request because "his Supervisor Pam Sizemore was on annual leave. His office consists of two supervisors and a manager. I could not have the office operate with two thirds of the management staff on annual leave. As the manager of the office, he was responsible for providing coverage and he could not." GA 114.

In August, the problems with leave time continued. Ware requested annual leave for August 9-13, 2008 in order to move his daughter into college. GA 115-16. Sullivan denied the request because one of Ware's supervisors was scheduled to be on vacation during the same time. GA 115; GA 649-50. On August 6, 2008, Ware requested sick leave from Boyne for the rest of the week, and Boyne notified Sullivan of Ware's request. GA 117; GA 649. Because Sullivan had previously denied Ware's request for annual leave for the

same days, Sullivan thought Ware was being dishonest when he said he was sick. GA 117; GA 650. Sullivan told Ware that he had contacted the Postal Service's Office of the Inspector General (OIG) and had given that Office the above information. GA 117; GA 650. Ware ultimately decided to remain at work on August 6, 2008. GA 650.

On August 7, 2008, Ware again requested annual leave for August 9-13. GA 115. Sullivan denied this request August 8, 2008 because Ware was still missing one of his supervisors. GA 115-16. In his denial, Sullivan explained to Ware "that I would not be able to approve your request for August 11th thru August 13th to use as annual leave because your supervisor is currently off on annual leave during this same time frame. When I told you that at times you need to say 'No' to your supervisor, your response was that you are not that type of manager and have a problem doing that. You are the manager of the facility and you [] are responsible for adequate coverage of that office." GA 116.

G. The notice of proposed removal

On September 19, 2008, Sullivan issued Ware a "Notice of Proposed Removal," which was based on four charges: (1) failure to follow instructions; (2) failure to perform your duties sat-

isfactorily; (3) AWOL; and (4) falsification. GA 117; GA 706-08.

1. Failure to follow instructions

The basis for the failure to follow instructions charge was Ware's handling of "Window of Operations" (WOO) grievances. GA 118. WOO grievances were an ongoing problem for the Postal Service; in the beginning of 2008, the Postal Service paid over $200,000 to settle WOO grievances because management lacked documentation to prove that it complied with the labor contract with respect to the scheduling of overtime. GA 118.

On April 7, 2008, Martin sent a memorandum to Ware and his colleagues outlining the proper way to handle WOO grievances. GA 118. Sullivan instituted procedures for managers to follow, including forwarding paperwork to Sullivan the day after overtime was requested and informing Sullivan when a WOO grievance arrived at the manager's office. GA 118. Ware attended a training session on this issue. GA 118. Nevertheless, on August 8, 2008, Sullivan became aware that, in Ware's branch, the Union had filed eleven WOO grievances and that Ware "failed to comply with the prerequisites set forth in [Sullivan's] instructions." GA 706.

Sullivan spoke to Ware on August 20, 2008, and found that Ware failed to submit the Postal Service's version of events (called Management Contentions) in response to the grievances. GA 118-19. Ware did not tell Martin and Sullivan that the grievances had been filed. GA 119. The end result was that the Postal Service was forced to pay $2,000 to settle the grievances. GA 119.

With respect to the grievances, Ware explained that he refused to meet with the union officials until the union officials met with his supervisors. GA 119. Further, Ware told Martin and Sullivan that he delegated all responsibilities for paperwork to his supervisors. GA 120. Regarding Martin's memorandum, Ware explained, "I don't even think I really reviewed all of it. I think my supervisor was the one that's in charge of the overtime." GA 120. Ware told Martin that "[i]n my office I have delegated my supervisors to process all paperwork pertaining to their respective operations." GA 120. In his deposition, Ware admitted it might have been "bad managing" to delegate so much responsibility to his subordinates. GA 122.

2. Failure to perform your duties satisfactorily

The notice of proposed removal also identified Ware's failure to perform duties satisfactorily as a reason for the potential removal. GA 122. This charge stemmed from an audit of Ware's office on August 13, 2008 by Cathy Clark, a Postal Service auditor who did not work for Martin or Sullivan. GA 122-23. Clark identified numerous failures in Ware's branch operations. GA 123. Ware admitted that there were various deficiencies, but claimed that others were responsible. GA 123-25. Martin believed that Ware was "blaming everyone else for the inefficiencies and omissions that were identified in your office. As the Manager of the Station it is your responsibility to ensure the proper procedures were followed." GA 125-26.

3. Absent without leave (AWOL)

Sullivan also charged Ware with AWOL. The AWOL charge stemmed from Ware's failure to report to work on July 24, 2008, when his office was preparing for the route inspection. GA 107-14; GA 126. Ware had requested leave for July 24, 2008, but Sullivan denied Ware's request because of the route inspections. GA 707. Ware did not come to work on July 24, 2008 because he

was in Washington, D.C. watching his daughter play basketball. GA 290; GA 707.

4. Falsification

The falsification charge arose out of a summons to jury duty. GA 708. Ware was summoned by the district court to attend jury duty on August 15, 2008. GA 126. Ware informed Sullivan about the jury duty on August 14, 2008. GA 126. Despite written instructions on the jury duty form, Ware did not call the automated number the night before jury duty. GA 126-27. Upon arriving at the district court at 8:00 a.m., Ware was told that jury duty was cancelled. GA 127. Ware waited at the court until 9:30 a.m. to confirm with the clerk's office that jury duty was cancelled. GA 127. Rather than go to work at that point, Ware went to his doctor's office. GA 127. As Ware explained,

> With the incident that took place between Tom and I on August 6, where he threatened to fire me for being sick, I could not muster up the strength to tell him I was going to the doctor and await another denial.

GA 127. Ware scheduled a 2:45 p.m. appointment, went home, went to the appointment, and went back home. GA 127-28.

On August 18, 2008, after Sullivan realized that he had never received a leave request for Ware's jury duty, Sullivan provided Ware with a leave slip request for eight hours of court leave and asked Ware to sign the form. GA 128. Ware signed the form. GA 128. Sullivan subsequently told Martin that Ware was on jury duty leave on August 15. GA 128; GA 759.

Martin decided to verify Ware's jury duty because "Ware had not been truthful . . . on many other occasions." GA 759. Martin called the district court and spoke to a court clerk who informed her that there was no jury duty on August 15, 2008. GA 759. Martin then reconfirmed that Ware had requested court leave for that day. GA 759.

Sullivan held a pre-disciplinary interview with Ware on August 20, 2008 to discuss Ware's court leave. GA 759. Martin observed the PDI. GA 759; GA 129-30. After the PDI, Martin called the court to verify what she was told by Ware. The clerk confirmed there was no jury duty on August 15, and that the Marshalls guarding the court would have informed Ware as soon as he arrived that jury duty was cancelled. GA 759.[3]

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[3] Prior to issuing the Notice of Proposed Removal, the Postal Service learned from one of its inspectors general that Ware called the district court's auto-

Because jury duty was cancelled, Martin believed Ware should have either reported to work or put in for a different type of leave. GA 760. Postal Service rules state that "[e]mployees . . . who are excused from court service for an entire day or days are not entitled to compensation for such days unless they actually perform service as postal employees." GA 129. Ware did not tell Martin or Sullivan that he did not serve on jury duty until Sullivan held the PDI with him. GA 130. Because Ware signed a leave request for eight hours of court leave when he knew he did not attend jury duty, Martin believed he falsified the leave slip. GA 760.

H. Ware's response to the notice of proposed removal and the Postal Service's letter of decision

On November 14, 2008, Ware responded by a written letter to the September 19, 2008 notice of proposed removal. GA 699. Ware generally disagreed with the Postal Service's reasons for terminating his employment. Martin responded to Ware's letter on November 24, 2008 with a Letter of Decision. GA 763.

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mated jury duty line on August 15, 2008 at 8:33 a.m., 8:54 a.m., 9:12 a.m., and 12:14 p.m. GA 131; GA 761-62.

Martin found that the charges in the notice of proposed removal were valid. GA 763. Martin specifically rebutted Ware's arguments that the removal was not valid. GA 763.

As to charge one, failure to follow instructions, Martin wrote: "you state that you were on annual leave from 4/17 through 4/19 when Tom Sullivan gave the instruction to notify him prior to scheduling non-OTDL carriers to work overtime, yet, later in your response you acknowledge that you knew what the proper procedure was…." GA 763.

As to charge two, failure to perform your duties satisfactorily, Martin wrote: "you seem to be blaming everyone else for the inefficiencies and omissions that were identified in your office. As the Manager of the Station it is your responsibility to ensure the proper procedures are followed." GA 763.

As to charge three, AWOL, Martin wrote: "you claim that Manager Tom Sullivan had approved your leave for July 24, 2008. This claim is not supported by the evidence." GA 763.

Finally, as to charge four, falsification, Martin wrote: "You acknowledge that your jury duty for August 15, 2008 was cancelled and . . . you failed to report for duty. You state that you were ill that day and you went to your doctor, yet, 3

days later you signed your request for court leave for 8/15/08." GA 763.

Although Martin rejected all of Ware's explanations and she upheld the discipline, she decided to reduce the punishment. GA 763-64. Instead of terminating his employment, Martin demoted Ware from a Customer Service Manager (or Station Manager) to a part-time letter carrier in a nearby post office. GA 764. During the litigation of this case, Ware continued to work at the Postal Service as a part-time letter carrier. GA 583.

Summary of Argument

Ware alleged that any incident where he was questioned, corrected or reprimanded between his February 2008 return to the East Hartford Post Office as Manager of Customer Service and his November 2008 demotion was discriminatory or retaliatory. Ware does not deny the problems raised by the Postal Service; rather, he suggests others were responsible, and therefore should have been reprimanded, for those problems. A number of Ware's retaliation claims fail because the challenged actions took place before Ware filed his EEO complaint. In addition, for many of the incidents that he alleged, Ware failed to present evidence of a prima facie case of discrimination or retaliation because he did not suffer an

adverse act. For those incidents that rose to the level of an adverse act, Ware could not show a causal connection between the act and discrimination or retaliation. Furthermore, even if Ware could meet the elements of a prima facie case, Ware could not show for any of the challenged actions that the Postal Service's reasons for its actions were pretext for discrimination or retaliation. The district court, therefore, properly granted summary judgment to the Postal Service.

Argument

I. The district court properly granted summary judgment to the Postal Service.

A. Relevant facts

The relevant facts are set forth above.

B. Governing law and standard of review

1. The law governing summary judgment

Rule 56(a) of the Federal Rules of Civil Procedure provides that a court shall render summary judgment when a review of the entire record demonstrates "that there is no genuine dispute as to any material fact." *See also Celotex*

Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The relevant question is not whether the non-moving party has provided any evidence, but

> whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict—whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (internal quotation marks omitted). In determining whether there is a genuine issue of material fact, the court must resolve ambiguities and draw factual inferences in favor of the non-moving party. *Id.* at 255.

Although the court has a duty to resolve ambiguities in favor of the non-moving party, "[a] defendant need not prove a negative when it moves for summary judgment on an issue that

the plaintiff must prove at trial." *Parker v. Sony Pictures Entertainment, Inc.*, 260 F.3d 100, 111 (2d Cir. 2001). When the moving party points to an absence of evidence regarding an essential element, "the onus shifts to the party resisting summary judgment to present evidence sufficient to satisfy every element of the claim. The non-moving party is required to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Holcomb v. Iona College*, 521 F.3d 130, 137 (2d Cir. 2008) (internal quotation marks omitted).

On summary judgment, the court's "obligation to draw all reasonable inferences in favor of plaintiffs does not mean [the court] must credit a version of the facts that is belied by the record." *Tabbaa v. Chertoff*, 509 F.3d 89, 93 n.1 (2d Cir. 2007). "The Supreme Court held in *Anderson* . . . that a plaintiff may not defeat summary judgment by merely asserting that the jury might, and legally could, disbelieve the defendant's denial." *LaFrenier v. Kinirey*, 550 F.3d 166, 167 (1st Cir. 2008) (citing *Anderson*, 447 U.S. at 252).

This Court reviews *de novo* a district court's grant of summary judgment. *Chau v. Lewis*, 771 F.3d 118, 126 n.4 (2d Cir. 2014).

2. The law governing Title VII

In this case, Ware argues that the Postal Service discriminated and retaliated against him when it subjected him to disparate treatment on account of his color, race, and gender.

a. Title VII discrimination law

Title VII prohibits discrimination on the basis of, inter alia, race, color and gender. 42 U.S.C. §§ 2000e-2 and 2000e-16. Claims involving discrete acts that result in allegations of disparate treatment are analyzed under the *McDonnell Douglas* burden shifting framework. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Graham v. Long Island R.R.*, 230 F.3d 34, 38 (2d Cir. 2000). For Title VII discrimination cases, the first step in the *McDonnell Douglas* analysis requires the plaintiff to produce evidence that (1) he is a member of a protected class; (2) he was competently performing his duties; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Graham*, 230 F.3d at 38. An adverse employment action is defined as:

> a materially adverse change in the terms and conditions of employment. . . . To be materially adverse, a change in working

> conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities. . . . Examples of such a change include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation.

Sanders v. New York City Human Res. Admin., 361 F.3d 749, 755 (2d Cir. 2004) (citations omitted; internal quotation marks omitted).

Should the plaintiff carry his burden to make a prima facie case, the burden of production shifts to the employer to offer legitimate non-discriminatory reasons for its actions. *Howley v. Town of Stratford*, 217 F.3d 141, 150 (2d Cir. 2000).

After the plaintiff makes a prima facie case and the employer offers a legitimate non-discriminatory reason, the burden shifts back to the plaintiff. *Id*. The plaintiff must show that the employer's proffered non-discriminatory reason was, in fact, a pretext for discrimination. *Id*. The plaintiff must produce:

> admissible evidence that would be sufficient to permit a rational finder of fact to

> infer that the employer's proffered reason is pretext for an impermissible motivation. . . . However, merely showing that the employer's proffered explanation is not a genuine explanation does not in itself entitle the plaintiff to prevail; the plaintiff is not entitled to judgment unless she shows that the challenged employment decision was more likely than not motivated, in whole or in part, by unlawful discrimination. . . . The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

Id. (citations omitted; internal quotation marks omitted). If the plaintiff fails to meet his burden of presenting evidence rebutting *each* of the employer's legitimate non-discriminatory reasons, summary judgment is appropriate. *Jackson v. Watkins*, 619 F.3d 463, 467 (5th Cir. 2010) (per curiam).

When evaluating whether the employer's legitimate non-discriminatory reasons are a pretext for discrimination, neither a plaintiff nor a court may substitute their business judgment for that of the employer. *Alfano v. Costello*, 294 F.3d 365, 377 (2d Cir. 2002); *see also Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 103 (2d

Cir. 2001) (quoting with approval *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1330 (10th Cir. 1999) ("Our role is to prevent unlawful hiring practices, not to act as a super personnel department that second guesses employers' business judgments.")). "[I]t is not the function of a fact-finder to second-guess business decisions or to question a corporation's means to achieve a legitimate goal. . . . Evidence that an employer made a poor business judgment in discharging an employee generally is insufficient to establish a genuine issue of fact as to the credibility of the employer's reasons." *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988) (internal citations omitted).

Further, when a court examines an employer's legitimate non-discriminatory reasons, the focus is on what an employer believed at the time it made its decision, not post-hoc explanations provided by the plaintiff. *See Cameron v. Community Aid For Retarded Children, Inc.*, 335 F.3d 60, 65 (2d Cir. 2003) (inaccuracy of reports of employee's abusive conduct toward subordinates "d[id] not matter if [the employer] believed [the reports]"). As one court explained, "[i]n determining whether a plaintiff has produced sufficient evidence of pretext, the key question is *not* whether the stated basis for termination ac-

tually occurred, but whether the defendant *believed it to have occurred*." *Soto v. Core-Mark Int'l, Inc.*, 521 F.3d 837, 842 (8th Cir. 2008) (emphasis added).

b. Title VII retaliation law

The Title VII retaliation provisions make it an unlawful employment practice for an employer to discriminate against any of its employees because the employee has engaged in a protected activity, such as filing a complaint with the Equal Employment Opportunity Commission. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 59, 68 (2006). A plaintiff's Title VII retaliation claims are analyzed under the same *McDonnell Douglas* burden-shifting framework that applies to discrimination claims, save for two important differences (described below). *Adams v. Department of Public Safety*, 764 F.3d 244, 254 (2d Cir. 2014). To establish a prima facie case of retaliation the plaintiff must show that: (1) he engaged in a protected activity; (2) his employer was aware of the activity; (3) he suffered an adverse employment action; and (4) a causal connection exists between the challenged action and the protected activity. *Hicks v. Baines*, 593 F.3d 159, 164 (2d Cir. 2010).

The first difference between discrimination and retaliation provisions under Title VII relates

to the third prong of the prima facie case. The anti-retaliation provision of Title VII, unlike Title VII's discrimination provision, is not limited to discriminatory actions that affect the terms and conditions of employment. *See id.* at 165; *Kessler v. Westchester County Dep't of Soc. Servs.*, 461 F.3d 199, 207 (2d Cir. 2006) (applying this standard to Title VII and ADEA retaliation claims). Rather, the "plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which . . . means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 548 U.S. at 68 (internal quotation marks omitted); *Kessler*, 461 F.3d at 207-209.

The second difference between discrimination and retaliation provisions under Title VII relates to proving causation, whether at the prima facie stage or when proving pretext: Unlike discrimination claims, "'Title VII retaliation claims must be proved according to traditional principles of but-for causation,'" which "'requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.'" *Zann Kwan v. Andalex Group LLC*, 737 F.3d 834, 845 (2d Cir. 2013) (quoting *University of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013)).

Although Title VII retaliation claims are analyzed similarly to Title VII discrimination claims, the anti-retaliation portion of Title VII is meant as a shield for employees, not as a sword. *See Jackson v. St. Joseph State Hospital*, 840 F.2d 1387, 1391 (8th Cir. 1988) ("Title VII protection from retaliation for filing a complaint does not clothe the complainant with immunity for past and present inadequacies, unsatisfactory performance, and uncivil conduct in dealing with subordinates and with . . . peers. The public and the state should not have to suffer waste of public funds in countenancing . . . arrogant and bizarre conduct . . . ."). "The mere act of filing an EEOC complaint does not render illegal all subsequent disciplinary actions taken by [the defendant]." *Id*. at 1390. "Were the rule otherwise, then a disgruntled employee, no matter how poor his performance or how contemptuous his attitude toward his supervisors, could effectively inhibit a well-deserved discharge by merely filing, or threatening to file, a discrimination complaint." *Mesnick v. General Electric Co.*, 950 F.2d 816, 828 (1st Cir. 1991).

3. The law governing the ADEA

Ware also argues that the Postal Service discriminated and retaliated against him in violation of the ADEA.

a. ADEA discrimination law

The ADEA is an anti-discrimination statute that aims to eliminate discrimination against people over the age of 40. Suits involving federal employment are governed by § 633a of the ADEA. *See* 29 U.S.C. § 633a. ADEA claims are governed by the same *McDonnell Douglas* burden shifting analysis set forth above. *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 106-07 (2d Cir. 2010). For the purposes of summary judgment, the ADEA is a subtle mix of Title VII's anti-discrimination provision and the anti-retaliation provision. For the prima facie case, a plaintiff must prove that he was subjected to an "adverse employment action," *D'Cunha v. Genovese/Eckerd Corp.*, 479 F.3d 193, 195 (2d Cir. 2007) (per curiam), which is the same standard applicable to Title VII's anti-discrimination provision (but different than its anti-retaliation provision).

When it comes to proving pretext, however, the Supreme Court has held that the ADEA follows Title VII's anti-retaliation provision and requires proof of "but-for" causation. *Gross v. FBL Financial Servs., Inc.*, 557 U.S. 167 (2009). The Supreme Court's decision in *Gross* holding that plaintiffs bringing ADEA claims must establish "but-for" causation was based on § 623 of the ADEA, which applies to private sector defend-

ants. The Seventh Circuit has suggested that *Gross* applies to the federal defendant's provision of the ADEA at issue here (§ 633a), while the D.C. Circuit reached the opposite conclusion and applied the substantial or motivating factor test. *Cf. Reynolds v. Tangherlini*, 737 F.3d 1093, 1103-04 (7th Cir. 2013) with *Ford v. Mabus*, 629 F.3d 198, 205-206 (D.C. Cir. 2010). "The First and Fifth Circuits have noted the issue but not resolved it." *Reynolds*, 737 F.3d at 1103-04 (citing *Velazquez-Ortiz v. Vilsack*, 657 F.3d 64, 74 (1st Cir. 2011) and *Leal v. McHugh*, 731 F.3d 405, 411-12 (5th Cir. 2013)). The Second Circuit has not resolved this question.[4]

b. ADEA retaliation law

Concerning ADEA retaliation claims, this Court (admittedly before the Supreme Court's decisions in *Nassar* and *Gross*) has said that Title VII and the ADEA contain "nearly identical provision[s] prohibiting retaliation for complaining of employment discrimination on the basis of

[4] Although the appropriate standard in federal cases is an open question in this Court, that question is not squarely presented by this case. The issue was not raised by either party below, nor was it considered by the district court. Furthermore, this Court does not need to resolve the question because Ware cannot prove pretext under either standard.

age . . . and the same standards and burdens apply to claims under both statutes." *Kessler*, 461 F.3d at 205. Although it appears this Court has not decided whether "but-for" causation is required under ADEA retaliation claims, this Court's prior decisions suggest that *Nassar* would apply to ADEA retaliation claims. *See Kessler*, 461 F.3d at 205; *Gorzynski*, 596 F.3d at 111 (post-*Gross*, the analysis for Title VII and ADEA retaliation claims are the same).

C. Discussion

Ware argues that the district court erroneously granted summary judgment to the Postal Service, dismissing Ware's claims for disparate treatment and retaliation in violation of Title VII and the ADEA.[5] Brief of Appellant Ware (Pl. Br.) at 6. Ware's brief lists "[a]ll the incidents in the complaint" as issues presented to this Court

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[5] Ware's brief on appeal discusses only discrimination and retaliation under Title VII and the ADEA. Ware does not raise on appeal claims for hostile work environment under Title VII. The Postal Service therefore understands the hostile work environment claims are waived. *Cruz v. Gomez*, 202 F. 3d 593, 596 n.3 (2d Cir. 2000) ("When a litigant—including a *pro se* litigant—raises an issue before the district court but does not raise it on appeal, the issue is abandoned.").

for review on appeal. Pl. Br. at 5. Although Ware only discusses a few of those incidents in his brief before this Court, in light of Ware's *pro se* status, and in an attempt to establish a framework for the allegations in the complaint, the Postal Service will address each adverse act listed in Ware's amended complaint below.

The district court properly granted summary judgment in favor of the Postal Service because, with regard to each incident, Ware failed to make a showing sufficient to meet his burden of proof on at least one of two elements essential to his case: (1) Ware failed to establish a prima facie case of discrimination or retaliation; and/or (2) Ware failed to present evidence to support his allegation that the Postal Service's proffered legitimate non-discriminatory reasons for disciplining and demoting Ware were pretexts for discrimination or retaliation.

1. The March 7, 2008 PDI cannot support a claim for discrimination or retaliation.

Ware alleged below that the Postal Service discriminated and retaliated against him when his supervisor conducted a PDI with him on March 7, 2008. GA 93-94; GA 573-77.

Ware cannot meet the first two prongs of a prima facie case of retaliation based on the

March 7, 2008 PDI because that PDI took place before May 6, 2008, the date Ware filed his EEO complaint. GA 907-08; GA 236-37. At the time of the PDI, Ware had not engaged in a protected activity, and therefore the Postal Service could not have been aware of the protected activity.

Ware cannot establish the third prong of a prima facie case of discrimination based on the March 7, 2008 PDI because a PDI is not an adverse employment act. A PDI is a meeting where upper management can ask questions of the employee and determine whether discipline is warranted. GA 96; GA 602; GA 604. The Postal Service does not consider a PDI to be discipline. GA 602; GA 604. Consequently, a PDI has no effect on the terms and conditions of employment, and therefore cannot qualify as an adverse employment act. *See Stembridge v. City of New York*, 88 F. Supp. 2d 276, 283 (S.D.N.Y. 2000) (reprimand not adverse employment action).

Even if Ware could make a prima facie case of retaliation or discrimination, the Postal Service had legitimate non-discriminatory reasons for questioning Ware on March 7, 2008 about his conduct. The March 7, 2008 PDI was held to discuss Martin and Sullivan's March 3, 2008 visit to the East Hartford Main Street Station. GA 592-93; GA 202-03; GA 643-44. Martin and Sullivan both observed several of Ware's letter

carriers casing DPS mail, which should never be cased. GA 96; GA 592; GA 643-44. Ware presented no evidence to show that the above reasons were a pretext and thus the PDI could not form the basis for a discrimination or retaliation claim.

2. The March 12, 2008 proposed letter of warning in lieu of a seven-day suspension cannot support a claim for discrimination or retaliation.

Ware alleged below the Postal Service discriminated and retaliated against him when his supervisor issued proposed letter of warning in lieu of a seven-day suspension on March 12, 2008. GA 26; GA 29.

Ware cannot establish the first two prongs of a prima facie case of retaliation based on the March 12, 2008 proposed letter of warning because it was issued before May 6, 2008, the date Ware filed his EEO complaint. GA 907-08; GA 236-37. Ware did not engage in a protected activity and the Postal Service could not have been aware of the protected activity until May 6, 2008, the date Ware filed the EEO complaint.

Ware also cannot establish the third prong of a prima facie case of discrimination based on the March 12, 2008 proposed letter of warning because it was only a proposed adverse employ-

ment act. GA 1270. Proposed discipline does not result in an adverse employment action. GA 1270-71. In fact, on May 29, 2008, Martin reduced the March 12, 2008 proposed letter of warning in lieu of a seven-day suspension to a letter of warning. GA 595; GA 99; GA 225; GA 227. (This letter of warning will be discussed in the next section.)

Even if Ware could establish a prima facie case of retaliation or discrimination, Ware presented no evidence to suggest that the legitimate non-discriminatory reasons the Postal Service offered for issuing the proposed letter were pretext for discrimination. The March 12, 2008 proposed letter of warning identified three reasons why it was issued to Ware: (1) Ware failed to stop letter carriers from casing DPS mail on March 3, 2008; (2) Ware failed to take corrective action against the carriers casing DPS mail as instructed; and (3) Ware failed to insure all delayed mail was delivered immediately. GA 592. The record shows that these were legitimate, non-discriminatory reasons for issuance of the letter. Martin and Sullivan both observed several of Ware's letter carriers casing DPS mail, which according to their directives, should never be cased. GA 96; GA 592; GA 643-44. Martin had notified Ware prior to March 3 that DPS mail should not be cased. GA 97; GA 682. Further,

Sullivan notified Ware on March 3 that Ware should discipline his carriers for casing the mail. GA 592.

The only evidence Ware offered to establish pretext in these reasons is his opinion that his subordinates, the people who directly supervised the carriers, were responsible for the violations. GA 904-05. Ware's suggestion that he was not responsible for the actions of his subordinates, and therefore Ware should not have been disciplined, is not sufficient to survive summary judgment. Ware is simply challenging the business decision of the Postal Service to hold Ware, as the highest ranking official for the East Main Street Hartford office, rather than his subordinates, responsible for violation of Postal rules at the station. Ware presents no evidence that links the decision to issue the proposed letter of warning to a discriminatory animus.

3. Martin's May 29, 2008 reduction of the March 12, 2008 proposed letter of warning in lieu of a seven-day suspension to a letter of warning cannot support a claim for retaliation or discrimination.

Ware argued below that the May 29, 2008 letter of warning constituted discrimination and retaliation. GA 26; GA 29. Although the May 29,

2008 letter of warning was issued within a month after Ware filed his EEO complaint, the letter of warning was a lessening of proposed discipline for incidents that occurred *before* the EEO complaint. Martin's decision to reduce discipline after an EEO complaint cannot logically be retaliation.

Even assuming a letter of warning was an adverse employment action and Ware could make a prima facie case of retaliation and discrimination, as set forth above, Ware presented no evidence that Martin's legitimate reasons for issuing the letter of warning were pretext for discrimination or retaliation. Ware agrees that the letter of warning was a reduction in proposed discipline, and that Martin reduced the discipline at Ware's request. GA 595; GA 714. There is no evidence that Martin's decision was a pretext for discrimination or retaliation.

4. The May 9, 2008 proposed letter of warning in lieu of a fourteen-day suspension cannot support a claim for discrimination or retaliation.

Ware argued below that he was discriminated and retaliated against when he was issued the May 9, 2008 proposed letter of warning in lieu of a fourteen-day suspension. GA 27-28.

Ware cannot establish the second prong of a prima facie case of retaliation based on the May 9th proposed letter of warning because Sullivan was not aware of Ware's EEO complaint until after May 9th. GA 236-37.

Ware also cannot establish the third prong of a prima facie case of discrimination based on the May 9, 2008 proposed letter of warning because it was only a *proposed* adverse employment action. GA 1270-71. Proposed discipline does not result in adverse employment action. GA 1270-71. Ware appealed to Martin to remove the discipline because he did not know how to perform the volume counts that led to his discipline. GA 670. Martin removed the proposed letter from Ware's file and gave him training. GA 670; GA 226-27. The May 9 proposed letter of warning did not, therefore, have any effect on the terms and conditions of Ware's employment.

Even if Ware could establish a prima facie case of discrimination or retaliation, he did not meet his burden of showing evidence that would demonstrate the Postal Services' stated legitimate, non-discriminatory reasons for issuing the May 9 proposed letter of warning were pretext for discrimination. In the May 9 letter, Sullivan found Ware had failed to follow instructions because he failed to accurately perform volume counts. GA 596. Ware admitted he had not re-

viewed earlier mail count reports for errors because he expected others to do that work. GA 646; GA 714. Ware's argument improperly challenges the business decision of the Postal Service to hold Ware, rather than his subordinates, responsible for violation of Postal rules. *See Alfano*, 294 F.3d at 377; *Byrnie*, 243 F.3d at 103. Accordingly, Ware cannot show that this was pretextual.

5. Martin's May 12, 2008 phone call to Ware while he was on sick leave cannot support a claim for discrimination or retaliation.

Ware argued below that Martin's May 12, 2008 phone call to him while he was on sick leave discriminated or retaliated against him. GA 29.

Ware cannot establish the third prong of a prima facie case of discrimination or retaliation based May 12th call. Martin made the call in response to a voicemail message Ware left for her regarding a request for sick leave. Such a responsive phone call would not dissuade a reasonable worker from making or supporting a charge of discrimination. *See Burlington Northern*, 548 U.S. at 68; *Kessler*, 461 F.3d at 207 (applying this standard to Title VII and ADEA retaliation claims). Similarly, for the discrimina-

tion claim, the call to Ware in no way affected the terms and conditions of Ware's employment. No discipline was issued during or as a result of the call. Finally, even if Ware could make a prima facie case of discrimination or retaliation, Ware presented no evidence linking Martin's May 12 call to a discriminatory animus.

6. Charging Ware with leave for Monday, July 21, 2008 when Ware did not request leave for that day cannot support a claim for discrimination or retaliation.

Ware argues on appeal that he was discriminated and retaliated against when charged with annual leave for Monday, July 21, 2008, because he did not request leave for that day.[6] Pl. Br. at 10-11. Ware argues that he was entitled to "compensation leave" on Monday, July 21, 2008

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[6] Ware suggests, for the first time on appeal, that his rights under the Fair Labor Standards Act were violated when he was forced to work more than 40 hours the week of July 19-25. Pl. Br. at 11. This argument was not raised below and is, therefore, waived on appeal. *In re Nortel Networks Secs. Litig.,* 539 F.3d 129, 132 (2d Cir. 2008) (per curiam); *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 104 (2d Cir. 2001) (courts generally decline to consider issues first raised on appeal).

to make up for the fact that he had worked the previous Saturday, his scheduled day off. Pl. Br. at 10-11.

Ware cannot meet the third prong of a prima facie case of retaliation or discrimination based on the annual leave charge. With regard to retaliation, a reasonable employee would not have been dissuaded from making or supporting a charge of discrimination because his supervisor charged him with annual leave on a day he was scheduled to work but did not work. *See Burlington Northern*, 548 U.S. at 68; *Kessler*, 461 F.3d at 207. With regard to discrimination, there was no materially adverse change in the terms or conditions of his employment. *See Sanders*, 361 F.3d at 755. Ware presented no evidence that Postal Service regulations entitled him to "compensatory leave" for working on a scheduled day off. On appeal, Ware references "Def. SJ Exhibit 20" in support for his claim that he was entitled to compensation for days worked in excess of forty hours per week. Pl. Br. at 11. That exhibit, however, does not support such a claim. GA 688-89. Defendant's Summary Judgment Exhibit 20 is a handwritten note from Ware to Sullivan outlining his leave request and supervisory coverage in his branch. It does not articulate or cite Postal regulations that might guarantee compensatory leave. GA 688-89. Moreover, although

Ware had one less vacation day to use, the loss of a vacation day is not materially adverse since Ware had, in fact, been on vacation on Monday, July 21, 2008, which was a scheduled work day for him. GA 108-09; GA 319-22; GA 633. *See Terry v. Ashcroft*, 336 F.3d 128, 147 (2d Cir. 2003) ("The denial of restoration of lost leave time . . . is legally insufficient to constitute an adverse employment action."). Ware retained the right to accrue and use annual leave.

Even if Ware could make a prima facie case of discrimination, Ware presented no evidence to rebut the Postal Service's legitimate non-discriminatory reasons for charging Ware with annual leave on Monday, July 21. The circumstances support Sullivan's decision to charge Ware with annual leave rather than sick leave or some other form of leave. Ware was scheduled to work on July 21. Ware informed Sullivan that Ware would be in Washington, D.C. that day to attend his daughter's basketball tournament. Ware did not report to work on July 21. GA 633; GA 319-22; GA 781. There is no evidence Ware was entitled to, or that he asked Sullivan for, "compensatory leave" for Monday, July 21, 2008. Ware cites Exhibit 20 as evidence that he informed Sullivan that he had worked Saturday, July 19, 2008, his scheduled day off. Pl. Br. at 11. That exhibit does not, however, mention "Ju-

ly 19," "July 21," or "compensatory leave." GA 688-89.

In any event, even if Ware had asked for and could have been granted compensatory leave, Ware's challenge to Sullivan's business decision to charge Ware with annual leave instead of granting Ware a compensatory day is insufficient to establish a genuine issue of fact as to pretext. *Dister*, 859 F.2d at 1116 ("Evidence that an employer made a poor business judgment . . . is insufficient to establish a genuine issue of fact as to the credibility of the employer's reasons."). Ware presented no evidence linking Sullivan's decision to a discriminatory animus.

7. The denial of leave requests cannot support a claim for discrimination or retaliation.

Ware claims that he was discriminated and retaliated against when his requests for annual leave were denied on three separate occasions: (1) July 24-25, 2008; (2) July 29-31, 2008; and (3) August 9, 11-13, 2008. GA 106; GA 574; GA 576.

Ware cannot establish a prima facie case of discrimination or retaliation based on the denial of his leave requests because denial of a leave request is not an adverse employment act. The denial of three leave requests does not create a materially adverse change in the terms and con-

ditions of employment. *See Terry*, 336 F.3d at 147 ("The denial of restoration of lost leave time . . . is legally insufficient to constitute an adverse employment action."). Although Ware had the right to request annual leave, he did not have the right to take annual leave *without permission* of his supervisor. The Postal Service expects supervisors to deny an employee's request for annual leave when the needs of the Postal Service require. GA 736. Under circumstances such as these, where management explained the reasons for denial, portions of the leave requests were granted, and management had approved other requests for leave following the filing of the EEO complaint, denial of three leave requests is not likely to prevent a reasonable employee from filing or pursuing a claim.

Ware also cannot establish a prima facie case of discrimination or retaliation based on Sullivan's alleged failure to return the leave request forms because this is not an adverse employment action. The alleged failure to return the forms did not prevent Ware from taking leave on the portion of days Sullivan approved. GA 654; GA 633. Ware had notice that his leave requests were denied before the dates requested, even without the forms. GA 109; GA 114-16; GA 316-17; GA 657; GA 673; GA 690; GA 694; GA 716-17; GA 723; GA 726; GA 758; GA 975-76. Conse-

quently, the failure to return the forms did not affect the terms and conditions of Ware's employment, nor would it dissuade a reasonable employee from pursuing a protected activity. There is no evidence Sullivan failed to return Ware's leave request forms because he was discriminating or retaliating against Ware.

Even if the denial of a leave request was an adverse employment act, Ware offered no evidence to rebut the Postal Service's stated legitimate non-discriminatory/non-retaliatory reasons for denying Ware's three leave requests.

a. There is no evidence that the Postal Service's legitimate non-discriminatory reasons for denying Ware's requests for leave July 24-25 and July 29-31 were pretext for discrimination or retaliation.

Sullivan and Martin denied Ware's requests for leave Thursday, July 24 and Friday, July 25, 2008, as well as Tuesday, July 29 to Thursday, July 31, 2008, because those dates immediately preceded scheduled route adjustments in Ware's station,[7] and Sullivan and Martin believed it

[7] The route adjustment was originally scheduled to take place at the East Hartford station on Saturday,

was necessary for Ware to be at work in the days leading up to implementation of the route adjustment. GA 653-54; GA 657; GA 723; GA 287-88; GA 694; GA 975-76.

On appeal, Ware attempts to show Sullivan and Martin's stated reason for denying his leave was pretext by arguing he was never told that his request for leave on Thursday, July 24, 2008 was denied. Pl. Br. at 10-12. Ware states he never received his leave slips denying leave for the 24th. Pl. Br. at 11-12. Ware also states he believed he and Sullivan "had a verbal agreement that I would return on Friday July 25, 2008." Pl. Br. at 12.

The evidence demonstrates, however, that Martin and Sullivan notified Ware that his request for leave on July 24 was denied. Ware admits he talked to Sullivan on Friday, July 18, and during that conversation Sullivan told Ware he wanted Ware at work on July 24th and 25th to prepare for the route adjustments. GA 690; GA 282-83. Sullivan told Martin before July 23rd that he had denied Ware's requests for

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July 26, 2008. After Martin determined Ware had failed to ensure tasks necessary to complete the adjustment process were completed, Martin postponed the route adjustment to Saturday, August 2, 2008. GA 114; GA 694-95.

leave for July 24th and July 25th. GA 781; GA 975-76. When Ware called Martin on July 23rd to inform her he would not report to work on July 24th or July 25th because he could not leave his daughter alone in Washington, D.C., Martin denied Ware's request for emergency annual leave because she believed Ware was needed in the office to prepare for the route adjustments. GA 287-88; GA 694; GA 975-76.

Ware presented no evidence to rebut the Postal Service's legitimate non-discriminatory reason for denying Ware's leave requests prior to the route adjustment. As discussed above, the evidence supports the conclusion that at the time Ware's leave request was denied, Sullivan and Martin believed it was important for Ware to be at his station in the days leading up to the route adjustments, and that they notified Ware of their belief. GA 287-88; GA 653-54; GA 657; GA 690; GA 694; GA 723; GA 975-76. The fact that Sullivan had, throughout the spring and summer of 2008, repeatedly granted Ware's previous requests for annual leave[8] further supports Sullivan's testimony that he only denied

[8] Sullivan approved Ware's requests for annual leave during the periods April 17-21, 2008, April 28 2008, July 10-11, 2008, and July 21-23, 2008, and August 21-22, 2008. GA 654-55. Ware filed his EEO complaint on May 6, 2008. GA 907-08; GA 236-37.

Ware's requests for annual leave when those requests conflicted with the interests of the Postal Service. Ware admits that the route adjustments were important, and that his station was one of the first stations implementing the route adjustment under a new procedure. GA 271-72; GA 717.

Ware suggested below that the fact that Martin and Sullivan granted another manager's request for leave during the days just before the route adjustment at her station was evidence of discrimination or retaliation. GA 721. This is insufficient to defeat summary judgment. Ware did not provide evidence that the manager (Bertha Billington) or her station (Murphy Road) were similarly situated to Ware and East Hartford, and in fact, the record suggested otherwise. Sullivan testified that he believed Billington, unlike Ware, had adequate coverage for her station in the days leading up to the route adjustments. GA 653. Martin stated that Billington, unlike Ware, had prepared for the route adjustment by specifically assigning her duties to staff who worked for her. GA 673-74; GA 685; GA 1281-82. Indeed, Ware admitted that he did not give his staff a specific list of tasks to complete because he was not aware of what his responsibilities were leading up to the route adjustment. His approach, rather, was to tell his subordinates to

do whatever was needed. GA 274-80. Ware also did not dispute that his subordinate supervisor of the letter carriers was on annual leave July 29-31, 2008. GA 114; GA 1112.

Moreover, even if Martin and Sullivan were mistaken in their belief that it was necessary for Ware to be in the office during the days leading up to a route adjustment, that fact would not be sufficient to challenge summary judgment. *Dister*, 859 F.2d at 1116 (poor or mistaken judgment does not equal discrimination). Their decisions to deny Ware's requests for leave leading up to the route adjustments were business decisions. When evaluating whether the employer's legitimate non-discriminatory reasons are a pretext for discrimination, neither a plaintiff nor a court may substitute their business judgment for that of the employer. *Alfano*, 294 F.3d at 377; *Byrnie*, 243 F.3d at 103.

Ware's arguments that he was not aware his leave requests were denied or his belief that the upcoming route adjustment was not a good reason to deny his requests for leave are insufficient to establish a genuine issue of fact as to whether the Postal Service offered legitimate non-discriminatory reasons for denying the leave are pretext.

b. There is no evidence that the Postal Service's legitimate non-discriminatory reasons for denying Ware's request for leave in August 2008 were pretext for discrimination or retaliation.

On July 17, 2008, Ware sent a request to Sullivan for annual leave on August 9, 11, 12 and 13, 2008, in order to move his daughter to college and take care of family business. GA 690. Sullivan denied the request because he believed if Ware was out of the office that week there would be inadequate supervisory coverage at the East Hartford station. Sullivan knew that Ware's subordinate, the supervisor of the letter carriers, would be on annual leave at the same time. GA 650; GA 690; GA 758; GA 248-49.

Ware argued below that Sullivan's claim that he denied Ware's request for annual leave due to insufficient coverage was pretext. GA 912. Ware did not dispute that his supervisor of letter carriers was on leave during the August 9-13, 2008 time period. GA 248-49. Ware argued, however, that Sullivan could have had a supervisor of letter carriers from another station oversee the East Hartford station while Ware was on annual leave. GA 912; GA 690.

There is no evidence to rebut the fact that Sullivan believed denying Ware's request for leave, rather than assigning a supervisor from another station, was in the best interest of the Postal Service. Sullivan testified he did not want to burden other stations by pulling a supervisor to cover Ware's station, because it was Ware's responsibility to ensure adequate coverage of his station. GA 758. Ware's argument that "Sullivan had other options available to him" (*see* GA 912) fails because a challenge to Sullivan's business judgment is insufficient to establish a genuine issue of fact as to the credibility of the employer's reasons. *See Dister*, 859 F.2d at 1116.

Ware also argued below that he was discriminated or retaliated against when Sullivan denied Ware's request to take sick leave on August 6, 2008. GA 576. As discussed above, Ware cannot establish a prima facie case of discrimination or retaliation based on the denial of one sick leave request because the denial of a leave request is not an adverse employment action. *See Terry*, 336 F.3d at 147. The Postal Service Employee and Labor Relations Manual (ELM) requires Postal employees to submit a request to take sick leave, and requires the employee's supervisor to consider "the needs of the Postal Service" in deciding whether to approve the employee's sick leave request. GA 736-38; GA 742-43;

GA 748. Ware retained his sick leave benefits. The denial of Ware's sick leave request did not affect the terms and conditions of Ware's employment.

Even if Ware could make a prima facie case of discrimination or retaliation based on Sullivan's denial of Ware's request for sick leave on August 6, 2008, Ware has not presented evidence sufficient to rebut the Postal Service's legitimate non-discriminatory/non-retaliatory reason for denying Ware's request for sick leave: Sullivan believed Ware lied about being sick in order to move his daughter into college. GA 649-50. Sullivan stated that when he called Ware on August 6, 2008 about Ware's request for sick leave, Ware said he was sick because Sullivan had disapproved his annual leave request, and he would not be back until next week. GA 649-50. Ware's statement that he would be out sick the rest of the week meant that he was requesting sick leave *for the same days his annual leave requests had been denied*. GA 650; GA 690. (Indeed, just two weeks earlier, Ware had requested sick leave after Sullivan and Martin denied his requests for annual leave. GA 286-90.) Sullivan told Ware on the phone he was denying Ware's request for sick leave and contacting the OIG to confirm Ware did not leave to move his daughter into college. GA 649-50.

Even if Ware was actually sick on August 6, 2008, that would not counter the evidence that Sullivan believed—reasonably—that Ware was lying about being sick. When a court examines an employer's legitimate non-discriminatory reasons, the focus is on what an employer believed at the time it made its decision, not post-hoc explanations provided by the plaintiff. *Cameron*, 335 F.3d at 65.

8. The notice of proposed removal and the demotion cannot support a claim for discrimination or retaliation.

Ware argues on appeal that the Postal Service discriminated and retaliated against him when Sullivan issued the September 19, 2008 notice of proposed removal and when Martin issued the November 24, 2008 letter of decision. Pl. Br. at 7.

Ware could not make a prima facie case of discrimination or retaliation based on the September 19, 2008 notice of proposed removal because it was only a proposed adverse employment act. GA 1271. The Postal Service does not dispute, however, that the November 24, 2008 letter of decision, which resulted in Ware's demotion, qualifies as an adverse act for the pur-

poses of making a prima facie case of discrimination or retaliation.

The Postal Service's legitimate non-discriminatory/non-retaliatory reasons for demoting Ware were listed in the September 19 and November 24 letters. GA 763-64. Ware focuses on five reasons from those letters: (a) failure to follow instructions relating to the procedure for assigning carriers to work overtime who were not on the overtime desired list (the WOO grievance procedure); (b) failure to perform duties satisfactorily relating to the deficiencies found during inspections on August 13 and August 14, 2008; (c) being AWOL on July 24, 2008; (d) falsification of a leave request form for eight hours of court leave; and (e) the consideration of past discipline. Pl. Br. at 7-17. Ware presented no evidence sufficient to meet his burden of showing each of these legitimate reasons for demotion were pretexts for discrimination or retaliation. *See Jackson*, 619 F. 3d at 467 ("Where a plaintiff falls short of [his] burden of presenting evidence rebutting *each* of the legitimate nondiscriminatory reasons produced by [the employer], summary judgment is appropriate.") (emphasis in original).

a. Ware cannot show that Martin's decision to demote Ware in part for his failure to follow instructions regarding the WOO grievance procedure was a pretext for discrimination or retaliation.

Ware seems to argue on appeal that Martin's reliance on his failure to follow instructions regarding the WOO grievance procedure was a pretext for discrimination because Ware never received instruction regarding the WOO grievance procedure. Pl. Br. at 15. Specifically, Ware argues that Sullivan failed to notify Ware of the WOO grievances or the procedure for filing those grievances. Pl. Br. at 15-16. Ware also seems to question whether the WOO grievances filed in relation to July 3, 2008 were properly filed. Pl. Br. at 15-16. Ware argued below that he should not have been disciplined for failure to follow the WOO grievance procedure because he had delegated that responsibility to his subordinates. GA 699-700; GA 426; GA 467-72.

Ware's argument that Sullivan failed to notify Ware of the WOO grievance procedure, or that it was Sullivan's responsibility under that procedure to notify Ware when grievances were filed, is contradicted by the record, including Ware's admissions. On April 7, 2008, Martin sent a memorandum to all Managers of Custom-

er Service in Hartford outlining the WOO grievance procedure. GA 605-15; GA 1290. Ware did not deny receiving that memorandum. GA 426; GA 1290. Ware attended a training that discussed how to document the use of letter carriers who were not on the overtime desired list. GA 769. Ware admitted in his November 14, 2008, letter to Martin in response to the notice of proposed removal that the union steward notified Ware about the grievances and asked to meet with Ware, but Ware refused to meet with the steward until the steward met with Ware's supervisor of letter carrier. GA 699; GA 1017. Ware also admitted the union steward asked Ware to sign off on the grievances, but Ware refused to sign off because he did not know the nature of the grievances. GA 699; GA 1017. Ware also admitted he never informed Sullivan that the steward planned to send the grievances forward. GA 699.

Even if Ware was not aware of the facts underlying the WOO grievances, or if he had delegated the responsibility for handing the proper procedure, those facts are insufficient to establish pretext. Ware cannot prove pretext by questioning the accuracy of the underlying factual basis for Martin's belief that demotion was justified based on Ware's failure to follow the WOO grievance procedure. *See Cameron*, 335 F.3d at

65; *Soto*, 521 F.3d at 842 ("In determining whether a plaintiff has produced sufficient evidence of pretext, the key question is not whether the stated basis for [discipline] actually occurred, but whether the defendant believed it to have occurred."). As discussed above, the evidence clearly supports Martin's belief that Ware had failed to follow the WOO grievance procedure. GA 605-15; GA 699-700; GA 763. Martin's decision to hold Ware accountable for the WOO grievance procedure at his station was a business decision. This Court has repeatedly held that a plaintiff cannot demonstrate pretext by questioning the defendant's business judgments. *Alfano*, 294 F.3d at 377; *Byrnie*, 243 F.3d at 103.

Finally, Ware suggests in his brief on appeal that he was not able to present evidence of pretext because "all the documentation necessary for completing this task which I had requested has been suppressed by Order [64] Motion to Compel…." Pl. Br. at 15. This argument does not raise a question of fact sufficient to avoid summary judgment for three reasons.

First, as the district court found in its Order denying Ware's motion to compel, the Postal Service produced all relevant documents to Ware. GA 7. Second, the district court did not "suppress" any evidence. In fact, the court granted Ware's request to re-open discovery so

Ware could obtain documents from the Postal Service responsive to Ware's February 16, 2010 requests for production. GA 6 (docket entry 59). Ware had all relevant documentation and evidence available to him in his response to the Postal Service's Motion for Summary Judgment below.

Third, the documents Ware referenced as being "suppressed" would not be relevant to Ware's ability to present evidence in connection with the WOO grievances. Ware's motion to compel sought the Postal Service's responses to the first two requests in Ware's February 16, 2010 requests for production of documents. GA 879-94. Those requests were for documents relating to the scheduling, the cancellation, and the reason for not rescheduling the August 1, 2008 mediation between Martin and Ware relating to Ware's EEO complaint. GA 6 (docket entry 55). As Ware articulates in his brief before this Court, Sullivan did not become aware of the WOO grievance issues until August 8, 2008, so they would not have been the topic of conversation at the August 1, 2008 mediation, even if it had taken place. Pl. Br. at 16. Consequently, contrary to Ware's claim, the allegedly missing documents would not have been relevant to Ware's ability to present evidence in connection with the WOO grievances.

b. Ware cannot show that Martin's decision to demote him in part for his failure to perform duties satisfactorily on August 13, 2008 and August 14, 2008 was a pretext for discrimination or retaliation.

Ware argues that Martin's reliance on his failure to perform his duties satisfactorily on August 13 and 14 was a pretext for discrimination. Ware attempts to prove pretext by arguing that Martin came to Ware's station on August 14th looking for problems so she could "stack" charges against Ware. Pl. Br. at 15. Ware points out that Martin claimed she came to his station on August 14, 2008 to ensure he corrected the inefficiencies observed on August 13, but she proceeded to look for additional problems. Pl. Br. at 13-15. Ware also contends that the majority of deficiencies Martin noted in her audit on August 14 were not listed as deficiencies in the August 13 audit. Pl. Br. at 14. Ware argues that because he was only instructed on August 13 to correct inefficiencies found in the August 13 audit, he should not be disciplined for other inefficiencies found on August 14. Pl. Br. at 14.

Ware's claim that Martin was intentionally looking for problems in Ware's station is insufficient to rebut the Postal Service's legitimate

non-discriminatory reason for disciplining Ware. There is no evidence that Martin did not believe Ware failed to perform his duties satisfactorily on August 13 and August 14. In fact, Ware admitted that many of the deficiencies cited in the August 13 and August 14 audits were valid. GA 123-25. Furthermore, Martin's decision to hold Ware accountable for the problems observed on August 14 as well as the problems observed on August 13 was a business decision. A plaintiff cannot demonstrate pretext by questioning the defendant's business judgments. *See*, *e.g.*, *Alfano*, 294 F.3d at 377; *Byrnie*, 243 F.3d at 103.

c. Ware cannot show that Martin's decision to demote Ware based in part on his July 24, 2008 AWOL was a pretext for discrimination or retaliation.

Ware argues on appeal that the AWOL charge in the November 2008 letter of decision was pretext because he should have been granted annual leave for July 24, 2008. Pl. Br. at 10-12. It is undisputed that the Postal Service expected Ware to come to work and that he failed to do so. Martin considered Ware's explanation for the events, but rejected it. In the November 2008 letter of decision, Martin explicitly found

Ware's claim that Sullivan approved Ware's leave for July 24, 2008 "not supported by the evidence." GA 763. There is no evidence this was a pretext for discrimination or retaliation.

d. Ware cannot show that Martin's decision to demote him in part for his falsification of a leave request form for court leave was a pretext for discrimination or retaliation.

Ware seems to argue on appeal that Martin and Sullivan falsified (or at least failed to correct) Postal Service payment records for the purpose of using Ware's payment for eight hours of jury duty leave as a pretext for discrimination or retaliation.[9] Pl. Br. at 9-10.

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[9] Ware seems to suggest on appeal that the temporal proximity between Sullivan's presentation of the leave form to Ware on August 18, 2008 and Ware's "having filed a formal EEO complaint on August 16, 2008" is sufficient to prove pretext. Ware has alleged, however, that Martin and Sullivan became aware of the EEO complaint on June 4, 2008. GA 237. Consequently, Sullivan's presentation of the leave form for eight hours of jury duty and the related August 20, 2008 PDI actually took place two months after the Postal Service was notified of Ware's EEO complaint. In any event, "[t]emporal

Ware admitted that when he learned jury duty was cancelled, he did not report to work and he did not request another type of leave. GA 383; GA 624; GA 631-32; GA 704. Ware also admitted that if an employee does not submit a leave request, his supervisor can generate one for the employee to sign. GA 328. Ware further admitted that when Sullivan gave him a leave request stating that Ware served eight hours of court leave, Ware did not tell Sullivan that jury duty had been cancelled. GA 390-91; GA 704; GA 651-52. Indeed, Ware admitted he did not tell Sullivan jury duty was cancelled until after Sullivan informed Ware that Martin learned jury duty was cancelled. Pl. Br. at 8. Ware was not disciplined for attending jury duty. He was disciplined for, once again, not being truthful with his supervisors about his leave. He offered no evidence that this reason was a pretext for discrimination or retaliation.

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proximity alone is insufficient to defeat summary judgment at the pretext stage." *Kwan*, 737 F.3d at 847.

e. Ware cannot show that Martin's consideration of past discipline in her decision to demote Ware was improper.

Ware argues that he was discriminated and retaliated against when Martin considered past discipline in deciding to demote Ware. Pl. Br. at 12. Ware argues Martin should not have considered a past letter of warning because the letter of warning should have been removed from Ware's file before the notice of proposed removal. Martin did not explicitly reference the letter of warning in her November 24, 2008 letter of decision, but she did say that she "considered [Ware's] past disciplinary record" in deciding to demote Ware. GA 764.

The consideration of past discipline does not create an issue of fact that prevents summary judgment for two reasons. First, the letter of warning properly remained in Ware's disciplinary records in November 2008. The May 29, 2008 decision letter notified Ware that the letter of warning would be held in Ware's personnel file for two years if there were performance issues during the six months after it was issued. GA 100; GA 595; GA 668. As discussed above, Ware had a number of performance issues in July and August 2008, within the six month window.

Second, even if Ware is correct and the letter of warning was not properly in Ware's file, summary judgment is appropriate because Ware presented no evidence that Martin did not believe demotion was justified. Ware cannot prove pretext by questioning the accuracy of the underlying factual basis for Martin's decision to demote Ware. *See Cameron*, 335 F.3d at 65.

Ware failed to show that any of the reasons for the demotion were a pretext, much less that all of the reasons were a pretext for discrimination or retaliation. He did not carry his burden of production or persuasion. Summary judgment on Ware's claim that he was discriminated or retaliated against by the November 2008 demotion was, therefore, appropriate.

9. The fact that Ware was replaced by a "younger inexperienced white male" cannot support a claim for age discrimination.

For the first time in this litigation, Ware argues in his brief before this Court that the Postal Service's non-discriminatory/non-retaliatory reasons for demoting Ware were pretext for age discrimination because the person who replaced Ware as manager of customer service at the East Hartford Station was a white male, under 40

years of age, who had less experience than Ware. Pl. Br. at 13.

Ware presented no evidence that age was the but-for cause or a substantial or motivating factor of his demotion. In fact, Ware proposed several reasons, besides his age, why he was demoted. Ware suggests that the man who replaced him was promoted in part because his father was a high ranking official in the Hartford Post Office. Pl. Br. at 13; GA 499-500; GA 1108; GA 1111; GA 1244-46. Ware also admitted below that his problems with Sullivan in part stemmed from the fact that he and Sullivan did not get along. GA 90; GA 92. Moreover, the age of Ware's replacement does not help Ware defeat the Postal Service's legitimate non-discriminatory/non-retaliatory reasons for demoting him. The fact that Ware was replaced by a younger white male with less experience is not, therefore, sufficient to prevent summary judgment.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: December 23, 2014

Respectfully submitted,

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Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,997 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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Addendum

29 U.S.C. § 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall--

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each de-

partment, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportuni-

ty Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of sections 626(d)(3) and 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

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42 U.S.C. § 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the ju-

dicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to

carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall--

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action

taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to--

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for

bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(f) Section 2000e-5(e)(3) of this title applicable to compensation discrimination

Section 2000e-5(e)(3) of this title shall apply to complaints of discrimination in compensation under this section.