JUDGE ANDRE M. DAVIS
Nominee to the Fourth Circuit Court of Appeals

United States District Court Judge Andre M. Davis has been nominated to a seat on the United States Court of Appeals for the Fourth Circuit. Because various important government offices, including the Pentagon and the CIA are located within its jurisdiction, the Fourth Circuit has gained increased prominence in recent years, hearing cases related to national security and anti-terrorism policies. Judge Davis's nomination early in the term of this new administration signals that President Obama understands the Court's importance and the need fill its four current vacancies.

QUALIFICATIONS

Judge Davis is a graduate of the University of Pennsylvania and a *cum laude* graduate of the University of Maryland School of Law. Following law school, he clerked for Judge Frank A. Kaufman on the United States District Court for the District of Maryland, and then for Judge Francis Murnaghan on the Fourth Circuit Court of Appeals. Thereafter, Judge Davis handled appellate cases for the U.S. Department of Justice, Civil Rights Division. He has also been an Assistant United States Attorney for the District of Maryland, a private practitioner, and an assistant professor at the University of Maryland School of Law. In 1995, President Clinton nominated Judge Davis to the seat he currently holds; he was confirmed by a unanimous vote. The Fourth Circuit seat to which he is nominated has been vacant since 2000.

In 1995, the American Bar Association's Standing Committee on the Federal Judiciary gave then-nominee Davis its highest rating of "well qualified."[1]

Judge Davis has served on various professional and community organizations. He has served as past-director of the Baltimore Urban League, Inc.; past-president of the Legal Aid Bureau, Inc.; past-director of Big Brothers and Big Sisters of Central Maryland, Inc.; past-president and vice president of the Executive Committee of the Maryland Judicial Conference; past-president of Digges Inn, American Inns of Court; past-member of the Council, Section on Correctional Reform, Maryland State Bar Association; current member of the OSI board of Baltimore; current member of the Executive Committee and officer, Conference of Federal Trial Judges, Judicial Division of the American Bar Association; and current member of the board and co-chair of the International Committee at the Einstein Institute for Science, Health and the Courts. Judge Davis was once a board member of the Foundation for Economics and the Environment ("FREE") - an organization funded by companies such as Texaco, Exxon, General Motors, General Electric, Monsanto, Pfizer, and Shell - but resigned after a formal ethics opinion by the judiciary's Code

[1] American Bar Association, Ratings of Article III Judicial Nominees 104th Congress, 1995-1996, http://www.abanet.org/scfedjud/ratings/ratings104.pdf.

of Conduct Committee found a "tension" between his membership on FREE's board and his ethical obligations.[2]

BACKING

Judge Davis' nomination enjoys the support of both his home state senators. Senator Benjamin Cardin stated that he was "very pleased"[3] about Judge Davis' nomination to the Fourth Circuit. "I cannot think of a better choice for this seat. Judge Davis has an extremely long and distinguished career in the Maryland legal community."[4] Senator Cardin is a member of the Senate Judiciary Committee, which will consider this nomination. Senator Barbara Mikulski called Davis "a man of keen intellect, sound judicial experience and temperament, and great integrity. He has diverse and deep roots in the Maryland community."[5] She went on to say, "I am so pleased that President Obama has nominated [him]."[6] One of his classmates at the University of Maryland School of Law, Elijah Cummings, now a Maryland Congressman, said that during law school Davis "was just brilliant, he was a curve buster."[7]

CASES

In his over fourteen years on the bench, Judge Davis has ruled on a variety of matters. Below are summaries of few of his employment, disability, and criminal cases. They were selected to show the breadth of Judge Davis' rulings on these issues, which may shed light on the type of jurist he will be if elevated to the Fourth Circuit.

- **Employment**

Plaintiffs in employment discrimination cases often face a difficult path in the federal court system. Between 1979 and 2006, persons bringing workplace discrimination cases won their cases only fifteen percent of the time, compared to fifty-one percent for non-workplace claims.[8] On appeal their chance of success doesn't improve; employment discrimination plaintiffs losing at trial win a reversal in less than nine percent of appeals, while employers who lose at trial win reversals forty-one percent of the time.[9] As a result, fewer employees are bringing actions in federal court. Such skewed results suggest some judges do not approach cases with an open mind, deciding each case based upon its own particular facts. Instead, the federal court seems hostile to these claims.

Judge Davis has authored numerous workplace discrimination claims, some on matters of first impression for the court. For example, in a case involving allegations of discrimination at a Dave & Buster's Restaurant, he provided a thoughtful analysis of how to demonstrate a *prima*

[2] Mark Sherman, "Judges on Industry-Backed Group's Board," Associated Press (Jan. 30, 2008).
[3] Joint Press Release, Senators Cardin & Mikulski, Cardin, Mikulski Applaud Nomination of Judge Andre M. Davis to Court of Appeals for the Fourth Circuit (April 3, 2009), http://cardin.senate.gov/news/record.cfm?id=311133.
[4] Id.
[5] Id.
[6] Id.
[7] Tricia Bishop, *Baltimore Judge Nominated for U.S. Appeals Court*, Baltimore Sun, April 3, 2009.
[8] Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse*?, Harv. L & Pol'y Rev. (2008).
[9] Id.

facie claim for a violation of the 1991 Civil Rights Act.[10] Yet, in total, Judge Davis' record indicates a propensity toward awarding summary judgment in favor of the defendant employers. Summary judgment is a procedural maneuver that disposes of a case before trial. It is only to be granted when the judge determines that the plaintiff has failed to put forth enough evidence to support their claim(s). Because the result of summary judgment is so severe – the case is thrown out of court before the matters in question are resolved – the court is required to view all the evidence in the light most favorable to the plaintiff. In fairness to Judge Davis, many of the cases on which he granted summary judgment were dismissed "without prejudice," meaning that the person bringing the claim isn't precluded from trying again later after gathering more evidence. But the cumulative effect of these dismissals adds to the overall anti-employee bias so prevalent in the federal court system today.

The cases we include below are a snapshot of some of Judge Davis' opinions in this area of the law.

***Brumback v. Callas Contractors, Inc.*, 913 F. Supp. 929 (D. Md. 1995).**
In this employment discrimination case, Plaintiff Lavon Brumback worked as a small equipment mechanic for the defendant Callas Contractors for more than five years when he got a new boss, Allen Hammond, who he alleged subjected him to racial abuse and discrimination. Particularly pervasive was Hammond's use of the epithet "n____r." Brumback complained to management about this behavior, but, while Hammond was warned that he could be fired for such behavior, the behavior persisted. Brumback decided to file a formal complaint with the Maryland Commission on Human Relations and the EEOC. Three months later, Hammond was finally terminated when the owner of the company learned that Hammond called the owner's secretary a "broad" or a "bitch." Three months after Hammond's termination, the plaintiff was told he was being laid off for lack of work. Plaintiff alleged that this was a pretext and he was in fact being fired based on discrimination and in retaliation for his EEOC complaint.

Defendants moved for summary judgment saying that Brumback failed to establish a hostile work environment. Judge Davis rejected that argument writing that: "Where one individual continues to verbally abuse an employee over the course of several months, this Court is at a loss to call these incidents 'isolated.' Nor is repeated use of the ancient epithet – 'nigger' – trivial as a matter of law." Defendants also moved for summary judgment contending that Brumback was simply one of several people laid off because of a lack of work. Defendant presented evidence that Brumback's job as a small equipment mechanic was never filled. Yet, Judge Davis found that Brumback raised genuine issues of material fact precluding summary judgment based on evidence that another person hired with a different title was, in fact, doing Brumback's job.

***Demby v. Preston Trucking Co., Inc.*, 961 F. Supp. 873 (D. Md. 1997).**
Judge Davis denied summary judgment as to a hostile work environment claim brought by an African-American man who was subjected to the repeated use of racial epithets, who recounted several incidents involving disparate treatment, and whose work space had been vandalized with a painted swastika and a threatening and racially offensive phrase. The plaintiff complained to his superiors about the fact that racial slurs were being used and that he was being required to perform work that should be performed by various white employees, but management arguably did not do enough to punish the offenders or prevent the behavior from recurring. Based on

[10] *Callwood v. Dave & Buster's, Inc.*, 98 F. Supp. 2d 694 (D. Md. 2000).

these facts, Judge Davis held that a reasonable juror could find that the company condoned the discrimination and could be held liable. Similarly, with respect to the incident of vandalism, while the company made some unavailing efforts to find the perpetrator, Judge Davis found that this was evidence that Demby suffered a hostile work environment motivated by racial animus.

***Kubicko v. Odgen Logistics Services*, 1:96-cv-01085-AMD (D. Md. 1997) (order granting summary judgment), *rev'd*, 181 F.3d 544 (4th. Cir. 1999).**

This Title VII case involving retaliatory discharge was a matter of first impression for the court. Richard Kubicko was employed as a logistics engineer by Odgen Logistics where he worked on a NASA program which provided logistical support services for the Hubble Space Telescope. One of Mr. Kubicko's subordinate employees, Leslyn Joyner, approached him complaining that she was being sexually harassed by the branch manager. He urged Ms. Joyner to report he harassment, telling her that he would support her if she pursued the matter further. She pursued her claim with the Maryland Human Relations Commission and the Equal Employment Opportunity Commission; Mr. Kubico was interviewed on her behalf and stated that he witnessed the manager sexually harass Ms. Joyner. Shortly thereafter, the company fired Mr. Kubico alleging poor performance. When filing his Title VII discrimination suit, he requested that the court use a "mixed-motive" standard of proof to evaluate his claim. This standard places liability on the employer once a Title VII plaintiff shows that a factor made illegal under this statute played a "motivating part in an employment decision," to be rebutted only by proving by a "preponderance of the evidence" that the employer would have made the same decision regardless. The court had not yet addressed this question. Judge Davis denied the plaintiff the opportunity to apply the standard of proof for a mixed-motive claim. Instead, he held that the mixed-motive analysis did not apply to Title VII retaliation claims as a matter of law and granted Odgen's motion for summary judgment. The case was appealed to the Fourth Circuit where all three panel members agreed that summary judgment was inappropriate; two judges found that the mixed-motive analysis should have applied.

***Settle v. Baltimore County Police*, 34 F. Supp.2d 969 (D. Md. 1999).**

In *Settle*, two black police officers sued the Baltimore County Police Department by two black police officers alleging, *inter alia*, violations of Title VII of the Civil Rights Act of 1964 and equal protection under the First and Fourteenth Amendments. They pointed to various incidents in support of this claim. The officers claimed that less experienced white officer's requests for days off were prioritized over theirs; that one of their sergeants possessed a noose; that their patrol car and other patrol cars driven by African American officers were being unfairly surveiled by a computer tracking system; and that they were routinely denied training opportunities or notified in a matter inconsistent with the white officers. In a ruling totally nearly 50 pages, Judge Davis granted summary judgment for the county. He held that the officers did not suffer employment injuries and failed to demonstrate that race or retaliation was the impetus behind any action taken by the county. No racial nexus was shown and that any occasional acts were not pervasive enough to interfere with their ability to perform their jobs.

***Callwood v. Dave & Buster's, Inc.*, 98 F. Supp. 2d 694 (D. Md. 2000).**

In this case, two groups of African American plaintiffs alleged "extraordinarily discourteous and hostile treatment" from employees of a Dave & Buster's restaurant. Judge Davis provided a thoughtful analysis of how to demonstrate a *prima facie* claim for a violation of the 1991 Civil Rights Act as it related to private contracts in a restaurant setting. He addressed the differences between employment discrimination claims and those arising under a public accommodations

context, finding that the latter involved unique factors which precluded a wholesale adoption of an employment law framework. The itinerant nature of the retail food industry clientele, the rare documentation of discrimination, and the interaction with mainly lower level employees were distinct considerations. The restaurant moved for summary judgment on both suits. Judge Davis denied summary judgment on one set of claims and granted summary judgment on another. On the claim that was allowed to proceed, he found that the plaintiffs showed that restaurant employees demonstrated a marked hostility toward them; they were refused seating, denied services, and ultimately ejected while other white patrons were served.

***Collier v. RAM Partners, Inc*., 159 F. Supp. 2d 889 (D. Md. 2001)**
In this action, Rhonda Collier, an African-American woman, alleged that she was subjected to a hostile work environment on the basis of her race and filed suit under Title VII of the Civil Rights Act of 1964. Collier worked as a leasing agent in an apartment complex managed by the defendant RAM Partners, Inc. ("RAM"). After discovery, RAM moved for summary judgment arguing that while there were inappropriate comments made, they were neither directed at the plaintiff, nor unwelcome, nor due to plaintiff's race, nor pervasive enough to constitute a hostile work environment. Judge Davis, however, denied summary judgment as to Collier's claim of hostile work environment where the plaintiff provided evidence that (1) racial epithets were used repeatedly (stating that, in particular, "repeated use of the ancient epithet 'nigger' is far from trivial as a matter of law"); (2) the person who persisted in using racial slurs also threatened Collier with physical harm; and (3) supported the conclusion that racial epithets were knowingly tolerated by management.

***Rose v. Son's Quality Food Co*, 2006 U.S. Dist. LEXIS 2560 (D. Md. 2006).**
The plaintiff, Valda Rose, an African American, was head cook at Son's Quality Food ("Son's"). After she was fired, she filed suit asserting claims for race and sex-based discrimination and retaliation under Title VII, as well as a claim for intentional infliction of emotional distress under state law. Son's moved for summary judgment. Judge Davis held that her claim of a racially hostile work environment could not survive summary judgment because she failed to demonstrate that she suffered from pervasive harassment that created an abusive working environment. In particular, the judge held that although she was called names including "black dummy" and "black bitch," this was properly viewed as "racially neutral profanity." Judge Davis said, "the addition of the word 'black' to the otherwise racially neutral name-calling . . . does not support a claim of hostile environment."

***Hildebrandt v. W.R. Grace & Co. –Conn.*, 492 F. Supp. 2d 516 (D. Md. 2007).**
Darrell Hildebrandt had been employed by the Defendant W.R. Grace & Co., -Conn. ("W.R. Grace") for over 25 years. At the end of his career with W.R. Grace, Hildebrandt was employed as a senior development engineer assigned to the FCC Development Group. Hildebrandt was terminated in connection with a workforce reduction one month prior to his 55th birthday - the time at which he would have become eligible for retirement - and, subsequently, he applied for other jobs at W.R. Grace, but was not rehired. Hildebrand filed against W.R. Grace alleging violations of the Age Discrimination in Employment Act ("ADEA"), and against W.R. Grace and two of its senior managers alleging intentional interference with his pension rights, in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"). After discovery, Defendants filed for summary judgment.

Judge Davis considered the defendants' motions for summary judgment on both the ADEA claim and the ERISA claim and held that Hildebrandt could pursue both claims with the caveat

that the plaintiff could not maintain a claim based on disparate impact because the Fourth Circuit limits the use of that theory to class action discrimination claims. In particular, Judge Davis held that there was a genuine issue of material fact as to whether Hildebrandt was both selected as the person in his group whose employment would be terminated and not hired back into the company because of his age. Furthermore, with regard to plaintiff's ERISA claim, Judge Davis held that "the temporal proximity of the decision to select Hildebrandt for termination just one month prior to his 55th birthday and becoming eligible for retirement, after 24 years of successful employment . . . creates a sufficient question of fact as to whether age was a motivating factor in the decision to terminate plaintiff's employment."

***Andrew v. Clark,* 472 F. Supp. 2d 659 (D. Md. 2007)*, vacated and remanded* 2009 U.S. App. LEXIS 6751 (4th. Cir. 2009).**

Commanding Officer Michael Andrew was a seventeen year veteran in the Baltimore City Police Department. In 2003, he arrived at a crime scene involving a shooting victim where the 78 year-old suspect barricaded himself in an apartment. Officer Andrew secured the scene and called for help, instructing others to hold tight until they returned. In his absence, the other officers entered the apartment, used a taser on the suspect (who fired a shot), and shot and killed the man. Officer Andrew wrote a memo about the incident in an attempt to address the matter with the police commissioner. Andrew questioned why the officers prematurely entered the apartment, an action that placed all parties in harms way, without utilizing other less severe methods. He called for the police department to institute a "command forum" to address proper procedure in these barricade-type situations. When the commissioner failed to respond, he made the memo public. He was subsequently fired after a local newspaper printed a story about the incident. Andrew sued the Department claiming that he was terminated for exercising his First Amendment rights, and was denied his due process because he was never given a hearing to explain the situation. Although the Fourth Circuit had not yet ruled on the application of a recent Supreme Court decision addressing this issue, Judge Davis held that Andrew's speech was not covered under existing First Amendment doctrine and granted the Police Department's motion to dismiss. This decision was severe in light of the fact that Andrew was, in effect, a government whistleblower advocating on a matter of public safety. The Fourth Circuit vacated the decision and remanded the case back to the district court, finding that disputed issues of material fact remained and the issue should be presented to a jury.

***Marshall v. Compher,* 2008 U.S. Dist LEXIS 66304 (D. Md. 2008).**

This case involved a *pro se* plaintiff, Marian Marshall, who attempted to sue for alleged employment discrimination after she received a right-to-sue notice from the EEOC. Defendant Compher was a state employee. He filed a motion to dismiss based upon the fact that no claim could be filed against him. Ms. Marshall, a non-lawyer representing herself, incorrectly served the wrong party; she served the Maryland Assistant Attorney rather than the proper Assistant U.S. Attorney. The court directed Ms. Marshall that she should re-file against the appropriate party, but somehow the faulty documents were still scanned into the record. In a footnote, Judge Davis noted the error and Ms. Marshall's request for appointment of counsel – a request he denied. Judge Davis held for the defendant and granted summary judgment, calling the *pro se* plaintiff's facts "garbled" and "fail[ing] to set forth a coherent theory of discrimination."

***Perez v. Mountaire Farms, Inc.*, 2008 U.S. Dist. LEXIS 52844 (D. Md. 2008).**

In this opinion, Judge Davis granted summary judgment in favor of the plaintiffs in an action brought under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act. The plaintiffs alleged that their employer violated the Fair Labor Standards Act by requiring them to

sanitize and don special safety and sanitation gear (among other things, for example, special gloves, ear plugs, and steel toe boots), but not paying them for the time spent putting on and taking off this safety and protective gear. Judge Davis concluded that the time was compensable as necessary gear incident to their work in a chicken processing operation and did not fall into the exception allowing employers not to pay employees for "changing clothes." Furthermore, in a related case against the same defendant brought by past and present employees of the defendant challenging this same practice, Judge Davis extended his analysis and granted the plaintiffs' motions for collective action under the FLSA.

- **Disability Rights**

It is vital that courts robustly uphold laws meant to protect the rights of disabled Americans, including the Americans with Disabilities Act ("ADA"). Yet, for many years, the Fourth Circuit seemed indifferent to the plight of those bringing disability claims. A 2001 study showed that it had the lowest number of rulings in favor of ADA employment discrimination plaintiffs among all the federal courts of appeals.[11] The Fourth Circuit, after the departure of more senior judges, is now more evenly split on these cases. Thus, Judge Davis' addition to the bench could make a significant difference on rulings in this area of law. His record, however, does not indicate that much will change. The non-profit, public-interest group ADA Watch, a disability rights organization, and the National Coalition for Disability Rights ("NCDR") oppose his nomination.[12] They found that Judge Davis places inappropriately stringent standards which have prevented individuals from enforcing rights under the ADA, has imposed incorrect procedural hurdles that are contrary to the law's requirements, and has applied a cramped interpretation of the law.[13] Below are a few of his rulings.

***Bryant v. Better Business Bureau of Greater Maryland*, 923 F. Supp. 720 (D. Md. 1996).**
In *Bryant*, Judge Davis, denied a motion for summary judgment by an employer who was alleged to have discriminated against an employee having a hearing disability. The plaintiff, JoAnn Bryant, was initially hired as a bookkeeper at Greater Maryland's Better Business Bureau. After requesting a transfer, Ms. Bryant soon began working more regularly on the phone handling business hotline questions. The headset her employer had initially supplied her with while she kept books was inadequate for her to perform her newer more rigorous duties; she now needed a text telephone or TTY system made specifically for the hearing impaired. The Better Business Bureau declined her request. Ms. Bryant thereafter filed a suit which included a claim under the Americans with Disabilities Act ("ADA") alleging that her employer failed to provide her with reasonable accommodations as required by law. Both parties filed for summary judgment on the ADA claim; Judge Davis denied both motions finding both that the employer's actions were not "reasonable accommodations" as required by statute, and that the employer raised genuine issues of material fact as to whether Ms. Bryant was qualified to work in her position. This case was one of the very first federal court decisions to address the ADA, and has since been cited by many other courts.

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[11] Ruth Colker, *Winning and Losing Under the Americans with Disabilities* Act, 62 Ohio State L. J. 239, 275 (2001).
[12] Letter from Jim Ward, Founder & President, ADA Watch/NCDR, to Senators Patrick Leahy & Orrin Hatch, Apr. 22, 2009 (on file with author).
[13] ADA Watch, Judicial Nominee's Troublesome Disability Rights Record, March 19, 2009, http://adawatch.org/?p=272.

***Campbell v. Federal Express Corp.*, 918 F. Supp. 912 (D. Md. 1996).**
In a disability rights case of first impression before the Court, Judge Davis held that Plaintiff Robert Campbell was required to exhaust state Department of Transportation ("DOT") remedies before bringing his ADA claim, a hurdle not required by the ADA itself. Mr. Campbell's left hand was injured. At the time he sought employment with Federal Express ("Fed Ex"), he had undergone two of the necessary three surgeries which would add flex capability to his fingers. He was initially hired by DHL Worldwide Express – and certified by their medical professionals – but subsequently received a better "offer" from Fed Ex. He quit his job with DHL, but after undergoing Fed Ex's medical exam, Mr. Campbell was found to have finger grasping deficiencies making him unable to perform his job duties. He filed suit in federal court alleging violations of the ADA. Fed Ex filed a motion for summary judgment, suggesting that the U.S. District Court lacked jurisdiction because Mr. Campbell should be required to exhaust the state appeal process as provided for by the state DOT. Although the relevant ADA-prescribed procedures only required Mr. Campbell to only file a timely charge of discrimination with the Maryland Human Relations Commissions and the EEOC, which he did, Judge Davis granted summary judgment for Fed Ex and dismissed with prejudice his ADA claim.

***Fitch v. Solipsys Corp.*, 94 F. Supp. 2d 670 (D. Md. 2000).**
The Plaintiff, Keith Fitch, brought suit against his former employer, Solipsys Corporation, alleging both disability discrimination under the ADA and retaliation in violation of Title VII of the Civil Rights Act of 1964. Mr. Fitch suffered from a heart condition that restricted the amount of weight he could lift. At times, his employer requested that he move heavy computer equipment which he was unable to do without assistance. On the ADA claim, Judge Davis granted summary judgment to the employer, even though, on the basis of the pleadings, a company principal and two sons of company principals referred to Mr. Fitch as a "cripple" in his presence. He held that "no reasonable jury could conclude that Fitch was terminated because Solipsys *perceived* him to be disabled."[14] As to the Title VII claim, during his 20 month employment at the company, Mr. Fitch reported that on a business trip one of the company principals stated that he wanted to replace the administrative staff with "big breasted women," to which Fitch objected. Also, the same man commented on two separate occasions that "too many black people are having children and not enough white people." Again, Judge Davis granted summary judgment in favor of the employer finding that the facts presented did not constitute a hostile work environment as required by Fourth Circuit precedent. Rather, using a balancing test, he held that while Mr. Fitch may have been sincerely concerned about the women he had helped to recruit work at Solipsys, his overall "obstreperous behavior" could not be "sheltered as opposition to unlawful discrimination."

***EEOC v. Von Hoffman Graphics, Inc.*, Civil No. AMD 01-2187 (D. Md. 2002).**
Judge Davis ruled against granting summary judgment in favor of employer Von Hoffman on a claim of discrimination under the ADA. In *Von Hoffman*, Eddie Griffith, a former printing company employee who was profoundly hearing deficient, experienced problems after transfer to a new supervisor. The two men communicated via written notes or body language. Yet, Mr. Griffith noticed that under his new boss, his job duties changed significantly. He was removed from technical and mechanical assignments and reassigned to more menial tasks. Moreover, during his job performance evaluations, Van Hoffman never supplied an interpreter, leaving Mr. Griffith to communicate through rough hand-written notes. Mr. Griffith was for the first time accused of poor job performance and was denied a transfer which would have given him a raise.

[14] *Fitch* at 676 (emphasis in original).

After filing a discrimination claim with the EEOC, the EEOC issued a determination finding that the company had violated the ADA by denying reasonable accommodations and training. At issue was whether the EEOC engaged in good faith conciliation efforts during its negotiations and investigation into the discrimination allegations. Judge Davis ruled that the agency's actions were reasonable and denied Von Hoffman's motion for summary judgment; the parties ultimately settled the claim.

***Walton v. Guidant Sales Corp.,* 417 F. Supp.2d 719 (D. Md. 2006).**
Anthony Walton was employed as a salesperson for Guidant Sales Corporation, a medical device manufacturer. He proceeded *pro se*, without an attorney, against Guidant alleging an ADA violation. Judge Davis granted summary judgment in favor of Guidant, finding that Mr. Walton had not filed a timely claim and exhausted administrative remedies within 300 days as required by statute -- even though the doctrine of equitable tolling allows *pro se* claimants a time extension in certain circumstances. The doctrine applies, as Mr. Walton alleged in this case, when a *pro se* litigant misses a deadline due to reliance on misleading or incorrect information provided by the EEOC. In this case, Judge Davis held that he had not met this standard even though Mr. Walton contacted the EEOC on numerous occasions to inquire about the status of his administrative charge, was initially sent the wrong form by the EEOC, alleged that he timely filed the corrected form that he was sent after informing the EEOC of their mistake, and was helped by the EEOC to complete another charge after the deadline because the EEOC could not find his earlier form and had admittedly experienced problems with their data management system during the relevant time period. Judge Davis granted summary judgment against the plaintiff even though an EEOC supervisor even deemed Mr. Walton to have filed a "minimally sufficient" charge of discrimination within the 300 day period.

***Equal Rights Ctr. v. Equity Residential,* 483 F. Supp. 2d 482 (D. Md. 2007)**
In this action, the plaintiff was a non-profit organization whose mission is to protect the rights of people with disabilities. The organization brought suit against Equity Residential and a subsidiary alleging that the defendants had a widespread practice (implemented at 300 properties nation-wide) of designing and constructing apartment properties that were not accessible to people with disabilities. The plaintiff, Equal Rights Center, brought two claims – one under the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, and one under the Americans with Disabilities Act. The defendants moved to dismiss arguing that the plaintiffs lacked standing and that the venue was improper. In the alternative, the defendants argued that the court should sever the two claims into a claim for each of the 300 properties and that each of the 300 claims should be transferred to the district where the property was located. Judge Davis rejected all of those arguments and ruled in favor of the plaintiffs proceeding in his court on their two claims covering all 300 properties.

- **Criminal**

Judge Davis' has a varied record on criminal cases. In some instances, he is deferential to the accused, granting motions to suppress evidence that were later reversed by the Fourth Circuit. Yet, in others cases he narrowly applies the law to deny defendants their constitutional rights. The following cases are but a few of his numerous rulings in this area of law.

***United States v. Wooten*, 2004 U.S. Dist LEXIS 24976 (D. Md. 2004).**
After spending an evening at Roots Bar, Deanna Morgan and Jenelle Henderson were mugged after leaving in the early morning hours. When questioned by police, both victims described their assailant as simply "an unknown black male wearing a blue sweatshirt." Baltimore City Police detectives identified a man, Marvin Wooten, they suspected carried out the armed robbery. To assist their case, the detectives created a photo array that both Morgan and Henderson could use to identify the robber. In creating this photo line-up, the detectives engaged in a series of missteps which eventually resulted in Judge Davis throwing out the results due to its highly suggestive nature. First, the defendant - who had unique facial features resembling, as the court described it, "Donald Duck" - was placed in the center of the other photographs. Second, Wooten's photograph was significantly darkened. As a result, Wooten was shown to be much darker than any of the other five photographs. And finally, the detectives called the women late in the evening to come into the station on urgent business, specifically because they thought they had caught the man who robbed them. The resultant combination of these factors was dramatic. Both women, when shown the pictures, identified defendant Wooten as the robber even though they were earlier unable to describe him as anything more than a black male in a blue sweatshirt. Judge Davis held that under the totality of the circumstances, the photo identification was impermissibly suggestive and he suppressed the eyewitness identification evidence.

***United States v. Kimbrough*, No. 1:05-cr-00363-AMD (D. Md. 2006), *rev'd*, 477 F.3d 144 (4th. Cir. 2007).**
This case addressed the scope of a suspect's Fifth Amendment right against self-incrimination. At issue was whether the government could rely on statements at trial elicited by a third person prior to police giving the suspect a valid *Miranda* warning. Under *Miranda* analysis, if the third person's questioning was the equivalent of an official "custodial interrogation" the statements could not be used. In this case, Kimbrough was living at his mother's house when police received an anonymous tip that he was selling drugs from the residence. When the police arrived and discovered drugs in Kimbrough's living quarters, his mother began asking him questions in the officer's presence. Before proper Miranda warnings were given, Kimbrough answered and gave incriminating responses. Prior to trial, he moved to suppress the statements he made subsequent to his arrest. Neither party contested that the warnings were ineffective, yet the government nonetheless argued that Miranda warnings were not required because Mrs. Kimbrough, and not the police, asked the initial questions. Judge Davis ruled that "[her] involvement in questioning . . . was the equivalent of official custodial interrogation. It was obvious to [the police] that Miss Kimbrough . . . as [the officer put it] quite candidly in his testimony – she did the questioning for him."

***United States v. Gardner*, 417 F. Supp. 2d 703 (D. Md. 2006).**
On a matter of first impression in the federal courts, Judge Davis held that charging defendant Gardner under both the Racketeer and Influenced and Corrupt Organizations Act ("RICO") and the statute addressing violent crimes in the aid of racketeering ("VICAR") was a violation of the Double Jeopardy Clause of the Fifth Amendment. In *Gardner*, the defendant was charged with multiple offenses stemming from his alleged involvement with a criminal enterprise. At issue were two similar conspiracy charges: racketeering conspiracy in violation of RICO and conspiracy to commit murder in aid of racketeering in violation of VICAR. To determine whether the two were multiplicitous, Judge Davis addressed whether the statutes were distinguishable and thus required proof of a separate element, and whether Congress intended cumulative punishment for the crimes. He found that the two crimes were substantively alike

and that Congress had not evidenced its intent to duplicate the punishments. Because charging Gardner with both crimes amounted to double jeopardy, Judge Davis held that the government could only proceed on one conspiracy theory.

***U.S. v. McNeill*, 420 F. Supp. 2d 448 (D. Md. 2006), *rev'd* 484 F.3d 301 (4th. Cir. 2007).**
Defendant McNeill was arrested without a warrant for "assault by threat" by a Baltimore police officer following an argument with his ex-girlfriend. When the officer arrived on the scene, the woman explained that she had obtained an *ex parte* protective order against McNeill. Upon hearing this, the defendant exclaimed "you bitch, you dead, you know I'm going to get you." When McNeill made these statements, the officer was facing the female and could not see McNeill. Once the defendant was taken to the police station, and after he received *Miranda* warnings, he confessed to two bank robberies. Judge Davis allowed McNeill to suppress the confessions on the basis that the initial arrest was in violation of the Fourth Amendment. The issue was whether, as required by law, the officer had probable cause to make the arrest. Judge Davis held that probable cause did not exist because there is no such crime as "assault by threat" and no reasonable officer could have concluded that McNeill had the imminent intention to batter at the time he made the oral threat. Second, he held that there was no probable cause to arrest McNeill for the misdemeanor statutory offense of harassment because – in Judge Davis's words – "if any incident of harassment occurred, it occurred before the officer arrived at the scene . . . and therefore did not occur in his presence."

***United States v. Tate*, 1:06-cr-00243-AMD (D. Md. 2006), *rev'd* 524 F.3d 449 (4th Cir. 2008)**
In this case, Judge Davis denied Defendant Devon Tate the opportunity to challenge an affidavit submitted by a police officer, which resulted in a search of his premises and his ultimate arrest. Under the Fourth Amendment, police are required to establish probable cause before searching a residence; a duly submitted affidavit can provide the basis for a search. To challenge an affidavit, the defendant must show that the police submitted a deliberate or recklessly false statement, which is difficult to do – affidavits are presumed to be valid. The officer claimed that he searched Tate's trash bags left out for collection (this initial search turned up a firearm which was the basis for the warrant to search the house). Tate argued that the affidavit was crafted to omit the fact that the bags were not left out for collection and that the officer only accessed them by jumping a fence and trespassing onto Tate's property, making the search of the trash bags unconstitutional. Davis ruled that regardless of whether Tate could prove this violation the officer's affidavit was "literally true" and wasn't misleading because it didn't state "where the police officer who retrieved the bags physically was located when he retrieved [them]." A unanimous panel of the Fourth Circuit reversed Davis's ruling finding that Tate made a sufficient showing that the officer intentionally omitted material facts that, if true, would have rendered the search unlawful. The test, it held, wasn't whether the affidavit was literally true but whether it was designed to "mislead the issuing judge as to the constitutionality of the trash search that established probable cause."

CONCLUSION

President Obama's nomination of Judge Andre Davis to the Fourth Circuit Court of Appeals is a positive sign that he will work quickly to fill the Court's many vacancies. We look forward to working with the President to ensure that his nominees will uphold core constitutional values, and make sure the law works for everyone – not just a privileged few.