SIGNIFICANT RECENT EMPLOYMENT DISCRIMINATION LAW DECISIONS

By

Paul Grossman

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SIGNIFICANT RECENT EMPLOYMENT DISCRIMINATION LAW DECISIONS

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By

Paul Grossman*

Set forth below are brief digests of recent court decisions which I consider of particular interest. My criteria for inclusion of cases, in rough order of importance, are as follows: significance of the case, utility in litigation, uniqueness, and intellectual content. This paper does not, of course, purport to list all cases which could reasonably be considered as meeting the above criteria. This paper is designed to be used in conjunction with the third edition of Lindemann & Grossman, Employment Discrimination Law (Paul W. Cane, Jr., ed. 1996), and the 2002 Supplement (C. Geoffrey Weirich, ed.).

Disparate Treatment – Summary Judgment Standards (Ch. 2)

Wells v. SCI Management, 469 F.3d 697, 99 FEP 516 (8th Cir. 2006) – Summary judgment affirmed with respect to suspension in response to customer complaints – alleged comparators who had also been the subject of complaints but were not disciplined had either received far fewer complaints or the complaints were deemed unsubstantiated – other alleged comparators did not hold the same position, or had different supervisors in different locations, and thus the differences in discipline did not indicate bias.

Arnold v. Nursing and Rehab Center at Good Shepherd, LLC, 471 F.3d 843, 99 FEP 586 (8th Cir. 2006) – Employer reasonably believed black nurse verbally abused nursing home resident – does not matter if employer mistaken – fact that employer did not terminate white male employee who actually caused the death of a resident is not appropriate comparative evidence, since the death was accidental while the alleged conduct of the plaintiff was intentional.

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Crawford v. Indiana Harbor Belt Railroad Co., 461 F.3d 844, 98 FEP 1398 (7th Cir. 2006) – Summary judgment affirmed in disparate treatment discharge case – defendant employed 200 conductors and fired 10 of them, besides the plaintiff – all were male – plaintiff contended two who were not fired were comparable – this would not make any difference since if there were 12 “bad” male employees and 10 were fired, 5/6ths of the comparable males were treated the same way as plaintiff – in any event, alleged comparators are not comparably situated with respect to seniority and having the same supervisor – “There has been a tendency in our cases, and in those of some other circuits . . . to require closer and closer comparability between the plaintiff and members of the comparison group. . . . The requirement is a natural response to cherry-picking by plaintiffs, . . . If a plaintiff can make a prima facie case by finding just one or two [comparably situated majority group] workers who were treated worse than she, she should have to show that they really are comparable to her in every respect.” (Id. at 846) (citations omitted) – but in fairness to plaintiff the comparison group does not have to be comparable in every respect – “[T]he members of the comparison group must be comparable to the plaintiff in all material respects.” (Id.) (emphasis in original).

Antonio v. The Sygma Network, Inc., 458 F.3d 1177, 98 FEP 1562 (10th Cir. 2006) – “Same actor” inference determinative – discharge decision made by the same personnel committee that hired the plaintiff twice, most recently 10 months before her discharge.

Wright v. Murray Guard, Inc., 455 F.3d 702, 98 FEP 833 (6th Cir. 2006) – Summary judgment affirmed – inadequate showing for mixed-motive analysis – contention that sexual harassment investigation inadequate does not rebut fact that employer had honest belief that plaintiff had engaged in sexual harassment – alleged comparative evidence fails since female who was transferred rather than discharged did not engage in conduct which was as serious as sexual harassment – her conduct violated no laws.

Forrester v. Rauland-Borg Corp., 453 F.3d 416, 98 FEP 546 (7th Cir. 2006) – Male discharged for harassment contended employer’s investigation was shoddy and he didn’t do it – whether he did it or not is not the issue – the issue is not whether the employer was correct “but whether it is the true ground of the employer’s action rather than being a pretext for a decision based on some other, undisclosed ground” (Id. at 417) – if it is the true ground for the action, whether or not the employer’s conclusion was correct, the case is over – if it is not the true ground, the case cannot be resolved at summary judgment – “All this would be too familiar to require repetition in a published opinion were it not for a persistent dictum to the effect that pretext [can also be shown] by proof that the stated reason was ‘insufficient to motivate’ the action. [citation to numerous Sixth and Seventh Circuit cases omitted] It is time the dictum was laid to rest. . . . It adds nothing to the analysis of pretext but confusion.” (Id.) – If the stated reason did not motivate the action it was pretextual – if it was insufficient to motivate the action, this either means that it didn’t motivate it or that it shouldn’t have motivated it – the first is just a different way of saying that the stated reason was not the real reason – the second “is wrong because the question is never whether the employer was mistaken, cruel, unethical, out of his head, or downright
irrational . . . but simply whether the stated reason was his reason: not a good reason, but the true reason.” (Id. at 418) (emphasis in original) – in this case it matters not that the investigation was shoddy – summary judgment affirmed – “A pretext . . . is a deliberate falsehood. . . . An honest mistake, however dumb, is not, and if there is no doubt that it is the real reason it blocks the case at the summary-judgment stage.” (Id. at 419).

_Valez v. City of Chicago_, 442 F.3d 1043, 97 FEP 1390 (7th Cir. 2006) – Summary judgment in national origin demotion case – plaintiffs contended that two reports outlining their performance problems were tainted by the national origin animosity of their superior – any taint from the second report was removed when their supervisor had two fire department officials make an independent investigation, and the independent investigators concluded that the job performance was unsatisfactory and warranted demotion.

_Jaramillo v. Colorado Judicial Department_, 427 F.3d 1303, 96 FEP 1345 (10th Cir. 2005) – In promotion case one of employer’s reasons, that successful applicant scored higher on the examination, was false – “The fact that one of [the employer’s] explanations turned out to be incorrect does not necessarily create a genuine issue of fact concerning pretext.” (Id. at 1309) – the other reason was independent of the first and supported by evidence, and the false reason was not so outrageous as to destroy the employer’s credibility.

_Maxfield v. Cintas Corp. No. 2_, 427 F.3d 544, 96 FEP 1249 (8th Cir. 2005) – Summary judgment affirmed – even if employer’s explanation was false, explanation cannot be proved to be pretext for discrimination unless it has shown both that it was false and that discrimination was the real reason - no evidence of the latter.

_Keelan v. Majesco Software, Inc._, 407 F.3d 332, 95 FEP 906 (5th Cir. 2005) – Summary judgment for failure to establish prima facie case affirmed – _Desert Palace_ does not affect _McDonnell Douglas_ summary judgment analysis – _Desert Palace_ has no place in the analysis until after the plaintiff establishes a prima facie case and the employer articulates a legitimate nondiscriminatory reason – reliance on the fact that the Supreme Court in _Raytheon Co. v. Hernandez_, 540 U.S. 44 (2003), a post- _Desert Palace_ case, referenced the consistent use of the “familiar” _McDonnell Douglas_ burden-shifting approach for disparate treatment cases – in this circuit _Desert Palace_ mandates that at the final stage of _McDonnell Douglas_ the plaintiff can offer sufficient evidence to create a genuine issue of fact that the defendant’s reason is a pretext for discrimination or that the defendant’s reason, while true, is only one of the reasons and another motivating factor was a protected characteristic.

_Torlowei v. Target_, 401 F.3d 933, 95 FEP 753 (8th Cir. 2005) – _Desert Palace, Inc. v. Costa_, 539 U.S. 90 (2003), has no impact whatsoever on summary judgment – _Desert Palace_ is applicable to jury instructions post trial – summary judgment affirmed – plaintiff really asks us to review the fairness of actions taken, not whether they were based on racial discrimination – “Federal courts do not sit as a super-personnel department that reexamines an entity’s business decisions.” (Id. at 935) (citation omitted).
Noble v. Brinker Int’l, 391 F.3d 715, 94 FEP 1665 (6th Cir. 2004), cert. denied, 126 S. Ct. 353 (2005) – Federal district court’s refusal to grant judgment as a matter of law reversed – even though there was a prima facie case and evidence of pretext, reasonable jury could not have inferred discrimination – plaintiff admitted that the only person who discriminated against him was prior restaurant manager, and there is no evidence that the decisionmaker, the restaurant manager at the time of discharge, was influenced in any way by the prior manager – thus, the statements and conduct of the prior manager are statements or conduct of non-decisionmakers – the mere fact that Reeves allows a finding of discrimination when there is a prima facie case and evidence of pretext does not prevent judgment as a matter of law if a reasonable jury could not find discrimination – 2-1 decision.

Mayer v. Nextel West Corp., 318 F.3d 803, 90 FEP 1750 (8th Cir.), cert. denied, 540 U.S. 823 (2003) – Summary judgment affirmed despite fact that plaintiff rebutted employer’s legitimate, nondiscriminatory reasons for discharge and thus created issue of pretext – the employer’s explanations involved poor business judgment and failure of sales team to meet potential – it was rebutted by evidence that sales team exceeded quota and plaintiff received overall favorable evaluations – but the evidence of pretext is not strong, and “no rational factfinder could conclude [plaintiff’s] termination was discriminatory because no evidence creates a reasonable inference that age was the determinative factor.” (Id. at 808) – a prima facie case plus evidence of pretext is simply not enough absent additional evidence – cases cited by plaintiff contained distinguishing facts such as evidence of age-based animus – plaintiff’s argument that there is an issue of fact as to pretext and nothing in the record excludes age as a motive “misses the mark” – “Before a court can allow a discrimination case involving only circumstantial evidence to go to a jury, it must find sufficient evidence that would allow a reasonable factfinder to infer that age was a determinative factor . . . . [Plaintiff] must show something in the record that suggests age discrimination was a reason for [the employer’s] actions.” (Id. at 810)

Traylor v. Brown, 295 F.3d 783, 89 FEP 1438 (7th Cir. 2002) – Summary judgment affirmed on two bases: (1) no prima facie case; and (2) assuming prima facie case, employer’s explanation unrefuted – plaintiff argued that under Reeves summary judgment was improper because the employer’s proffered reasons for its actions were not offered by “disinterested witnesses” – she cited the following quote from Reeves v. Sanderson Plumbing Prods., Inc.:

The Court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.


We do not interpret the quoted language so broadly as to require a court to ignore the uncontroverted testimony of company
employees or to conclude, where a proffered reason is established through such testimony, that it is necessarily pretextual. To so hold would essentially prevent any employer from prevailing at the summary judgment stage because an employer will almost always have to rely on the testimony of one of its agents to explain why the agent took the disputed action. Moreover, . . . a plaintiff cannot avoid summary judgment by merely claiming a jury could disbelieve the employer’s reason.

*Traylor*, 295 F.3d at 791.

*Sandstad v. C.B. Richard Ellis, Inc.*, 309 F.3d 893, 90 FEP 248 (5th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003) - Testimony by senior managers who took part in firing a manager need not be disregarded as evidence offered by “interested witnesses” – “The definition of an interested witness cannot be so broad as to require us to disregard testimony from a company’s agents regarding the company’s reasons for discharging an employee.” (Id. at 898) – plaintiff argued that under Supreme Court’s *Reeves* ruling testimony by all managers involved in his termination must be disregarded as “interested witness testimony.”

*Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 89 FEP 306 (10th Cir. 2002) – A jury must normally be instructed that if they disbelieve an employer’s explanation for its employment decision they may but need not infer that the employer’s true motivation was discriminatory – a pretext instruction is not always required, but it must be given when a rational fact finder could reasonably find that the employer’s explanation was false and could infer from that falsity that the employer was dissembling to cover up a discriminatory purpose – 2-1 decision – dissent contended that while the pretext instruction would have been allowable the failure was not reversible error – majority found reversible error – issue analyzed at 170 LRR 176.

*Price v. Fed. Express Corp.*, 283 F.3d 715, 88 FEP 619 (5th Cir. 2002) – Summary judgment affirmed despite prima facie case – employer’s explanation for hiring white male instead of African American was better qualifications – “In order to establish pretext by showing the losing candidate has superior qualifications, the losing candidate’s qualifications must leap from the record and cry out to all who would listen that he was vastly – or even clearly – more qualified for the subject job.” (Id. at 723) (internal quotations omitted) – plaintiff did not prove such superior qualifications – assuming, *arguendo*, plaintiff did, and thus established pretext, “his evidence of pretext does not support an inference that intentional discrimination was the real reason.” (Id) – in cases where following *Reeves* we have reversed a grant of summary judgment, the evidence of pretext was considerably more substantial than that herein – argument that district court failed to give proper credence to EEOC’s determination letter in plaintiff’s favor rejected – “[T]he EEOC’s findings of racial discrimination are not dispositive in later racial discrimination suits.” (Id. at 725)
Blow v. City of San Antonio, 236 F.3d 293, 84 FEP 1268 (5th Cir. 2001) - In 2-1 decision, Reeves broadly interpreted and summary judgment overturned - reasonable fact finder could conclude that explanation that black librarian not promoted because white external candidate had already been hired by the time she applied was pretextual because supervisor on hiring team concealed job opening and discouraged application - a conclusion that this explanation was false would allow a jury to rule in her favor since the case presented “no unusual circumstances that would prevent a rational fact finder from concluding that [the City’s] reasons for failing to promote her were discriminatory” (Id. at 298) – the dissent contends that the majority’s decision would leave the jury to speculate, particularly since uncontroverted evidence indicated that the hiring supervisors did not know the librarian had applied.

Disparate Treatment - General (Ch. 2)

Ash v. Tyson Foods, Inc., 126 S. Ct. 1195, 97 FEP 641 (2006) – Racial discrimination in promotion alleged – certiorari granted and case remanded for reconsideration without briefing – Supreme Court addressed two issues: (1) Court of Appeals, in considering plaintiffs’ contention that their better qualifications were evidence of pretext relied on its holdings that the disparity in qualifications must be “so apparent as virtually to jump off the page and slap you in the face” – “The visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications.” (Id. at 1197) – Supreme Court did not set the standard but cited three courts of appeals decisions as to how great the differences in qualifications must be: (a) “disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question” (Id.); (b) “qualifications evidence standing alone may establish pretext where the plaintiff’s qualifications are ‘clearly superior’ to those of the selected job applicant” (Id. at 1197-98); and (c) “factfinder may infer pretext if ‘a reasonable employer would have found the plaintiff to be significantly better qualified for the job’” (Id. at 1198); (2) plaintiffs’ evidence of discrimination included being called “boy” – the Court of Appeals held that this was not evidence of discrimination by itself without a modifying racial classification like “black” – “Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker’s meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court’s decision is erroneous.” (Id. at 1197)
Desert Palace, Inc. v. Costa, 539 U.S. 90, 91 FEP 1569 (2003) – Unanimous decision – direct evidence unnecessary in mixed-motive bias case – circumstantial evidence is permissible – focusing on Justice O’Connor’s opinion in Price Waterhouse was inappropriate since that opinion was inconsistent with the text of § 703(m) (unlawful employment practice when plaintiff “demonstrates that [a protected criterion] was a motivating factor . . ., even though other factors also motivated the practice”) (Id. at 94) – this requires only that a case be proved by a preponderance of the evidence, which can be direct or circumstantial – “In order to obtain [a mixed-motive] instruction . . ., a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that [a protected characteristic] was a motivating factor for any employment practice.” (Id. at 101) - case and related issue of when attorney’s fees can be granted analyzed at 172 LRR 248.

Reynolds v. Ethicon Endo-Surgery, Inc., 454 F.3d 868, 98 FEP 783 (8th Cir. 2006) – Sales manager located in Sioux Falls, South Dakota alleged pregnancy discrimination when her territory was eliminated and she was offered a transfer with the same title, pay and advancement prospects and a relocation package to Louisville, Kentucky – she was offered the alternative of a severance package – she refused both and was terminated – since she rejected equivalent positions, there was no adverse employment action.

EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 98 FEP 571 (10th Cir. 2006), cert. granted, ___ U.S. ___ (2007) – The human resources official who made the decision to terminate plaintiff worked in a different city and did not know he was black – however, the human resources official relied exclusively on information provided by plaintiff’s immediate supervisor who allegedly had a history of discriminatory remarks and discrimination – summary judgment overturned under “cat’s paw” theory – the allegedly biased supervisor ordered the complainant to work on a Sunday – the complainant refused on the ground that “he had plans” – the HR official indicated that he could be given a direct order and if he disobeyed that he could be terminated – it was undisputed that the complainant was ordered to come to work and refused – it was disputed whether the complainant said he planned to call in sick on Sunday if ordered to come to work – in fact, he did become sick and canceled his earlier plans for Sunday and went to an urgent care clinic – the HR official examined the file and authorized discharge – circuits have divided as to the level of control a biased subordinate must exert in order for the cat’s paw theory to be applicable – some say possessed leverage influence is the standard – this improperly eliminates the requirement of causation – at the opposite extreme the Fourth Circuit has held that an employer cannot be held liable even if a biased subordinate exercises “substantial influence” or plays a “significant” role – under this theory the subordinate has to be the actual decisionmaker – we agree with the Seventh Circuit – a plaintiff must establish more than mere “influence” – the issue is whether the biased subordinate’s discriminatory reports caused the adverse employment action – in this case a reasonable jury could conclude that the subordinate was biased and did cause the termination.
Schierhoff v. GlaxoSmithkline Consumer Healthcare, 444 F.3d 961, 97 FEP 1484 (8th Cir. 2006) – No prima facie case since not qualified because of excessive absenteeism – does not matter that absences were caused by medical conditions and were excused – when overall absences reach an unacceptable level the employee is not qualified.

Goodwin v. Bd. of Trustees, Univ. of Ill., 442 F.3d 611, 97 FEP 1281 (7th Cir. 2006) – The issue was whether plaintiff presented any evidence of comparably situated individuals who had engaged in threatening, intimidating behavior and were dealt with more leniently – the first alleged comparator was in a senior position to the plaintiff and did not deal with the same supervisor – the second alleged comparator had accessed pornography at work – this is not similar to threats and intimidation – the final comparator was comparably situated – he received a warning but was not demoted – while it is true there was no supervisor/supervisee relationship in the incident involving the alleged comparator, requiring that would be applying the indirect method of proof too narrowly – employees must have engaged in similar but not identical conduct to be similarly situated – the comparator’s conduct “was both vulgar and potentially threatening, which is the essence of the charges against [plaintiff]” (Id. at 619) – plaintiff was alleged to have threatened an employee under her direct supervision – summary judgment reversed – at trial employer is not precluded from relitigating fact issues it lost before merit board of university system – collateral estoppel not applicable.

Scott v. FirstMerit Corp., 2006 WL 167151 (6th Cir. Jan. 23, 2006) – Long-service Ohio bank clerk fired after entering another employee’s name on a minor adjustment to a customer’s account – discharge decision was “unmercifully draconian” (Id. at *4) in light of tenure and small amount of money involved, but this does not provide a basis for inferring discrimination – bank had right to insist that its employees ensure the accuracy of bank documents.

Cornwell v. Electra Central Credit Union, 439 F.3d 1018, 97 FEP 930 (9th Cir. 2006) – Summary judgment reversed – district court granted summary judgment on the ground that plaintiff did not produce “specific and substantial evidence” of race discrimination – plaintiff did produce extensive circumstantial evidence – “Title VII does not require a disparate treatment plaintiff relying on circumstantial evidence to produce more, or better, evidence than a plaintiff who relies on direct evidence” (Id. at 1030) to avoid summary judgment.

Hussain v. Nicholson, 435 F.3d 359, 97 FEP 466 (D.C. Cir.), cert. denied, 127 S. Ct. 494 (2006) – alleged superior qualifications does not establish promotion discrimination unless the plaintiff is “significantly better qualified.” (Id. at 365)

Miles v. Dell Inc., 429 F.3d 480, 96 FEP 1639 (4th Cir. 2005) – Discharged female was replaced with a female – summary judgment nevertheless overturned – claim was that person who fired her did so because he wanted to hire a man but was overruled by his supervisors, who replaced her with a woman – general rule that prima facie case requires a
showing that the position remained open or was filled by someone outside the protected
group has a necessary exception when the firing and hiring are by different individuals.

_Garrison v. Gambro, Inc.,_ 428 F.3d 933, 96 FEP 1446 (10th Cir. 2005) – Employer with
quality problems required employees to pass a test designed to measure assembly skills for
medical equipment – seven female employees over the age of 40 who flunked pointed out
they had done essentially the same job for years with adequate evaluations – no prima facie
case since no showing of qualifications – employer had a right to upgrade skill
requirements – disparate impact claim rejected since employer hired women for four out of
six of the new positions.

_Whittaker v. Northern Illinois University_, 424 F.3d 640, 96 FEP 982 (7th Cir. 2005), _cert. denied_,
126 S. Ct. 2986 (2006) – No actionable adverse employment action despite negative
evaluation, written warning, requirement to provide proof of illness when out sick, and
unserved three-day suspension without pay which did not result in loss of pay because
employee resigned prior thereto – no adverse employment actions since the actions did not
result in tangible job consequences.

_Dominguez-Curry v. Nevada Transportation Department_, 424 F.3d 1027, 96 FEP 744 (9th Cir.
2005) – One of two decisionmakers had made biased statements against other women –
the other decisionmaker was unbiased – in 2-1 decision summary judgment for employer
reversed – in Ninth Circuit a single discriminatory comment by a decisionmaker is
sufficient to preclude summary judgment – it does not matter that there was no evidence
of any bias on the part of the other decisionmaker – dissent indicated no basis for
overturning conclusion that successful candidate was more qualified – plaintiff has
conceded that successful candidate was very qualified and might be more qualified than
her.

_Byrd v. Illinois Department of Public Health_, 423 F.3d 696, 96 FEP 812 (7th Cir. 2005) – New
trial ordered because of deficient jury instructions in imputed liability case – plaintiff
successfully alleged that the employer’s decisionmakers were liable because they relied on
input from a biased individual – it was reversible and prejudicial error to reject employer’s
jury instruction that if the ultimate adverse decisions were made on independent and legally
permissive bases, unrelated to the information from the biased individual, the bias would
be irrelevant – new trial required.

_Obrey v. Johnson_, 400 F.3d 691, 95 FEP 531 (9th Cir. 2005) – In alleged individual pattern or
practice case trial judge excluded statistical evidence of a disparity in promotions because it
did not take into account differences in qualifications, and rejected “me-too” evidence
because it would turn the case into a series of mini-trials – the Ninth Circuit reversed on
both grounds - although the statistics were weak and could not prove the case alone they
were relevant - the “me-too” evidence might help show a pattern or practice.
Mondero v. Salt River Project, 400 F.3d 1207, 95 FEP 577 (9th Cir. 2005) – Summary judgment affirmed in claim by laid-off female electrician – two supervisors had expressed bias – “[t]hey bring a woman to do a man’s job?” (Id. at 1211) – those supervisors were not decisionmakers and there is no evidence they communicated their bias to the decisionmaker – “Stray remarks not acted upon or communicated to a decision maker are insufficient to establish pretext. An agent’s biased remarks against an employee because of his or her gender are admissible to show an employer’s discriminatory animus if the agent was involved in the employment decision. . . . [Plaintiff] has failed to present any evidence that [the employer] declined to repeat the experimental program for her because [the employer’s] decision makers were influenced or even aware of the alleged gender bias of some of its agents.” (Id. at 1213) (citations omitted).

Gillis v. Ga. Department of Corrections, 400 F.3d 883, 95 FEP 427 (11th Cir. 2005) – Favorable annual evaluation was adverse employment action since more favorable evaluation would have resulted in over $900 per year in additional pay increases.

Coghlan v. American Seafoods Co., 413 F.3d 1090, 95 FEP 1825 (9th Cir. 2005) – Decisionmaker made favorable decision for plaintiff one year before making negative decision – same-actor rule creates “strong inference” that subsequent action was not discriminatory, and a court must take this into account on summary judgment – employee in same-actor case thus has a “heightened burden” to avoid summary judgment – summary judgment affirmed - little direct evidence is needed to avoid summary judgment, but no direct evidence here – circumstantial evidence must be “specific and substantial” to defeat summary judgment – a plaintiff’s burden “is especially steep” when the “same-actor inference” is applicable – although the Ninth Circuit has previously applied the same-actor rule in the context of hiring-firing “its logic applies no less” to other cases with a favorable action followed by an unfavorable action – “The point . . . is simply that when the allegedly discriminatory actor is someone who has previously selected the plaintiff for favorable treatment, that is very strong evidence that the actor holds no discriminatory animus, and the plaintiff must present correspondingly stronger evidence of bias in order to prevail.” (Id. at 1097) – Reeves “has no bearing on the same-actor inference, however, because the point of the same-actor inference is that the evidence rarely is sufficient . . . to find that the employer’s asserted justification is false when the actor who allegedly discriminated against the plaintiff had previously shown a willingness to treat the plaintiff favorably.” (Id.) (emphasis in original; internal quotations omitted)

Okrublik v. Univ. of Ark., 395 F.3d 872, 95 FEP 82 (8th Cir. 2005) – No adverse employment action in alleged denial of tenure case – employee did not go through the university appeals process – only an official denial of tenure is an adverse employment action – by not pursuing an appeal to the end she withdrew from the process.
Perez v. Tex. Dep’t of Criminal Justice, 395 F.3d 206, 94 FEP 1729 (5th Cir. 2004), cert. denied, 126 S. Ct. 545 (2005) – Plaintiff’s verdict overturned – error to instruct the jury in misconduct discharge that comparators’ misconduct “must be of comparable seriousness” and if so they would be similarly situated – “A correctly worded instruction would have made clear that the jury must find the employees’ circumstances to have been nearly identical in order to find them similarly situated.”  (Id. at 213)

Sartor v. Spherion Corp., 388 F.3d 275, 94 FEP 1153 (7th Cir. 2004) – Failure to retain only black employee at or above plaintiff’s level during reorganization and layoff is not direct or circumstantial evidence of discrimination – “In the context of a business undergoing a substantial reorganization, the fact that the sole black employee at a particular management level was not retained does not itself signal that the company was motivated to fire her because of her race.”  (Id. at 278)

Wilson v. B/E Aerospace Inc., 376 F.3d 1079, 93 FEP 1825 (11th Cir. 2004) – Summary judgment for employer in promotion case reversed – decisionmaker told female plaintiff that she was “the obvious candidate” and “the most qualified” for the promotion “even though women aren’t typically in that type of position and we’ll see what happens when we throw your name out there to corporate” (Id. at 1084) – employer chose male, claiming that male was most qualified – while this is not direct evidence of discriminatory intent, it would permit a reasonable jury to find that the employer’s explanation was pretextual so summary judgment must be reversed.

Hudson v. Chicago Transit Auth., 375 F.3d 552, 94 FEP 151 (7th Cir. 2004) – When claim of disparate treatment in promotions is based on plaintiff allegedly being more qualified, gap in qualifications must be so substantial as to “slap you in the face” – no such evidence exists here.

Bryan v. McKinsey & Co., 375 F.3d 358, 94 FEP 91 (5th Cir. 2004) – Elite consulting firm had “up or out” policy – after several promotions, the last of which was to associate principal, plaintiff was terminated – he alleged that all of the other 16 associate principals were white, and that many were given more time before being terminated – one was terminated in less time, and each of the 16 were either promoted or terminated at totally random times – there is no standard time – summary judgment affirmed.

Fonseca v. Sysco Food Servs. of Ariz., Inc., 374 F.3d 840, 94 FEP 65 (9th Cir. 2004) (Judges Betty Fletcher and Reinhardt) – Denials of overtime and suspension which were reversed by successful grievances under union contract still constitute adverse employment actions and can be the basis for a Title VII and § 1981 suit – while loss of pay and suspension was reversed, it was converted to a warning slip which can be an adverse employment action – prior Ninth Circuit holding in Brooks v. City of San Mateo, 229 F.3d 917, 930 (9th Cir. 2000), that a successful grievance could change the nature of an adverse employment action distinguished – here employee had to file several grievances whereas in Brooks it was just one grievance – summary judgment reversed.
Roberson v. Alltel Info. Servs., 373 F.3d 647, 93 FEP 1836 (5th Cir. 2004) – Biases of immediate supervisor irrelevant since biased supervisor had no input into choice of plaintiff for layoff - choice made by human resources manager who was in fact relying on decisions made by consulting company’s customers.

Cariglia v. Hertz Equip. Rental Corp., 363 F.3d 77, 93 FEP 833 (1st Cir. 2004) – Unbiased decisionmakers made discharge decision based on inaccurate, misleading or incomplete facts compiled by biased employee – judgment for employer reversed with directions to make findings as to whether biased submitter of information withheld exculpatory information because of bias.

Griffin v. Potter, 356 F.3d 824, 93 FEP 277 (7th Cir. 2004) – No adverse employment action so summary judgment affirmed – claim was that because of age shift was changed, commute was lengthened by transfer to another facility, an evaluation was unfair, discipline was unfair, letters of warning were unwarranted, and she was given difficult work assignments – some of her complaints were “plainly trivial” – adverse employment action must significantly alter the terms and conditions of the job.

Hitt v. Harsco Corp., 356 F.3d 920, 93 FEP 200 (8th Cir. 2004) – Eyewitness reports were that the protected-age plaintiff fully participated in a fight with a co-worker – even though those reports have now been shown to be wrong, the key question is not whether the plaintiff truly participated in the fight, but whether the employer really believed that the employee had been a participant when it made the discharge decision.

Marquez v. Bridgestone/Firestone, Inc., 353 F.3d 1037, 93 FEP 92 (8th Cir. 2004) – Comparative evidence fails despite plaintiff identifying many incidents in which she alleges she was discriminated against – plaintiff “was required to point to individuals who have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances,” (353 F.3d at 1038) (internal quotations omitted) – summary judgment affirmed.

Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 93 FEP 1 (4th Cir. 2004) (en banc), cert. dismissed, 543 U.S. 1132 (2005) – Influential coworker who was biased reported to management safety infractions committed by plaintiff – en banc court holds 7-4 that since biased coworker was not a decisionmaker, even though influential, there was no proof of improper motivation in the disciplinary actions – dissent argued that employer should be liable if an adverse action is motivated by the bias of a subordinate even if the subordinate lacks decisionmaking power.

Taylor v. Small, 350 F.3d 1286, 92 FEP 1785 (D.C. Cir. 2003) – Black employee given erroneously low performance evaluation which resulted in lower pay – employer corrected the low performance evaluation and the lower pay before litigation was filed – this renders plaintiff unable to establish she was subjected to an adverse employment action –
permitting employers opportunity to correct workplace wrongs prior to litigation is an objective of the EEO laws.

Tesh v. U. S. Postal Serv., 349 F.3d 1270, 14 A.D. Cas. 1829 (10th Cir. 2003) – Jury verdict overturned – employer reasonably believed employee had been dishonest, and whether this belief was erroneous or not was irrelevant.

Vasquez v. County of Los Angeles, 349 F.3d 634, 92 FEP 1630 (9th Cir. 2003) – No direct evidence – only direct evidence pertains to immediate supervisor, not decisionmaker – “[Immediate supervisor] was not the decisionmaker, and Vasquez has offered no evidence of discriminatory remarks made by [the decisionmaker]. Therefore, Vasquez must show a nexus between [the immediate supervisor’s] discriminatory remarks and [the decisionmaker’s] subsequent employment decisions. Vasquez has not shown the necessary nexus because [the decisionmaker] conducted her own thorough investigation. . . .” (Id. at 640) – therefore plaintiff must proceed under the McDonnell-Douglas test, and there is no evidence to prove that the employer’s explanation was pretextual – summary judgment proper on disparate treatment claim – with respect to racial hostile environment, “when compared to other hostile work environment cases, the events in this case are not severe or pervasive enough to violate Title VII. In Sanchez v. City of Santa Ana [936 F.2d 1027 (9th Cir. 1990)], . . . we held that no reasonable jury could have found a hostile work environment despite allegations that the employer posted a racially offensive cartoon, made racially offensive slurs, targeted Latinos when enforcing rules, provided unsafe vehicles to Latinos, and did not provide adequate police backup to Latino officers, and kept illegal personnel files on plaintiffs because they were Latino. The allegations in Sanchez were at least as severe as those in this case, yet the court held as a matter of law that there was no hostile work environment.” (349 F.3d at 643)

Cerutti v. BASF Corp., 349 F.3d 1055, 92 FEP 1613 (7th Cir. 2003) – 10 of 23 laid-off employees alleged age discrimination and four claimed race or national origin discrimination – plaintiffs argue that it was discriminatory not to make the layoffs on the basis of previous evaluations – “[T]here is certainly nothing inherently discriminatory about an employer’s decision to use criteria other than past performance evaluations to determine whether its employees can meet the increased workplace expectations that often coincide with a corporate reorganization.” (Id. at 1065)

Neal v. Roche, 349 F.3d 1246, 92 FEP 1601 (10th Cir. 2003) – A concession by the plaintiff that the real reason for the adverse action which the employer has concealed by a pretextual explanation is not prohibited by statute mandates summary judgment against the plaintiff – it does not help the plaintiff to prove discrimination if the employer gave a false reason if the real reason is nondiscriminatory.

Leong v. Potter, 347 F.3d 1117, 92 FEP 1384 (9th Cir. 2003) – Discharged employee did not establish that allegedly comparable majority group employees were in fact comparable – plaintiff was subject to a “last chance agreement” after earlier serious rules violations, but
none of the alleged comparators were subject to such an agreement or had amassed such a volume of misconduct.

*Frank v. Xerox Corp.*, 347 F.3d 130, 92 FEP 1270 (5th Cir. 2003) – Xerox’s balanced work force initiative had the stated purpose of ensuring that all racial and gender groups were proportionately represented at all levels of the company – allegation that the Houston office set out to match the racial goals which required reduction of percentage of black employees sufficient to withstand motion for summary judgment on both disparate impact and disparate treatment theories – policy of reducing percentage of black employees constitutes direct evidence of discrimination.

*Rowland v. Am. Gen. Fin., Inc.*, 340 F.3d 187, 92 FEP 734 (4th Cir. 2003) – Federal district court erred in refusing to give a mixed-motive instruction – employer stated it did not promote female branch manager because of complaints from employees and customers, and jury accepted that argument – however, substantial evidence of bias presented – there is a real possibility that if the mixed-motive instruction had been given the jury might have found that sex was a motivating factor even if the employer would have made the same decision anyway.

*Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 91 FEP 887 (7th Cir. (2003) – Summary judgment affirmed on ground that black plaintiff did not establish that white comparator received promotion – company had admitted in discovery promotion occurred but admission was not called to the district court’s attention – district court is not required to scour the record for evidence that is not called to the court’s attention by the parties.

*Gilmore v. AT&T*, 319 F.3d 1042, 91 FEP 381 (8th Cir. 2003) – Discharged African-American employee failed to demonstrate that eight co-workers with alleged similar problems were similarly situated – three of them are also black – misconduct of three others was not comparable in severity or frequency – no proof with respect to the other two that the supervisor was the same.

*Jetter v. Knothe Corp.*, 324 F.3d 73, 91 FEP 316 (2d Cir. 2003) – Same-actor rationale has far less applicability in a circumstance in which the employer was forced to hire the employee because it wanted to acquire his company.

*Herrnreiter v. Chicago Hous. Auth.*, 315 F.3d 742, 90 FEP 801 (7th Cir. 2002) – Transfer to auditing division from investigation division was not adverse employment action and is not actionable – for a lateral transfer to be actionable there must be a significant reduction in the employee’s career prospects by preventing him from using the skills in which he is trained and experienced so that his career is likely to be stunted, or where the transfer subjects the employee to humiliating, degrading, or unsafe conditions.

*Ford v. Gen. Motors Corp.*, 305 F.3d 545, 89 FEP 1721 (6th Cir. 2002) – Plaintiff alleged he was given an increased workload in retaliation for filing an EEOC charge – employee also
alleged he received increased supervisory scrutiny – claim of increased scrutiny precluded the grant of summary judgment – 2-1 decision.

Collins v. New York City Transit Auth., 305 F.3d 113, 89 FEP 1473 (2d Cir. 2002) – Employee terminated for misconduct filed a grievance and was represented by his union at the arbitration hearing – the arbitration board upheld the termination – summary judgment was granted – the arbitration board had the power to prevent the termination – the arbitration board issued a reasoned 14-page opinion – a negative arbitration decision under a labor contract does not bar a subsequent Title VII action, but to survive a motion for summary judgment in such circumstances the claimant must present strong evidence that the decision was wrong – since the arbitration panel could have prevented the discharge, its neutral conclusion broke any chain of causation from allegedly biased supervisors – this is in accord with Alexander v. Gardner-Denver which indicated that arbitration decisions while not determinative may be given “such weight as the court deems appropriate” – issue analyzed at 170 LRR 455.

Elsayed Mukhtar v. Cal. State Univ., Hayward, 299 F.3d 1053, 89 FEP 849 (9th Cir. 2002), as amended by, 319 F.3d 1073 (9th Cir. 2003) - $637,000 jury verdict for professor denied tenure overturned – Ninth Circuit faults trial court for failing to assess the reliability of an expert witness’s testimony and remands for new trial – alleged expert testimony addressed the critical issue and drew the inference of discrimination in a case otherwise based on less than convincing circumstantial evidence – the district court’s failure to make a Daubert ruling on the reliability of the expert’s testimony was not harmless error – putting the expert’s testimony aside, “the remaining evidence seems to indicate, at most, a mere difference of academic opinion – not discrimination – and does not undermine the University’s nondiscriminatory reasons for denying . . . tenure” (Id. at 1067) – the expert testified he had developed eight criteria for “decoding” white behavior which was discriminatory and found all eight present – “The trial court must act as a ‘gatekeeper’ to exclude ‘junk science’ that does not meet Rule 702’s reliability standards by making a preliminary determination that the expert’s testimony is reliable.” (Id. at 1063) – what is needed is a district court determination of the reliability of the testimony – on remand, with respect to punitive damages, “[t]o award punitive damages, the individuals’ conduct must have been more than just intentional discrimination – instead they must have known they were acting in violation of federal law” (Id. at 1068 n.15) – negligence is not enough. [Note: Eleven Ninth Circuit judges dissented from the denial of rehearing en banc.]

Policastro v. Northwest Airlines, Inc., 297 F.3d 535, 89 FEP 730 (6th Cir. 2002) – No cognizable adverse employment action when employee who had had geographic areas 1 and 2 was assigned exclusively to geographic area 2.

Scott v. Suncoast Beverage Sales, Ltd., 295 F.3d 1223, 89 FEP 472 (11th Cir. 2002) – Comment of co-worker who two and one-half years later became black employee’s supervisor that “we will burn his black ass” (Id. at 1227) is not direct evidence of racial motivation for termination – plaintiff contended that racial attitudes are slow to change and comment
should be direct evidence – comment was too far removed in time and too indirectly connected to termination decision.

Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654, 88 FEP 1769 (9th Cir. 2002) – Summary judgment affirmed – employee established prima facie case, but employer’s legitimate nondiscriminatory reason for termination (slow worker and seasonal downturn necessitated layoff), successfully rebutted prima facie case – statistics are rarely sufficient in disparate treatment case to rebut employer’s nondiscriminatory explanation - lower court’s finding that there was no prima facie case because plaintiff failed to show he was qualified rejected, but summary judgment affirmed.

Snipes v. Ill. Department of Corrections, 291 F.3d 460, 88 FEP 1681 (7th Cir. 2002) – African American who claimed that majority group members who had similar attendance violations were not discharged could not rely on majority group members who had different supervisors – exclusion of evidence of such co-workers’ disciplinary records was not abuse of discretion.

Forrest v. Kraft Foods, Inc., 285 F.3d 688, 88 FEP 823 (8th Cir. 2002) – Black employee terminated for leaving work without permission not comparably situated to white who did the same thing with lesser discipline because black employee had previously been warned and had extensive disciplinary record.

Brummett v. Lee Enters., 284 F.3d 742, 88 FEP 609 (7th Cir. 2002) – African-American advertising salesman whose job required substantial driving discharged after third incident of driving under influence of alcohol – trial court granted summary judgment on ground that there was no prima facie case and furthermore there was no direct or indirect evidence that the employer’s neutral explanation was a subterfuge for discrimination – summary judgment affirmed - normally plaintiff must meet prima facie case including fact that his performance was meeting his employer’s legitimate expectations before one even gets to the pretext stage – but in limited circumstances the legitimate expectations aspect need not be met if the plaintiff demonstrates that the employer’s legitimate expectations were themselves pretextual – under these circumstances prima facie case is subsumed into the pretext case – in this case that would require evidence that the employer’s legitimate expectation of a good driving record was a pretextual policy cloaked in the shadow of racial discrimination – but such a showing is impossible since good driving is so clearly related to the job – circuit-by-circuit analysis on the “legitimate expectations” aspect of the prima facie case contained at 169 LRR 327.

Clayton v. Meijer, Inc., 281 F.3d 605, 88 FEP 350 (6th Cir. 2002) – African-American driver who caused serious disabling injury to co-worker by driving away from the dock before the dock plate had been removed not similarly situated to three non-discharged white drivers who engaged in similar conduct but which did not cause injury – accident that causes injury is qualitatively more serious and therefore the parties were not comparably situated.
Millbrook v. IBP, Inc., 280 F.3d 1169, 88 FEP 297 (7th Cir. 2002) – Evidence that claimant is better qualified is normally insufficient to establish pretext – plaintiff argued that jury could reasonably disbelieve employer’s explanation – unless the differences are so favorable to the claimant there can be no dispute among reasonable persons of impartial judgment that the plaintiff was better qualified an alleged difference in qualifications cannot establish pretext – issue of comparative qualifications analyzed at 169 LRR 231.

Williams v. Saint Luke’s-Shawnee Mission Health Sys., Inc., 276 F.3d 1057, 87 FEP 1473 (8th Cir. 2002) – Discharged black employee not comparably situated to two white employees who were not discharged – black employee had more serious accusations against him, and a greater number of accusations.

Bilow v. Much Shelist Freed Denenberg Ament & Rubenstein, P.C., 277 F.3d 882, 87 FEP 375 (7th Cir. 2001) - Female law firm income partner alleged discrimination by being required to litigate complex class action with help only of local counsel whereas male attorneys were never required to try similarly complex cases without substantial assistance - lawsuits were not comparable, so no prima facie case.

Cofield v. Goldkist, Inc., 267 F.3d 1264, 86 FEP 1562 (11th Cir. 2001) (per curiam) - Summary judgment affirmed - older female did not prove that her qualifications were so superior to younger male as to create inference of discrimination - employer’s legitimate nondiscriminatory reason was that the younger male was better qualified - plaintiff cannot get to a jury merely by showing that she is more qualified - she “must adduce evidence that the disparity in qualifications is ‘so apparent as virtually to jump off the page and slap you in the face’” (Id. at 1268 (citation omitted)) - plaintiff’s “qualifications are not so superior as to allow a reasonable fact-finder to conclude that [the employer’s] reason for hiring [the younger male] was pretextual. We will not second guess [the employer’s] decision to emphasize qualifications over length of service . . . . Federal courts do not sit as a super-personnel department that reexamines an entity’s business decisions.” (Id. at 1269) (internal quotations omitted).

Celestine v. Petroleos de Venez. S.A., 266 F.3d 343, 86 FEP 1462 (5th Cir. 2001) - Class certification was denied - the denial of class certification was affirmed on an interlocutory appeal in Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998) - the case proceeded as a series of individual claims - a group of 36 failure-to-promote and train and racial harassment claims were consolidated - summary judgment was granted for the employer - each of the summary judgments must be analyzed under the McDonnell Douglas order and allocation of proof - “The pattern and practice method of proof is almost exclusively used in class actions, with individual racial discrimination plaintiffs confined to the McDonnell Douglas framework.” (266 F.3d at 355 (citation omitted)) - since the employer’s legitimate nondiscriminatory reason was that the persons promoted were better qualified, and the plaintiffs have failed to produce evidence of a substantial disparity in qualifications in their favor, summary judgment was appropriate - continuing violation theory properly not applied to claims of promotion and training discrimination - continuing violation theory
also inapplicable to racial harassment claims in view of failure of plaintiffs to show substantial similarity between older allegations of harassment and present allegations of harassment - limited number of alleged incidents of harassment insufficient to establish hostile environment - all summary judgments affirmed.

*McGuinness v. Lincoln Hall*, 263 F.3d 49, 86 FEP 1102 (2d Cir. 2001) - African-American offered higher severance package than white - summary judgment for employer reversed - reasonable jury could find that employer offered relatively comparably-situated executives disparate severance packages based on race.

*Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 86 FEP 380 (2d Cir. 2001) - Plaintiff presented direct evidence of discrimination (you can be replaced by someone “younger and cheaper”) and evidence of pretext - error not to instruct jury on both mixed-motive and pretext - new trial ordered.

*Yates v. Douglas*, 255 F.3d 546, 86 FEP 298 (8th Cir. 2001) - Supervisor X one to two years before discharge used the “N” word against African-American employee and made other offensive comments - summary judgment for employer nevertheless affirmed - although allegedly biased supervisor found not to have played integral role in discharge, “[E]ven were we to find that [the allegedly bigoted supervisor] was closely involved in the employment decision, we would nevertheless affirm . . . . Not all comments that may reflect a discriminatory attitude are sufficiently related to the adverse employment action in question to support an inference of racial discrimination . . . . Direct evidence of racial discrimination is not established by mere stray remarks in the workplace, statements by nondecision-makers, or statements by decision-makers unrelated to the decisional process itself.” ([Id. at 549](#)) (internal quotations omitted).

*Davis v. Town of Lake Park*, 245 F.3d 1232, 85 FEP 788 (11th Cir. 2001) - No actionable adverse employment action - police officer received two warning notices and twice was removed as officer in charge - test for adverse employment action is whether it would be viewed as material by a reasonable person - no tangible effect from warnings - being removed as officer in charge was not a demotion nor material change in work assignment since it merely designates the individual who must ensure that tasks are performed if the supervisor is unavailable.

*Donovan v. Donovan*, 150 F. Supp. 2d 249, 86 FEP 262 (D. Mass. 2001) - Summary judgment motion by defendant law firm denied - law firm had rule that a single partner’s veto can bar partnership - law firm argued that this means that as long as one of the partners who voted “no” could not be shown to have a discriminatory bias, this insulates the law firm - court rejects this theory as “bizarre” - allowing a single-vote rule to increase the associate’s burden of proof would be contrary to policy and precedent.

evidence which would allow a jury to conclude that both illegal and lawful motivations were present – court may instruct on mixed-motive burden-shifting scheme whether or not employer pleaded mixed motive as an affirmative defense.

*Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 11 A.D. Cas. 659 (9th Cir. 2001) – When state law claim is removed based on diversity to federal court, federal court applies *McDonnell Douglas*’s burden-shifting analysis – summary judgment affirmed even though Oregon law does not allow summary judgment after a prima facie case – plaintiff failed to raise issue of material fact as to whether employer’s reason for termination was pretextual – issue analyzed at 166 LRR 232 - 2-1 decision.

**Adverse Impact** (Ch. 4)

*EEOC v. Dial Corp.*, 469 F.3d 735, 99 FEP 321 (8th Cir. 2006) – Canned food plant utilized strength test that had disparate impact upon female applicants – employer unable to prove that the test was a business necessity.

*Adams v. Chicago*, 469 F.3d 609, 99 FEP 327 (7th Cir. 2006) – Minority police officers challenged promotional exam that had a disparate impact upon them – they failed to show that a valid alternative method was available at the time of the at-issue promotions in 1997 – summary judgment for defendant affirmed – court establishes an extremely high bar for plaintiffs seeking to prove the existence of an alternate business practice – in this case the City of Chicago actually implemented the very alternatives plaintiffs offered later on, but the court held that as a practical matter it was not available at the time in question – in order to survive summary judgment the plaintiffs were obliged to show that they made a pre-litigation demonstration of the efficacy of the alternative to the employer and the employer refused. [Note: This is a very significant decision on the third prong of the adverse impact test – what must a plaintiff show if the employer shows business necessity?]

*Electrical Workers v. Mississippi Power & Light Co.*, 442 F.3d 313, 97 FEP 1025 (5th Cir. 2006) – The burden of showing the existence of an alternative selection procedure than tests in a disparate impact claim is on the plaintiffs – they had the burden to establish that an acceptable alternative practice for making job-placement decisions existed once the defendant established a business necessity for using the disputed tests.

*Morgan v. United Parcel Serv., Inc.*, 380 F.3d 459, 94 FEP 591 (8th Cir. 2004), cert. denied, 544 U.S. 999 (2005) – Summary judgment granted in class action by UPS center managers alleging discrimination in promotion and compensation – with respect to excess subjectivity claim, “It is difficult to understand this claim as one of disparate impact. Plaintiffs’ claim as to the subjective decisionmaking process is not that this facially race-neutral process has an adverse impact on blacks and the process cannot be justified by business necessity. Rather, plaintiffs claim the subjective decisionmaking resulted in [discrimination against blacks]. We read plaintiffs’ arguments as alleging disparate
treatment through the subjective decisionmaking process; that is, that the subjective selection process provided the opportunity for UPS to choose not to promote some employees because they were black -- to discriminate on account of race.” (Id. at 465 n.2) – in any event adverse impact claims fail because of inadequate evidence of the qualified available employees – with respect to pay discrimination, plaintiffs claim that a multiple regression analysis showed that UPS paid white center managers more than black center managers – in a multiple regression analysis, “explanatory variables are the expected influences on the dependent variable [pay]” (Id. at 466) – “[T]he selection of explanatory variables is quite important. However, even the best regression equation cannot directly show discrimination because it cannot prove causation. The most it can show is a correlation that can give rise to an inference of discrimination. . . . Whether such an inference is reasonable is the legal question we address.” (Id.) – “Admissible regressions, however, do not necessarily mean summary judgment is inappropriate.” (Id. at 468) – here the regressions are deficient because they did not take into account pay prior to becoming a manager, which determines the base pay for a manager – plaintiffs argue that this should be assumed to be a tainted variable, but they have offered no evidence of discrimination in pay prior to becoming a manager – the court cannot assume that prior pay is a tainted variable – omitting this was therefore so deficient that the regression creates no inference of discrimination – “Pay was set according to a decentralized scheme in which district managers were given the discretion to set pay. With approximately 70 districts in the United States . . . the statistical evidence would have to be quite strong to raise, by itself, an inference of nationwide discrimination.” (Id. at 471) – “It would be manifestly unreasonable to infer from plaintiffs’ regression analyses that UPS set center managers’ base pay lower for blacks as a matter of practice all across the country.” (Id. at 472) – summary judgment affirmed.

Paige v. California, 291 F.3d 1141, 88 FEP 1666 (9th Cir. 2002) – In promotion case, internal pool consisting of non-white percentage of highway patrol officers who applied for promotion is the proper comparative group – plaintiff’s argument that because of hiring discrimination that percentage was too low rejected. – the only question is whether the challenged practice favors existing white officers over existing non-white officers – summary judgment for plaintiffs reversed and case remanded for trial.

EEOC v. Joe’s Stone Crab, Inc., 220 F.3d 1263, 84 FEP 195 (11th Cir. 2000) - In five years before EEOC sued, Joe’s hired 108 male food servers and zero females - after suit filed female applicants comprised 22% of all applicants, and received 21.7% of jobs - district court concluded Joe’s had not intentionally discriminated but was guilty of disparate impact discrimination based on statistical disparities - court of appeals expressed doubt about disparate impact finding, suggested possibility of disparate treatment finding, and remanded - “[T]he facts of this case render a disparate impact finding inappropriate. A disparate impact claim requires the identification of a specific, facially-neutral, employment practice causally responsible for an identified statistical disparity.” (Id. at 1268) - before the suit, hiring was done at a roll call on the basis of “four subjective factors” - appearance, articulation, attitude and experience - with respect to establishing an adverse impact claim,
to quote *Watson*, “the plaintiff must offer statistical evidence of a kind and degree sufficient to show that *the practice in question has caused* the exclusion of applicants for jobs or promotions because of their membership in a protected group.” (*Id.* at 1274-75) [Emphasis added by Eleventh Circuit.] although Joe’s hired no females during the relevant period, very few females applied - thus, Joe’s hiring system did not produce the disparity - to hold Joe’s liable under a disparate impact theory would be to accept a “bottom line” analysis which the Supreme Court has rejected - as the Supreme Court explained in *Ward’s Cove*, an employer cannot escape liability by showing equality at the bottom line and it cannot be held liable by showing a bottom line imbalance - “[A] plaintiff must do more than simply identify a workforce imbalance to establish a prima facie disparate impact case; it must causally connect a facially-neutral employment practice to the identified disparity.” (*Id.* at 1276) - district court did this by utilizing work force statistics rather than applicant statistics but this was not a result of any facially neutral practice of Joe’s - word-of-mouth recruiting is not sufficient because no woman testified she didn’t know about jobs being available - the testimony was that women didn't apply because they felt it would be futile - moreover, the subjective hiring criteria did not cause the disparity since there were virtually no female applicants - the district court relied on Joe’s reputation but that is not a facially neutral practice - disparate impact judgment vacated and disparate treatment rejection remanded for reconsideration.

**Nonscored Objective Criteria (Ch. 6)**

*Lanning v. Southeastern Pa. Transp. Auth.*, 308 F.3d 286, 90 FEP 49 (3d Cir. 2002) – Applicants for police academy were required to run 1.5 miles in 12 minutes – this disqualified almost 90% of the female applicants – lower court had held test valid since it correlates to successful performance as a police officer in making arrests – this finding was not clearly erroneous – test can be valid even though some people can do the job without passing the test – majority suggests that test can only seek to determine whether applicant has minimum required competence – dissent felt that the studies on which the lower court found validity were flawed.

**Religion (Ch. 8)**

*Moranski v. General Motors Corp.*, 433 F.3d 537, 97 FEP 97 (7th Cir. 2005) – General Motors had numerous affinity groups for various Title VII protected classes but did not allow religious-based affinity groups – Title VII not violated when it rejected a born-again Christian employee’s proposed Christian-employee network – “Simply stated, General Motors’ affinity group policy treats all religious positions alike – it excludes them all from serving as the basis of a company-recognized Affinity Group.” (*Id.* at 541) – does not matter that other Title VII protected classes are allowed affinity groups – court is aware of no “authority for [plaintiff’s] proposition that a court should use cross-categorical comparisons when evaluating Title VII claims.” (*Id.*)
Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 94 FEP 1476 (1st Cir. 2004), cert. denied, 125 S. Ct. 2940 (2005) – Employer had no duty to accommodate employee who insisted that her religion required her to wear multiple facial piercings while at work – Costco was under no duty to accommodate Cloutier because the accommodation she insisted on, being allowed to wear the facial piercings, would be tantamount to losing its legitimate interest in controlling its public image – “Costco has made a determination that facial piercings, aside from earrings, detract from the ‘neat, clean and professional image’ that it aims to cultivate. Such a business determination is within its discretion.” (Id. at 136)

Bodett v. CoxCom, Inc., 366 F.3d 736, 93 FEP 1108 (9th Cir. 2004) – Evangelical Christian supervisor discharged for harassing lesbian subordinate by telling her that the bible prohibited homosexuality – despite fact that supervisor held that belief, it is not religious discrimination to discharge one for harassing a subordinate.

Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 94 FEP 206 (9th Cir. 2004) – Female ordained Presbyterian minister can sue church for sexual harassment and recover damages – she cannot contest her discharge as a minister and the fact that she is barred from ever being a minister again under either a sex discrimination or retaliation theory because of the ministerial exception to Title VII – however, a suit for damages for sexual harassment does not implicate the ministerial exception under the rule set forth in Bollard v. California Province of the Society of Jesus, 196 F.3d 940 (9th Cir. 1999) – concurring opinion expressed doubts about Bollard but indicated that it was binding precedent – dissent argued that the sexual harassment claims necessarily implicated the ministerial exception.

Peterson v. Hewlett-Packard Co., 358 F.3d 599, 92 FEP 1761 (9th Cir. 2004) – Plaintiff, a self-described “devout Christian,” believed that homosexual activities violate the Ten Commandments and that he had a duty “to expose evil when confronted with sin” – he posted biblical scriptures at his work cubicle in a manner visible to coworkers which were anti-gay – when questioned by the company he told them that the biblical passages condemned “gay behavior” and “were intended to be hurtful” – he hoped that his gay and lesbian coworkers would read the messages and repent – he was given paid time off to reconsider his refusal to remove the posters and then was terminated for insubordination – religious accommodation request rejected in decision by Judge Reinhardt – the company’s diversity initiative’s goal was to increase tolerance of diversity – combating prejudice against homosexuality is not unlawful – alleged disparate treatment with respect to other employees who posted religious or secular messages rejected since the other messages were not intended to be hurtful to any particular group of employees – plaintiff was not discharged because of his religious beliefs but because he violated the company’s harassment policy by attempting to generate a hostile environment for certain coworkers – with respect to accommodation requests, there is no obligation to allow accommodations that would result in discrimination against coworkers – cases on rights of “devout” Christians in the workplace analyzed at 173 LRR 477.

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Endres v. Ind. State Police, 349 F.3d 922, 92 FEP 1683 (7th Cir. 2003) – Police officer who has conscientious objection to doing law enforcement work at a casino has no right to an accommodation – reasonable accommodation provisions do not give law enforcement personnel the right to choose which laws they will enforce and whom they will protect from crime.

Rivera v. P. R. Aqueduct & Sewers Auth., 331 F.3d 183, 92 FEP 1 (1st Cir. 2003) – Rude and unprofessional comments by co-workers directed toward deeply devout Christian employee, including calling her “Mother Theresa,” was not because of religion but was in response to her scolding of co-workers for constant profanity and vulgarity.

EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillado de P.R., 279 F.3d 49, 87 FEP 1722 (1st Cir. 2002) – Union, sued because it caused an employer to discharge a Seventh-Day Adventist for refusing to pay union dues, should have been allowed to challenge the bona fides of his professed belief – union had evidence that employee engaged in various conduct contrary to the tenets of his professed belief, such as lying on an employment application, obtaining a divorce, and taking an oath – the union also showed that the alleged conflict between his beliefs and union membership changed each time the union tried to accommodate him – although the bona fides for religious belief is a “delicate business,” issue on remand should be the sincerity of the beliefs and not the fact finder’s own view of religion.

Anderson v. U.S.F. Logistics (IMC), Inc., 274 F.3d 470, 87 FEP 828 (7th Cir. 2001) - Employee citing religious beliefs claimed she had the right to begin conversations with customers and vendors with the phrase “Have a blessed day,” which she defined as an expression of her Christian Methodist/Episcopal faith - the employer had a right to selectively bar her from using the phrase with customers and vendors and reasonably accommodated her by allowing her to use the phrase with others - at least one customer had complained and the employer did not have to jeopardize its relationships with its customers in order to accommodate the employee’s religious beliefs.

Peterson v. Wilmur Commun., Inc., 205 F. Supp. 2d 1014, 89 FEP 148 (E.D. Wis. 2002) – Plaintiff is a “reverend” in the World Church of the Creator, an organization whose central tenet is white supremacy – it teaches that all people of color are “savage,” that African Americans are subhuman and should be “shipped back to Africa,” that Jews control the nation and that although the Holocaust didn’t occur, if it had Nazi Germany would have done the world a favor – plaintiff supervised eight employees, three of whom were not white – the day after a newspaper article interviewing him in which he described his beliefs occurred he was demoted to a nonsupervisory position – these beliefs, called “creativity,” is a religion – Supreme Court precedent indicates that beliefs constitute a religion “if they ‘occupy the same place in the life of the [individual] as an orthodox belief in God holds in the life of one clearly qualified’” (Id. at 1018) (alteration in original) (citation omitted) – concept of God not needed – purely moral or ethical beliefs can be religion – undue hardship applies only to accommodations, not to discrimination – employer cannot
lawfully take adverse action against an employee based on pure belief – employer’s contention that this “church” is similar to other white supremacy organizations that have found to be political and not religions rejected – employer argument that Supreme Court decisions relied on by the court, U. S. v. Seeger, 380 U.S. 163 (1965) and Welsh v. U. S., 398 U.S. 333 (1970), found beliefs religious because they rested on “goodness, morality, and living up to the highest ideals of society” rejected – summary judgment granted to employee – case analyzed at 170 LRR 127.

Disability/Handicap - General (Ch. 9)

Raytheon Co. v. Hernandez, 540 U.S. 44, 14 A.D. Cas. 1825 (2003) – Supreme Court 7-0 reverses Ninth Circuit finding that policy of never rehiring involuntarily terminated employees violated the ADA when applied to rehabilitated drug addict – only disparate treatment claim before the Court – “[W]hile ostensibly evaluating whether [Raytheon] had proffered a legitimate, nondiscriminatory reason for failing to rehire [Hernandez] sufficient to rebut [the] prima facie showing of disparate treatment, the Court of Appeals held that a neutral no-rehire policy could never suffice in a case where the employee was terminated for illegal drug use, because such a policy has a disparate impact on recovering drug addicts. In so holding, the Court of Appeals erred by conflating the analytical framework for disparate-impact and disparate-treatment claims. Had the Court of Appeals correctly applied the disparate-treatment framework, it would have been obliged to conclude that a neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason under the ADA.” (Id. at 51-52) – case remanded for determination as to whether reasonable jury could conclude that no-rehire policy was in fact applied – “Both disparate-treatment and disparate-impact claims are cognizable under the ADA,” (Id. at 53) but here “respondent did not timely pursue a disparate-impact claim” (Id.) – Court of Appeals characterized Hernandez’s workplace misconduct as merely “‘testing positive because of [his] addiction.’ . . . To the extent that the court suggested that, because Respondent’s workplace misconduct is related to his disability, [Raytheon’s] refusal to rehire Respondent . . . violated the ADA, we point out that we have rejected a similar argument in the context of the Age Discrimination in Employment Act. See Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993),” (Id. at 54 n.6) – decisionmaker was apparently unaware of Hernandez’s alleged disability – “The Court of Appeals did not explain . . . how it could be said that Bockmiller was motivated to reject Respondent’s application because of his disability if Bockmiller was entirely unaware that such a disability existed. If Bockmiller were truly unaware that such a disability existed, it would be impossible for her hiring decision to have been based, even in part, on Respondent’s disability. And, if no part of the hiring decision turned on Respondent’s status as disabled, he cannot, ipso facto, have been subject to disparate treatment.” (Id. n.7) – Ninth Circuit judgment vacated and case remanded – case analyzed in Special Report at 173 LRR 358.
Spencer v. Wal-Mart Stores, Inc., 469 F.3d 311, 18 A.D. Cas. 1185 (3d Cir. 2006) – No back pay to hearing-impaired employee who prevailed on hostile environment claim – since employee quit, could recover back pay only if was constructively discharged – “[A] successful hostile work environment claim alone, without a successful constructive discharge claim, is insufficient to support a back pay award.” (Id. at 317) – back pay is an equitable remedy that can only be awarded by the court and thus should not have been submitted to the jury.

Bates v. United Parcel Service, 465 F.3d 1069, 18 A.D. Cas. 897 (9th Cir. 2006) – UPS violated ADA by requiring deaf employees to pass a DOT hearing test in order to drive smaller vehicles to which the test does not apply – in disparate impact case plaintiffs need not establish that they were “qualified” in the sense of being able to perform the essential function of driving “safely” – this would require deaf employees to prove that they cannot meet the hearing standard but still can satisfy a function that the standard addresses – once the employee established that other than hearing he was qualified and that the DOT standard screened out individuals with a disability, the employer had the burden of proof to show that the standard was job-related and consistent with business necessity – UPS failed to do this because it failed to show either that substantially all deaf drivers have a higher risk of accidents than non-deaf drivers or that there are no practical criteria for determining which deaf drivers present a heightened risk.

Fasano v. Federal Reserve Bank, 457 F.3d 274, 18 A.D. Cas. 321 (3d Cir. 2006), cert. denied, 2007 WL 36166 (2007) – Federal Reserve Act provision that allows its banks to dismiss employees “at pleasure” preempts New Jersey law prohibiting disability discrimination but not ADA – Congress impliedly amended this provision when it passed the ADA.

Sista v. CDC Ixis N. Am., Inc., 445 F.3d 161, 17 A.D. Cas. 1453 (2d Cir. 2006) – Employee with depression discharged for threatening a co-worker – district court properly granted summary judgment but for the wrong reason – making a threat is not the same as being a threat to others – however, employer had a right to discharge the employee because of the threat – an employer has a right to protect itself from potentially violent employees.

Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., 434 F.3d 75, 17 A.D. Cas. 769 (1st Cir. 2006) – Employee who had a penile implant was subjected to a hostile work environment that led to his constructive discharge – question of whether the employee was disabled or regarded as disabled is a difficult one but the employer failed to renew its motion for judgment as a matter of law at the close of the evidence and did not preserve that issue for judicial review – co-workers and supervisors constantly harassed the employee due to his condition and that is sufficient for hostile environment – punitive damages also affirmed.
D’Angelo v. ConAgra Foods Inc., 422 F.3d 1220, 16 A.D. Cas. 1825 (11th Cir. 2005) – Persons regarded as disabled are entitled to a reasonable accommodation – the definition of disability includes persons regarded as disabled – anomalous results relied on by other circuits in reaching contrary conclusion insufficient basis for disregarding statutory language.

Collado v. United Parcel Serv. Co., 419 F.3d 1143, 16 A.D. Cas. 1697 (11th Cir. 2005) – Post-verdict JNOV affirmed – diabetic former employee did not show that he was disabled – does not matter that case was submitted to the jury with instruction that the employee had established a prima facie case – court can still make finding that there was insufficient evidence to support a jury finding that the employee was disabled.

Head v. Glacier Northwest Inc., 413 F.3d 1053, 16 A.D. Cas. 1606 (9th Cir. 2005) – New trial ordered because of error in instruction – court instructed jury that issue was whether employee was discharged “because of” his disability – there should have been a mixed-motive instruction that plaintiff was required only to prove that his disability was a motivating factor.

Karraker v. Rent-a-Center Inc., 411 F.3d 831, 16 A.D. Cas. 1441 (7th Cir. 2005) – Inclusion of Minnesota multi-phase personality inventory in battery of tests required for promotion violated the ADA – as a practical matter the MMPI excluded employees with mental health disorders from consideration for promotion – this makes it a medical examination which cannot be given prior to hire or promotion.

Kelly v. Metallics West Inc., 410 F.3d 670, 16 A.D. Cas. 1538 (10th Cir. 2005) – Employee merely regarded as disabled was entitled to reasonable accommodation – Tenth Circuit agrees with First and Third Circuits, noting that there is a split in the circuits.

Nese v. Julian Nordic Constr. Co., 405 F.3d 638, 16 A.D. Cas. 1121 (7th Cir.), cert. denied, 126 S. Ct. 623 (2005) – Epileptic partner who was laid off because of slow work did not establish that he was either disabled or regarded as disabled – fact that the employer was “less than perfectly frank” with respect to the reason for the layoff “does not prove that the employer acted as it did for discriminatory reasons” (Id. at 642) – unlikely that discrimination was involved in the layoff decision since the plaintiff was hired and laid off by the same person.

Leonel v. Am. Airlines, Inc., 400 F.3d 702, 16 A.D. Cas. 897, amended, 16 A.D. Cas. 1536 (9th Cir. 2005) – American Airlines violated the ADA when it required medical examinations before making a “real” job offer – conditional job offers were not “real” and thus the medical inquiries were premature – American cannot penalize applicants who failed to disclose their HIV-positive status until it was discovered by a medical examination.
Gajda v. Manhattan & Bronx Surface Transit Operating Auth., 396 F.3d 187, 16 A.D. Cas. 645 (2d Cir. 2005) – Transit authority’s request for an HIV-positive bus driver’s laboratory test results did not violate the ADA – in seeking a leave the driver had indicated he could not work due to his health condition – this provided the transit authority with a legitimate reason to doubt his ability to perform his duties – requesting the test results was a reasonable way of achieving the goal of determining whether he could safely drive a bus.

Mannie v. Potter, 394 F.3d 977, 16 A.D. Cas. 641 (7th Cir. 2005) – Schizophrenic employee not subjected to hostile work environment – summary judgment affirmed – court assumes hostile work environment is cognizable under ADA and Title VII standards govern – contentions that supervisor made derogatory comments about her mental condition to others and that coworkers intentionally offended her by wearing tight-fitting clothing minor and isolated – plaintiff failed to demonstrate that behavior of coworkers and supervisors altered the terms or conditions of her employment.

Lanman v. Johnson County, Kan., 393 F.3d 1151, 16 A.D. Cas. 449 (10th Cir. 2004) – Hostile environment harassment claim actionable under the ADA – Tenth Circuit joins Fourth, Fifth and Eighth in recognizing such claims.

Werft v. Desert Southwest Annual Conference of United Methodist Church, 377 F.3d 1099, 15 A.D. Cas. 1409 (9th Cir. 2004) – Free Exercise Clause bars consideration of minister’s claim that his disability was not accommodated under the ADA – while the Ninth Circuit has allowed sexual harassment claims by clergy when the religious organization was not exercising any constitutionally protected prerogative with respect to choice of clergy, here the minister’s claim that he was forced to resign because he was not accommodated clearly falls into the category of personnel decisions exempt from consideration by the courts – a court could not even look into the church’s reasons for its decisions without offending the Free Exercise Clause.

Smith v. Henderson, 376 F.3d 529, 15 A.D. Cas. 1328 (6th Cir. 2004) – Factual issue exists as to whether denial of accommodation which required plaintiff with rheumatoid arthritis to work well in excess of 40 hours per week in contravention of medical restrictions constituted intolerable conditions for purposes of constructive discharge – denial of accommodation can be factor in determining intolerability.

Larimer v. IBM Corp., 370 F.3d 698, 15 A.D. Cas. 1070 (7th Cir.) (2004) – Father of prematurely born twins failed to show he was discharged because of his association with disabled persons – plaintiff failed to fall into any of three categories in which an employer would have a motive to terminate someone for association with a disabled: (1) the afflictions were not communicable or predictive of the employee’s future disability; (2) no evidence the twins’ condition would cause him to be absent or distracted at work; or (3) no evidence that plaintiff was an “expensive” employee whose medical benefits drained the department’s budget.
Hernandez v. Hughes Missile Sys. Co., 362 F.3d 564, 15 A.D. Cas. 609 (9th Cir. 2004) – Following Supreme Court reversal and remand, the Ninth Circuit (per Judge Reinhardt) finds a factual issue as to whether or not plaintiff was in fact rejected pursuant to a company policy of not rehiring involuntarily terminated employees – statement in earlier Ninth Circuit decision that there is no question that such a policy was the reason for plaintiff’s rejection withdrawn since it “overstated the record with respect to such policy” (15 A.D. Cas. at 612 n.5) - reasonable jury could conclude from text of Hughes’ letter to EEOC responding to original discrimination charge and fact that no-rehire policy was unwritten that Hughes refused to rehire plaintiff because of his past record of addiction and not because of the asserted no-rehire rule.


Chevron USA, Inc. v. Echazabal, 536 U.S. 73, 13 A.D. Cas. 97 (2002) – EEOC regulation allowing employers to exclude from the workplace individuals whose performance on the job would endanger the individuals’ own health because of a disability – Ninth Circuit, which had struck the regulation down, reversed – on remand determination will be whether exclusion was based on the sort of individualized medical inquiry required by the regulation – even though statute refers only to threat to others, it did so as an example of qualification standards that would be job-related – no indication Congress intended to preclude other qualification standards – Chevron legitimately wishes to avoid time lost to sickness, excessive turnover from medical retirement or death, litigation under tort law, and risk of violating OSHA – we need only look to OSHA to conclude that since there is an open question as to whether an employer could be liable under OSHA for hiring an individual who knowingly consented to dangers – this is not the sort of paternalism Congress had in its sights – Congress was looking at stereotypes, not individualized analysis that a specific person was going to injure himself – our decisions under Title VII precluding employers from excluding women from jobs the employer deemed too risky are different since they were based on broad categories of exclusion, not individual assessment.

Kramer v. Banc of America Securities, LLC, 355 F.3d 961, 15 A.D. Cas. 141 (7th Cir. 2004) – Compensatory and punitive damages are not available with respect to a retaliation claim under the ADA – although compensatory and punitive damages are available under the ADA, the statute lists the claims for which such damages are recoverable and ADA retaliatory claims are not on the list – conflict in the circuits on this point.

Echazabal v. Chevron USA, Inc., 336 F.3d 1023, 14 A.D. Cas. 1089 (9th Cir. 2003) – Chevron failed to prove that an employee with Hepatitis C was a direct threat to himself because it did not base its evidence on the best available medical information – Judge Reinhardt opinion in 2-1 split – dissent criticized majority for finding that the opinions of the two company physicians and Echazabal’s own physician were not enough to find he was at risk.

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of harm to himself, and majority placed unreasonable burden on employers to prove an employee is at risk.

_Bd. of Trustees v. Garrett_, 531 U.S. 356, 11 A.D. Cas. 737 (2001) – Supreme Court held 5-4 that private suits to enforce Title I of the ADA against state governments were barred by Eleventh Amendment – Court’s opinion, written by Chief Justice Rehnquist, concluded that while Congress affirmatively did authorize suits against the states when it passed the ADA, Title I (prohibiting employment discrimination and requiring reasonable accommodation for individuals with disabilities) was not legislation implementing the provisions of Fourteenth Amendment and thus could not subject an unconsenting state to suit – Court relied upon _City of Cleburne v. Cleburne Living Center_, 473 U.S. 432 (1985), for the proposition that distinctions based upon disability are not constitutionally suspect and that “States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational. They could quite hardheaded – and perhaps hardheartedly – hold to job-qualification requirements which do not make allowance for the disabled.” (Id. at 367-68) – Court concluded that in passing Title I of the ADA, Congress identified no historic pattern of unconstitutional behavior by state governments, and that even if such a pattern had been uncovered the remedy created by Title I – reasonable accommodation unless the employer is able to prove undue burden – “far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an ‘undue burden’ upon the employer” (Id. at 372) – Court explicitly refused to decide whether claims of employment discrimination against states might be raised under Title II (Public Services) of the ADA, noting that the appellate courts have split on that question – issue analyzed at 166 LRR 264.

_Shaver v. Indep. Stave Co._, 350 F.3d 716, 14 A.D. Cas. 1889 (8th Cir. 2003) – No disability harassment when timber mill employee was called “platehead” – employee had a metal plate in his skull due to surgery for epilepsy – the name-calling was not sufficiently offensive – there was no psychological treatment required, it was not threatening, and was not of a physical nature.

_EEOC v. W.H. Braum, Inc._, 347 F.3d 1192, 14 A.D. Cas. 1768 (10th Cir. 2003) – State statute of limitations has no applicability to individual claims under Title I (employment) of the ADA, which expressly adopts the statutory scheme of Title VII which has its own time limits.

_Longen v. Waterous Co._, 347 F.3d 685, 14 A.D. Cas. 1665 (8th Cir. 2003) – Last-chance agreement negotiated with employee with substance abuse problem which required him to abstain from mood-altering chemicals or face discharge did not violate ADA – failure to enforce this last-chance agreement would mean that all last-chance agreements are void – employee freely signed without coercion or duress to avoid discharge, and fact that that subjected him to different terms and conditions of employment than other employees is implicit in any last-chance agreement.
Russell v. TG Mo. Corp., 340 F.3d 735, 14 A.D. Cas. 1302 (8th Cir. 2003) – Employee with bipolar disorder was given accommodation of eight-hour day rather than 12-hour days – when told she would be scheduled for a sixth day on a weekend, she walked out in the middle of the shift and was terminated – no violation of ADA – employer made decision to terminate her immediately upon the walkout – nevertheless, her failure to show up for the scheduled Saturday work can be relied upon as further support for the discharge even though it was not the basis for the discharge decision – “As we have said many times, we do not sit as a ’super-personnel department’ with the power to second-guess employers’ business decisions.” (Id. at 746) – her departure provided a legitimate basis for her termination – retaliation claim barred since not made the subject of a timely charge.

Brown v. City of Tucson, 336 F.3d 1181, 14 A.D. Cas. 1194 (9th Cir. 2003) – No adverse employment action necessary for retaliation case under ADA – police detective alleged supervisor threatened her job if she did not forgo an ADA accommodation – Section 503(b), unlike Title VII, bars coercion without regard to whether an adverse employment action has occurred.

Conroy v. N.Y. State Dep’t of Corr. Servs., 333 F.3d 88, 14 A.D. Cas. 865 (2d Cir. 2003) – Policy requiring employees returning from sick leave to provide a certificate signed by a physician that included a brief general diagnosis of the condition treated may violate the ADA – case must be remanded for trial on business necessity – requiring such a physician’s certification may violate the provision of the ADA that states that medical examinations shall not be required unless job-related and consistent with business necessity – issue analyzed at 172 LRR 392 – district court had granted summary judgment to the plaintiff rejecting out of hand the business necessity defense – department suggested that its policy was justified by the need to assure that employees who had long absences could perform their duties without infecting staff or inmates and the need to verify that absent employees had valid justifications for their absences – however, sufficient proof to prove these needs had not been offered – the prohibition on medical inquiries does not refer to qualified individuals with disabilities but merely to employees – the ADA does not categorically prohibit an employer from implementing a general policy requiring medical certification with general diagnoses on return from leave of absence but business necessity must be shown and such policies must be examined closely – very little case law on the issue.

Cherosky v. Henderson, 330 F.3d 1243, 14 A.D. Cas. 673 (9th Cir. 2003) – Denial of an accommodation is not a continuing violation – however, a new request for the same accommodation, followed by a subsequent denial, would create a dispute that is not time-barred.

U. S. v. Miss. Dep’t of Pub. Safety, 321 F.3d 495, 13 A.D. Cas. 1706 (5th Cir. 2003) – Eleventh Amendment does not bar ADA action by United States against state entity brought on behalf of a discharged disabled individual – Supreme Court ruling in Board of Trustees v. Garrett that ADA suits by individual employees against state employers are barred by the Eleventh Amendment inapplicable.
Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183, 13 A.D. Cas. 1716 (3d Cir. 2003) – Employee asserted allergies to common workplace chemicals and fragrances, and asked for accommodation – she was fired for alleged insubordination during a meeting concerning her accommodation request – summary judgment for employer reversed – it is not a defense that the employee never established she was disabled – inconsistent reasons for firing her - comments suggesting the company did not want to be bothered by persistent accommodation requests and that the company was upset by her EEOC complaint – jury question of retaliation exists.

Rojas v. Florida, 285 F.3d 1339, 88 FEP 734 (11th Cir. 2002) – Fact that prior supervisors praised plaintiff's work and new supervisor was not satisfied with it does not establish factual issue as to whether asserted deficiencies are pretextual – different supervisors may impose different standards of behavior – record does not indicate that new supervisor singled plaintiff out for increased enforcement of rules – fact that male supervisor did not follow employer's guidelines about warnings does not establish pretext in view of evidence that male supervisor did not follow the same reprimand procedures for a male co-worker – summary judgment affirmed.

Jeseritz v. Potter, 282 F.3d 542, 12 A.D. Cas. 1512 (8th Cir. 2002) – Discharge of postal clerk sustained after allegedly disabled plaintiff was videotaped playing softball and operating a sod-cutting machine – assertions of being “set up” and being discharged for conduct no different than other employees who were not discharged rejected.

Reickenbacker v. Foster, 274 F.3d 974, 12 A.D. Cas. 916 (5th Cir. 2001) - Under Eleventh Amendment, Title II of ADA cannot be applied to the states - Supreme Court’s ruling that Title I of ADA does not abrogate states Eleventh Amendment immunity requires this holding.

Griffin v. Steeltek, Inc., 261 F.3d 1026, 12 A.D. Cas. 248 (10th Cir. 2001) - No damage recovery for asking questions prohibited by ADA despite contention that questions caused mental distress - employer established that employee was not interviewed because application on its face indicated lack of requisite experience and that only available position was filled by experienced former employee who had recently been laid off - there therefore were no damages whatsoever from the illegal questions.

Hoffman v. Caterpillar, Inc., 256 F.3d 568, 11 A.D. Cas. 1674 (7th Cir. 2001) - Denial of training because of disability is a violation of the ADA, without reference to any particular open job to which the individual with training could be promoted.

Flowers v. S. Reg'l Physician Servs., Inc., 247 F.3d 229, 11 A.D. Cas. 1129 (5th Cir. 2001) - Harassment actionable under ADA - HIV-positive employee originally had friendly relationship with supervisor before revealing HIV status - after revealing status supervisor became unfriendly, employee was forced to undergo four random drug tests, was written up, placed on probation, and eventually discharged.
Fox v. Gen. Motors Corp., 247 F.3d 169, 11 A.D. Cas 1121 (4th Cir. 2001) - Harassment actionable under ADA - supervisors used vulgar and profane language in berating employee with back injury.

Brown v. Lucky Stores, Inc., 246 F.3d 1182, 11 A.D. Cas 1195 (9th Cir. 2001) – ADA’s safe harbor provision for participants in drug and/or alcohol rehabilitation programs not applicable to employee discharged for missing three consecutive shifts after being arrested for drunk driving and under the influence of drugs - even though third absence was due to participation in rehabilitation program, employee entered program only five days after arrest - employee had not refrained from substance abuse for sufficient length of time to be protected under safe harbor provision - safe harbor requires both rehabilitation program and refraining from substance abuse.

Disability - ADA-Covered Disability (Ch. 9)

Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 12 A.D. Cas. 993 (2002) - Supreme Court unanimously holds that findings of disability under the ADA based on a substantial inability to perform manual tasks must look to the individual’s ability to accomplish activities that are of central importance to most people’s daily lives and not to the individual’s inability to accomplish isolated or minor tasks - medical diagnosis of carpal tunnel syndrome is insufficient proof of inability to perform manual tasks - there must be an individualized assessment of the effect of the impairment on the employee’s activities that goes beyond a mere medical diagnosis - Sixth Circuit’s focus on worker’s inability to perform specialized tasks associated with assembly line job rejected - an analysis of disability based on the ability to perform a broad class of jobs should be applied only to the major life activity of working - it was error to focus on worker’s inability to perform manual tasks associated only with the job while disregarding evidence of manual tasks such as personal hygiene and household chores - the manual tasks of central importance are tasks associated with personal hygiene and central to daily life - the language of the ADA requires that there be a “demanding standard for qualifying as disabled” - Congress said the Act covered 43 million people when it was enacted, but this number would have been much higher if “everyone with a physical impairment that precluded the performance of some isolated, unimportant or particularly difficult manual task” had been included - Sixth Circuit erred in interpreting Sutton as suggesting that proof of substantial limitation in the major life activity of performing manual tasks would establish ADA coverage - nothing in the ADA suggests a class-based analysis to any major life activity other than working - the impairment must be permanent or long term - case analyzed at 169 LRR 64.

Pittari v. American Eagle Airlines, 468 F.3d 1056, 18 A.D. Cas. 1089 (8th Cir. 2006) – Jury verdict that flight attendant removed from flight operations “regarded as” disabled reversed – perceived mental difficulties were regarded as temporary, and employee could work in numerous other airline jobs that did not involve safety – plaintiff simply failed to show that he suffered a significant reduction in meaningful employment opportunities
based on his employer’s perception of his limitations – since employee rejected Rule 68 offer, employee directed to pay all costs airline incurred subsequent to the offer.

_EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436, 18 A.D. Cas. 641 (6th Cir. 2006)_ – Employee discharged because of his weight (340-450 pounds) not proven to be disabled – morbid obesity by itself is not enough – there must be proof of a physiological disorder.

_Cassimy v. Board of Education of Rockford, 461 F.3d 932, 18 A.D. Cas. 647 (7th Cir. 2006)_ – Demotion of school principal to teacher following his request for an accommodation of his depression does not violate the ADA – the principal was not disabled – a few months after diagnosis he could return to work without restrictions – he was not regarded as disabled because there was no showing that the employer “‘held exaggerated views about the seriousness of his illness.”’ (Id. at 937) (citation omitted).

_Yindee v. CCH Inc., 458 F.3d 599, 18 A.D. Cas. 417 (7th Cir. 2006)_ – Vertigo not covered disability – employee claims retaliation for requesting the accommodation of working at home – employee pointed to fact that she was discharged before she had a chance to complete a performance improvement plan – “She complains . . . that CCH fired her before the prescribed end of the performance plan, as if federal law gave employees a right to serve out some minimum time under probation.” (Id. at 603) – no reasonable jury could conclude that she was fired in retaliation as opposed to poor performance – summary judgment affirmed.

_Breitkreutz v. Cambrex Charles City, Inc., 450 F.3d 780, 17 A.D. Cas. 1569 (8th Cir. 2006)_ – Work restrictions relating to lifting does not mean employer perceived a disability – employee not viewed as unable to perform a brad class of jobs.

_Holt v. Grand Lake Mental Health Ctr., Inc., 443 F.3d 762, 17 A.D. Cas. 1444 (10th Cir. 2006)_ – Discharged employee with cerebral palsy whose speech and fine motor coordination were affected and who could not cut her own nails, slice food, and had difficulty in chewing food not disabled within the meaning of the ADA – her limitations concerned narrow and specific activities rather than a broad range of tasks that would demonstrate a substantial limitation in her ability to perform manual tasks.

_Samuels v. Kansas City, Missouri School District, 437 F.3d 797, 17 A.D. Cas. 961 (8th Cir. 2006)_ – Physician imposed only temporary work restrictions - temporarily restricted employees are not disabled within meaning of ADA.

_Taylor v. Federal Express Corp., 429 F.3d 461, 17 A.D. Cas. 498 (4th Cir. 2005), cert. denied, 126 S. Ct. 2287 (2006)_ – Courier discharged due to work-related back injury not substantially limited in his ability to work – he could lift up to 30 pounds and perform a wide range of other daily activities – under _Toyota v. Williams_, which requires a strict interpretation to create a demanding standard for disability, a reasonable jury could not conclude he was disabled.
EEOC v. United Parcel Service, Inc., 424 F.3d 1060, 17 A.D. Cas. 129 (9th Cir. 2005) – Monocular vision package car driver – federal district court erred in concluding not limited in ability to see under California Fair Employment and Housing Act since FEHA requires only limitation on major life activity, not substantial limitation – also limited in the major life activity of working – however, UPS prevails under the “safety of others” defense available under FEHA – even a modest increase in risk is sufficient when the potential consequences are serious – statistical evidence supported conclusions that monocular drivers are involved in more accidents than binocular drivers.

MacKenzie v. Denver, 414 F.3d 1266, 16 A.D. Cas. 1616 (10th Cir. 2005) – City Clerk whose coronary disease required her to avoid stressful situations is not substantially limited in the major life activity of working and therefore not covered by the ADA – employee claimed that working under a certain supervisor caused stress.

Wenzel v. Missouri-American Water Co., 404 F.3d 1038, 16 A.D. Cas. 1124 (8th Cir. 2005) – Back-hoe operator with lifting restrictions caused by on-the-job injuries was not disabled or regarded as disabled – the job required heavy lifting which the operator could not do – the operator was perceived as unable to do the back-hoe job, not as unable to work in a class of jobs.

Moorer v. Baptist Mem’l Health Care Sys., 398 F.3d 469, 16 A.D. Cas. 705 (6th Cir. 2005) – Alcoholic former hospital administrator covered by statute because jury could reasonably conclude he was unable to perform a broad class of jobs because of alcoholism – judgment of over $1 million on ADA claim upheld.

Knutson v. Ag Processing Inc., 394 F.3d 1047, 16 A.D. Cas. 545 (8th Cir. 2005) – Plant boiler operator with lifting restrictions not disabled or regarded as disabled – plaintiff was reassigned after complaining he could not do the lifting necessary to be a boiler operator – he was then terminated – the specific tasks he was unable to perform were essential functions to a boiler operator but his inability to perform those special tasks did not render him unable to perform a broad range of jobs – he was regarded only as a person who could not do the boiler job.

Jacques v. DiMarzio Inc., 386 F.3d 192, 16 A.D. Cas. 1 (2d Cir. 2004) – Interacting with others is a major life activity but it requires much more than an erroneous jury instruction – the erroneous jury instruction said that it exists when there are consistently high levels of hostility, social withdrawal, or failure to communicate when necessary – jury verdict overturned – substantial limitation is shown when the individual is severely limited in the fundamental ability to communicate with others, when the impairment severely limits the ability to connect with others, not when the communication is merely inappropriate, ineffective or unsuccessful.
Rossbach v. City of Miami, 371 F.3d 1354, 93 FEP 1064 (11th Cir. 2004) – Police officers assigned to light duty because of physical impairments from on-the-job injuries were not substantially limited in major life activities nor regarded as such even though they were considered not “combat ready” – even though in the City’s vernacular not being “combat ready” meant “disabled,” that definition does not equate with the definition of a disability under the ADA.

Pegram v. Honeywell Inc., 361 F.3d 272, 15 A.D. Cas. 523, 93 FEP 649 (5th Cir. 2004) – Back condition aggravated by car accident not protected despite contention that condition was painful and impaired balance and ability to walk, sit and stand – employee was able to work, sit and stand for hours at a time and had not taken any leave because of the condition.

Sullivan v. Neiman Marcus Group, Inc., 358 F.3d 110, 15 A.D. Cas. 321 (1st Cir. 2004) – Summary judgment affirmed – assistant store manager terminated after entering alcohol rehabilitation program – alcoholism had not interfered with his ability to work – he was not in fact or regarded as limited in any major life activity.

McGeshick v. Principi, 357 F.3d 1146, 15 A.D. Cas. 225 (10th Cir. 2004) – Employee with vertigo rejected for cleaning job requiring working on ladders and on window ledges was not regarded as disabled – working in such conditions is not of central importance to most people’s daily lives.

Epps v. City of Pine Lawn, 353 F.3d 588, 15 A.D. Cas. 21 (8th Cir. 2003) – Police patrol officer fired because of degenerative disk disease which prohibited him from working as a patrolman was not regarded as disabled but merely regarded as someone who could not perform the job of a patrolman for a small municipality.

Allen v. Pac. Bell, 348 F.3d 1113, 14 A.D. Cas. 1833 (9th Cir. 2003) – Both company’s and employee’s doctors stated he was physically able to do only sedentary work – plaintiff requested a return to his prior non-sedentary position but failed to submit requested medical evidence – since plaintiff failed to submit this evidence there was no duty to engage in the interactive process with respect to the service technician job – Pacific Bell still had a duty to engage in an interactive process to consider whether there were alternatives – Pacific Bell presented evidence that it, in partnership with plaintiff’s union, had worked out a transfer system with all kinds of preferential treatment for disabled employees if their medical condition so permitted – this system required plaintiff to take tests – when he did not appear for a test he lost all further rights to additional accommodation – “Because Allen failed to cooperate in the job-search process, we cannot say that Pacific Bell failed to fulfill its interactive duty.” (Id. at 1116) – dismissal of the class action was proper “because Allen is not a proper class representative in light of the dismissal of his claims.” (Id.)
Whitlock v. Mac-Gray, Inc., 345 F.3d 44, 14 A.D. Cas. 1569 (1st Cir. 2003) – Employee with attention deficit hyperactivity disorder not limited in any major life activity despite conclusory declaration from expert asserting total disability – employee had conceded he was capable of performing job.

Brunke v. Goodyear Tire & Rubber Co., 344 F.3d 819, 14 A.D. Cas. 1473 (8th Cir. 2003) – Epilepsy did not substantially limit a major life activity – only one seizure at work – seizures controlled by medication – employee’s confrontational threatening behavior was separate and apart from epilepsy – fact that employer suggested anger counseling does not indicate employee was regarded as disabled.

Tockes v. Air-Land Transp. Servs., Inc., 343 F.3d 895, 14 A.D. Cas. 1389 (7th Cir. 2003) – Former truck driver with injured right hand who was discharged for using only one hand to fasten a load in violation of safety rules was not regarded as disabled even though the employer referenced him as “disabled,” “crippled,” and “handicapped” – he was regarded as merely having a hand injury which did not prevent him from driving a truck – that is insufficient for “regarded as” coverage.

Fraser v. Goodale, 342 F.3d 1032, 14 A.D. Cas. 1477 (9th Cir. 2003) – Diabetes substantially limited the major life activity of eating – supervisor’s refusal to allow plaintiff the accommodation of eating at her desk violated the ADA.

EEOC v. J.B. Hunt Transp., Inc., 321 F.3d 69, 13 A.D. Cas. 1697 (2d Cir. 2003) – Company refused to hire drivers who use certain medications – this did not show that the company regarded the individuals as disabled – the company saw them only as incapable of performing the single class of jobs the company had to offer – long distance, freight carrying, tractor-trailer driving jobs.

Mack v. Great Dane Trailers, 308 F.3d 776, 13 A.D. Cas. 1153 (7th Cir. 2002) – Lifting restrictions not ADA-covered disability even though employee was terminated for that reason since major life activity was performing manual tasks, and Toyota Motor Manufacturing v. Williams establishes that inability to perform occupation’s specific tasks does not show the required substantial limitation, which requires a substantial limitation on ability to perform tasks central to daily life.

Blanks v. Southwestern Bell Commun., Inc., 310 F.3d 398, 13 A.D. Cas. 1253 (5th Cir. 2002) – Employee diagnosed as HIV-positive not disabled – condition did not impair any life activities – he had decided years before not to father any more children – not substantially limited in his ability to work even though he could not do his stressful customer service job – his condition affected his ability to work in one particular job only – employer’s efforts to place him in alternate positions do not indicate that he was regarded as disabled but only that he was perceived as unable to perform a single job.
EEOC v. United Parcel Serv., Inc., 306 F.3d 794, 13 A.D. Cas. 961, amended, 311 F.3d 1132 (9th Cir. 2002) – UPS’s policy of disqualifying drivers with monocular vision does not automatically mean UPS regarded the individuals as having a statutorily covered disability – UPS does not consider the employees substantially limited in their ability to see in their daily lives – lower court ruling against UPS remanded for a determination as to whether the employees were disabled or regarded as disabled given the refined definition.

Gonzalez v. El Dia, Inc., 304 F.3d 63, 13 A.D. Cas. 889 (1st Cir. 2002) – Former reporter with orthopedic problems did not show that her condition substantially limited her ability to work – statement from physician that her ability to work was significantly restricted insufficient – difficulty walking and sitting for extended time periods does not per se indicate inability to perform broad range of jobs – physician’s statements are highly conclusory.

Black v. Roadway Express, Inc., 297 F.3d 445, 13 A.D. Cas. 581 (6th Cir. 2002) – Driver with knee injury that limited him to driving trucks with cruise control not disabled despite vocational expert’s testimony that the driver was disqualified from broad range of jobs – expert affidavit was entirely conclusory – insufficient evidence presented to show that employee was disqualified from broad range of jobs – summary judgment affirmed.

Mahon v. Crowell, 295 F.3d 585, 13 A.D. Cas. 390 (6th Cir. 2002) – Former steamfitter not substantially limited in ability to work despite back injury that precluded him from 47% of the jobs available in his market – although Sixth Circuit has in the past found ADA coverage when impairment barred individual from significant percentage of jobs, this was before Toyota Motor Manufacturing v. Williams which indicated that substantially limited should be read “strictly to create a demanding standard for qualifying as disabled” (Id. at 590) – steamfitter was still qualified for over half of the jobs he had been qualified for before his injury.

Carroll v. Xerox Corp., 294 F.3d 231, 13 A.D. Cas. 396 (1st Cir. 2002) – Sales manager who developed anxiety disorder and symptoms of job-related stress not disabled by inability to perform high-stress job – manager moved to less stressful job and adequately performed that for over two years – no showing manager was precluded from performing a broad range of jobs.

Rinehimer v. Cemolift, Inc., 292 F.3d 375, 13 A.D. Cas. 110 (3d Cir. 2002) – “Regarded as” case dismissed since employee was not regarded as disabled – employee had sensitivity to dust and paint fumes after being hospitalized for pneumonia – pneumonia is a temporary condition not protected by the ADA – in any event there is no evidence of employer’s belief plaintiff could not perform wide array of jobs or of employer’s perception about severity of his condition – employer simply knew that he could not work exposed to dust and fumes.
Szmaj v. AT&T, 291 F.3d 955, 13 A.D. Cas. 104 (7th Cir. 2002) – Employee whose eye condition prevents him from holding a job in which he has to spend more than 50% of his time reading, and which causes him difficulty in reading at all times because of his continuous difficulty in focusing, is not substantially limited in a major life activity.

Pollard v. High’s of Baltimore, Inc., 281 F.3d 462, 12 A.D. Cas. 1409 (4th Cir. 2002) – Back injury that prevented employee from working for nine months not substantial limitation – temporary impairment does not qualify as a general rule – medical restriction on ability to lift more than 25 pounds is not a significant impairment – fact that employee immediately found another job after being terminated buttresses contention that she was not disabled.

Conant v. City of Hibbing, 271 F.3d 782, 12 A.D. Cas. 839 (8th Cir. 2001) - Conditional job offer rescinded after applicant for laborer position was rated as unable to lift more than 30 pounds - this does not mean employer “regarded” employee as disabled - it simply means employer regarded employee as unable to meet the requirements of a specific job, not a broad class of jobs.

Furnish v. SVI Sys., Inc., 270 F.3d 445, 12 A.D. Cas. 620 (7th Cir. 2001) - Liver function is not a major life activity and thus employee who claimed he was discharged because he had cirrhosis of the liver was not disabled - liver function bears little resemblance to activities such as performing manual tasks, walking, seeing, hearing, speaking, breathing, and the like.

Swanson v. Univ. of Cincinnati, 268 F.3d 307, 12 A.D. Cas. 417 (6th Cir. 2001) - Surgical resident with major depression not substantially limited in ability to sleep, communicate and concentrate - resident was impaired with respect to these major life activities but not substantially limited - when on medication quality of sleep improved and communication abilities were restored - court rejected contention that resident’s good performance in subsequent surgical residency program while on medication should be considered only to show that he could perform his duties as a surgical resident - what it actually shows that he was not disabled.

EEOC v. Woodbridge Corp., 263 F.3d 812, 12 A.D. Cas. 254 (8th Cir. 2001) - No violation in rejecting applicants when preemployment tests showed they were likely to develop carpal tunnel syndrome - employees are not disabled - employees are not regarded as disabled - at most manufacturer regarded employees as unable to perform one specialized job.

Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 12 A.D. Cas. 211 (9th Cir. 2001), clarified, 292 F.3d 1045, 13 A.D. Cas. 203 (9th Cir. 2002) - Former reporter had arm and wrist injuries which restricted typing and handwriting - this is not a substantial limitation on the major life activity of working - plaintiff did not present evidence of jobs from which she was precluded - her level of education and subsequent work as a freelance journalist suggest she is not substantially limited - in addition to major life activity of working, plaintiff contended that she was substantially limited in the major life activity of “manual tasks” - she is able to shop, drive, make beds, do laundry, and dress herself, and inability to
type and write for extended periods of time is not sufficient to outweigh the manual tasks she can perform – “A ‘substantial limitation’ is not a mere difference in an ability to perform a particular act.” (Id. at 797) - no basis for claim plaintiff was “regarded as” disabled - only evidence is that employer was aware of her restrictions - in order for “regarded as” to be applicable, the employer “must have believed that [the employee] either had a substantially limiting impairment that she did not have, or that she had a substantially limiting impairment which, in fact, was not so limiting” (Id. at 798) - fact that employer considered accommodations is not a concession that employer regards employee as disabled – “A contrary rule would discourage the amicable resolution of numerous employment disputes” (Id) - remand to determine whether California law standard under Fair Employment and Housing Act does not require a substantial limitation - Modification to Opinion: The original mandate was stayed pending Supreme Court’s Toyota Motor Manufacturing v. Williams decision – court now reaches on the merits plaintiff’s contention that her inability to continuously keyboard or write is within what Williams defines as a substantial limitation – it is not – continuous keyboarding and handwriting is not of central importance to “most people’s daily lives” as Williams requires – plaintiff can perform both activities – she simply cannot pursue them continuously – although her life has been diminished by her inability to engage in continuous keyboarding or handwriting, that is very different from substantial limitation – earlier judgment was correct.

Chenoweth v. Hillsborough County, 250 F.3d 1328, 11 A.D. Cas. 1421 (11th Cir. 2001) - Driving to work is not major life activity - epileptic who was advised not to drive for six months after last seizure not substantially limited in a major life activity.

EEOC v. Rockwell Int’l Corp., 243 F.3d 1012, 11 A.D. Cas. 929 (7th Cir. 2001) – Applicants for entry level jobs rejected because they failed pre-employment nerve conduction test which measures susceptibility to carpal tunnel syndrome – summary judgment affirmed – did not prove foreclosed from broad range of jobs or that they were regarded as disabled – while not required to calculate the exact percentage of jobs from which they were foreclosed, cannot survive summary judgment without evidence of relevant labor market’s demographics.

Steele v. Thiokol Corp., 241 F.3d 1248, 11 A.D. Cas. 859 (10th Cir. 2001) - Obsessive compulsive disorder does not result in ADA coverage – not substantially limited in ability to sleep, walk or interact with others – alleged severe interpersonal problems insufficient – plaintiff also did not establish that he was regarded as disabled by employer.

Duncan v. Washington Metro. Area Transit Auth., 240 F.3d 1110, 11 A.D. Cas. 833 (D.C. Cir. 2001) - JNOV on appeal against former employee with lifting restriction – employee has burden to show number and kinds of jobs available to him in the geographic area – expert evidence about his back condition and lifting restrictions insufficient since they do not show the number and types of jobs for which he is qualified.

Contreras v. Suncast Corp., 237 F.3d 756, 11 A.D. Cas. 600 (7th Cir. 2001) – Employee who alleged he was able to engage in sexual intercourse 20 times per month before back injury and presently can do so only two or three times per month is not substantially limited in a major life activity – he is able to reproduce – even assuming that engaging in sexual relations is major life activity, unsubstantiated assertion as to frequency does not create factual issue on substantial limitation – inability to lift in excess of 45 pounds not substantial limitation – summary judgment affirmed.

Disability - Qualified Individual with Disability/Essential Job Functions (Ch. 9)

Josephs v. Pacific Bell, 443 F.3d 1050, 17 A.D. Cas. 1465 (9th Cir. 2006) – In applying in 1997 for home service technician job, which required home visits, employee lied and concealed a 1985 conviction for battery on a peace officer and an attempted murder charge, under which he was found not guilty by reason of insanity and hospitalized for three years in a mental hospital – employee sued under ADA, alleging he was “regarded as” disabled, contesting both his original termination and employer’s failure to reinstate him in union grievance procedure – jury found for the employer on the termination claim, but against the employer on the failure to reinstate claim – the Ninth Circuit decision affirming the failure to reinstate verdict was 2-1 – Ninth Circuit relied on two categories of evidence: statements by employer during grievance proceedings that it was concerned the employee had been in a mental hospital for three years, and fact that the employer in the context of union grievance proceedings had reinstated two other employees who lied on applications – the two employees who had concealed their convictions were a young Hispanic who had stolen less than $10 worth of candy and an employee who became violent toward his spouse when he found her in bed with another man – dissenting Judge Callahan pointed out that if plaintiff acted improperly toward a customer during a home visit, Pacific Bell would unquestionably be liable under a “negligent hiring” theory.

Hammel v. Eau Galle Cheese Factory, 407 F.3d 852, 16 A.D. Cas. 1185 (7th Cir.), cert. denied, 126 S. Ct. 746 (2005) – Legally blind factory employee had poor attitude, careless behavior, and deficient job performance – this rendered him unqualified – he was thus not a qualified individual with a disability who with a reasonable accommodation could perform the functions of his job – his repeated disregard of safety rules is relevant in determining qualifications – the ADA does not require an employer to accept irresponsible or insubordinate behavior, and the ADA does not protect non-disability-related failure to follow standards established for all employees – even though employee was told he was discharged because of his vision he failed to show that he was capable of performing essential job functions in a manner that met legitimate business expectations – employer was not required to isolate disability-related reasons for inferior performance from
problems that stem from poor attitude, insubordination, carelessness or outright disregard for safety – discharge was warranted on the basis of inability to properly perform the job, even if such inability was due entirely to disability – proposed accommodations are unreasonable in and of themselves and also because they address only a small portion of the poor work performance.

*Prasenth v. Rubbermaid Inc.*, 406 F.3d 1245, 16 A.D. Cas. 1197 (10th Cir. 2005) – Employee had blood disease that increased risk of prolonged bleeding when cut – 50 percent of positions on production line required knife use – jury properly found employee was qualified since there was no absolute need to rotate her into the 50 percent of positions that required knife use.

*McKenzie v. Benton*, 388 F.3d 1342, 16 A.D. Cas. 196 (10th Cir. 2004), cert. denied, 544 U.S. 1048 (2005) – Plaintiff has burden of proving she is not a “direct threat” – even though “direct threat” is listed in the statute as a defense, the ADA qualification standard necessarily incorporates it with respect to a former deputy sheriff who had engaged in aberrational behavior – it is an essential function of performing her duties that she do so without endangering others – no error to instruct the jury that the burden rested on her to prove she could perform this essential function.

*Brenneman v. MedCentral Health Sys.*, 366 F.3d 412, 15 A.D. Cas. 769 (6th Cir. 2004), cert. denied, 125 S. Ct. 1300 (2005) – Diabetic who claimed should have been granted leave as an accommodation rather than discharge for excessive absences was not a qualified individual due to excessive absenteeism – there were 109 absences in the five years preceding his discharge – over 20 per year – regular attendance is an essential job function.

*Cameron v. Cnty. Aid for Retarded Children, Inc.*, 335 F.3d 60, 14 A.D. Cas. 1001 (2d Cir. 2003) – Terminated associate director with anxiety disorder whose dispute with subordinate caused him to quit is not a qualified person with a disability since ability to get along with subordinates is an essential function of a managerial job – moreover, plaintiff does not claim that her inability to get along with subordinate was caused by actual disability – summary judgment affirmed.

*Conneen v. MBNA Am. Bank, N.A.*, 334 F.3d 318, 14 A.D. Cas. 874 (3d Cir. 2003) – Reporting to work at 8:00 a.m. was not an essential function of the bank manager who was discharged for excessive tardiness caused by morning sedation for depression – while an employer has a right to expect managers to set an example of timeliness, that does not elevate it to an essential job function.


*Calef v. Gillette Co.*, 322 F.3d 75, 14 A.D. Cas. 110 (1st Cir. 2003) – Manager whose uncontrollable anger was the product of an attention-deficit hyperactivity disorder is
unprotected since he could not handle the essential job function of avoiding anger –
manager had been warned about confrontations with co-workers and that he would be
discharged the next time he threatened a co-worker – ADA does not require retaining an
employee whose unacceptable behavior threatens others, even if the behavior stems from a
mental disability.

Waddell v. Valley Forge Dental Assoc., 276 F.3d 1275, 12 A.D. Cas. 1029 (11th Cir. 2001) -
HIV-positive dental hygienist posed a direct threat to the safety of the workplace and
therefore was not qualified - summary judgment affirmed.

Hutton v. Elf Atochem N. Am., Inc., 273 F.3d 884, 12 A.D. Cas. 909 (9th Cir. 2001) - Former
chlorine finishing operator with Type I diabetes posed direct threat to safety of himself and
others and thus was not qualified under ADA - even though risk of episode was “small,”
and even though elaborate safety system would mitigate harm caused by such an episode,
where nature of harm was catastrophic even a “small” risk of an episode is unacceptable -
summary judgment affirmed.

Pickens v. Soo Line R.R. Co., 264 F.3d 773, 12 A.D. Cas. 333 (8th Cir. 2001) - By 2-1 vote
Eighth Circuit upholds reversal of $620,000 jury verdict in favor of terminated railroad
conductor - plaintiff was not able to fulfill essential job functions because he was absent 29
days during a 10-month period which was “excessive and eviscerates any regularity in
attendance” - dissenting judge says that since such absences are a right guaranteed under
the collective bargaining agreement, it should not be deemed a violation of an essential job
function.

EEOC v. Yellow Freight Sys., Inc., 253 F.3d 943, 11 A.D. Cas. 1569 (7th Cir. 2001) -
Dockworker with AIDS-related cancer discharged for attendance problems - individual is
not a qualified person with a disability - regular attendance is an essential job function -
unlimited number of sick days is not a reasonable accommodation.

Phelps v. Optima Health, Inc., 251 F.3d 21, 11 A.D. Cas. 1487 (1st Cir. 2001) - Lifting 50
pounds was essential job function for nurse who must move patients - no merit to
contention that co-workers could do the moving.

Kiphart v. Saturn Corp., 251 F.3d 573, 11 A.D. Cas. 1473 (6th Cir. 2001) - Disabled employee
could not perform all functions required on production team which rotated tasks -
summary judgment reversed - reasonable jury could find that rotation of tasks was not an
essential job function.

Maziarka v. Mills Fleet Farm, Inc., 245 F.3d 675, 11 A.D. Cas. 1140 (8th Cir. 2001) - Regular
attendance is essential job function - job description so indicates.

Giles v. Gen. Elec. Co., 245 F.3d 474, 11 A.D. Cas. 844 (5th Cir. 2001) – Machinist with back
injury not allowed to return to job – jury award in his favor affirmed – GE claimed he
could not perform essential job functions – even though he cannot bend, climb or lift, job description does not indicate that climbing, bending or lifting is essential – his physician’s determination that he could not return to his machinist job was based on an incorrect job description.

Disability – Reasonable Accommodation (Ch. 9)

US Airways, Inc. v. Barnett, 535 U.S. 391, 12 A.D. Cas. 1729 (2002) – An accommodation is normally unreasonable if it conflicts with seniority rules for job assignments – seniority system was not a union seniority system – Ninth Circuit reversed – “[T]he seniority system will prevail in the run of cases.” (Id. at 394) – “[T]o show that a requested accommodation conflicts with the rules of a seniority system is ordinarily to show that the accommodation is not ‘reasonable.’” (Id.) – “[S]uch a showing will entitle an employer/defendant to summary judgment on the question – unless there is more. The plaintiff remains free to present evidence of special circumstances that make ‘reasonable’ a seniority rule exception in the particular case.” (Id.) – US Air’s claim that accommodation never involves preferences not accepted – reasonable accommodations are preferences – but Barnett’s argument that a reasonable accommodation is simply an effective accommodation is inconsistent with reasonableness – what is required is to reconcile “reasonable accommodation” and “undue hardship” in a practical way – the lower courts have done so by indicating that to defeat a motion for summary judgment a plaintiff must show only that an accommodation seems reasonable on its face – once the plaintiff has made this showing the defendant must show special circumstances that demonstrate undue hardship – we agree with these reconciling principles – normally an accommodation that violates a seniority rule would not be reasonable – it would not be reasonable in the run of cases to “trump the rules of a seniority system” – “To the contrary, it will ordinarily be unreasonable . . . .” (Id. at 403) – Lindemann & Grossman cited for the proposition that competitive seniority is important to employees – nothing in the statute suggests Congress intended to undermine seniority systems – the types of special circumstances that could be shown is that the employer retained the right to change the seniority system and exercise that right frequently – the plaintiff has the burden to show that special circumstances warrant an exception.

Graves v. Finch Pruyn & Co., 457 F.3d 181, 18 A.D. Cas. 193 (2d Cir. 2006) – Request for unpaid leave of absence which was denied violated ADA – while employee did not specify length of needed leave, employer could have easily ascertained that it was in the neighborhood of two weeks to get a doctor’s appointment.

Medrano v. City of San Antonio, 179 Fed. Appx. 897, 18 A.D. Cas. 451 (5th Cir. 2006) – Accommodation is not reasonable if it violates seniority system absent special circumstances – no special circumstances shown.
Overley v. Covenant Transport, Inc., 178 Fed. Appx. 488, 17 A.D. Cas. 1753 (6th Cir. 2006) – Truck driver with disabled daughter asserted she had a right to a modified work schedule in order to care for her daughter – no right to accommodation exists in such a situation – discharge for failing to report for scheduled shift sustained.

Canny v. Dr. Pepper/7-Up Bottling Group, Inc., 439 F.3d 894, 17 A.D. Cas. 1153 (8th Cir. 2006) – Jury verdict that beverage bottler failed to engage in the interactive process to determine an accommodation for a former route driver who could no longer drive because of vision impairment affirmed, but punitive damages reversed – HR manager did not inquire as to available positions because of her perception that the driver’s suggested accommodations were impractical – that conclusion did not relieve the bottler of the obligation to discuss the issue – however, the bottler reasonably perceived itself caught between compliance with federal safety regulations and the ADA, and that is not the type of malicious or reckless indifference conduct necessary to support punitive damages.

Nuzum v. Ozark Automotive Distributors, Inc., 432 F.3d 839, 17 A.D. Cas. 688 (8th Cir. 2005) – Employee with tendinitis elbow injury alleged that the effect of the injury was that he was unable to hug his wife as tightly as before the injury – this is not a substantial limitation on a major life function – assuming, arguendo, that it was, he requested a workplace accommodation, but such accommodation must be related to the disability and any workplace accommodation requested would have been unrelated to his limited ability to hug his wife.

Kratzer v. Rockwell Collins, Inc., 398 F.3d 1040, 16 A.D. Cas. 813 (8th Cir. 2005) – Interactive process broke down because plaintiff failed to provide updated physical evaluation rather than employer’s refusal to provide accommodation.

Williams v. Pa. Hous. Auth. Police Dep’t, 380 F.3d 751, 15 A.D. Cas. 1507 (3d Cir. 2004) – Employee “regarded as” disabled is entitled to an accommodation – Third Circuit joins First Circuit in so holding – police officer erroneously perceived as unable to be around firearms because of depression should have been reassigned to the radio room rather than taken off duty – with respect to argument that he receives a windfall compared to identical officer who is not misperceived as disabled, plaintiff sent home without pay while an employee whose limitations are perceived accurately gets to work is not receiving a windfall. [Note: Ninth Circuit is to the contrary on whether “regarded as” plaintiffs are entitled to an accommodation.]

Watkins v. Ameripride Servs., 375 F.3d 821, 15 A.D. Cas. 1229 (9th Cir. 2004) – Delivery driver of uniforms hurt his wrist and could not fulfill the position – employer created light-duty job for two months, but when it became apparent individual could not return to regular job, offered him a permanent job he could perform at a pay reduction – employee refused – employer had no obligation to create light-duty job even though it did so for two months – employer acted reasonably in creating two-month light-duty assignment at full pay and offering lower paying job that employee could perform.
Bartee v. Michelin N. Am., Inc., 374 F.3d 906, 15 A.D. Cas. 1217 (10th Cir. 2004) – Former production plant foreman who had hip surgery and arthritis in the ankle could have been accommodated – even though he could not perform his normal job which required extensive walking and 12-hour shifts, these were not essential job functions – he could have performed the movements required for the position if he was equipped with an average-size golf cart and allowed to work an eight-hour shift – the employer did not offer any such modifications or provide evidence that such modifications would disrupt essential job functions.

Rodal v. Anesthesia Group of Onondaga, P.C., 369 F.3d 113, 15 A.D. Cas. 973 (2d Cir. 2004) – Factual issue exists as to whether night and weekend duty could be waived as an accommodation for a group practice anesthesiologist or whether night and weekend duty was an essential job function – group had accommodated his request following the onset of cancer to be relieved of this duty for several months and it may have done so permanently had it reached an agreement with him on compensation modification.

Mason v. Avaya Communs., Inc., 357 F.3d 1114, 15 A.D. Cas. 153 (10th Cir. 2004) – Work at home was not reasonable accommodation – attendance at workplace for purposes of supervision and teamwork were essential job functions for service coordinator with communications systems company – does not matter that job description does not mention supervision and teamwork or that plaintiff testified she could perform her duties at home – company presented evidence it could not adequately supervise her from home and coordinators typically assist and cover for one another which shows that teamwork is essential – summary judgment affirmed despite plaintiff’s testimony that work could be done from home.

Hedrick v. W. Reserve Care Sys., 355 F.3d 444, 15 A.D. Cas. 1 (6th Cir. 2004) – Summary judgment granted with respect to plaintiff’s contention that she should have been awarded preferred position since she must prove that her disability was the sole reason she was not so awarded under Sixth Circuit authority – hospital satisfied its accommodation obligation by offering her a position for which she believed herself overqualified which would have involved a paycut.

Peebles v. Potter, 354 F.3d 761, 15 A.D. Cas. 146 (8th Cir. 2004) – Disabled employee returning from two-year leave asked for light-duty assignment but refused to supply medical proof that his medical restrictions still existed – Postal Service had rule requiring such verification – noncompliance with rule had nothing to do with disability – U.S. Supreme Court has held that exception to rule that is not necessitated by disability is presumptively unreasonable in *Barnett* (modification of seniority system would ordinarily be unreasonable).

Burchett v. Target Corp., 340 F.3d 510, 14 A.D. Cas. 1296 (8th Cir. 2003) – After accommodations to a depressed employee with respect to workload and working hours, employee requested a transfer to another department – company policy barred transferring...
unsatisfactory employees until the problem employee’s job performance improved – reassignment is an accommodation of last resort that is not mandated by the ADA – employee was capable of performing the essential functions of her present position without further accommodation – summary judgment affirmed.

*Wood v. Crown Redi-Mix Inc.*, 339 F.3d 682, 14 A.D. Cas. 1204 (8th Cir. 2003) – Truck driver became impotent after a fall at work – court rejects contention that back injury substantially limited his ability to work – the only substantial limitation is his ability to procreate – this is an inadequate basis for an ADA failure-to-accommodate claim – his requested accommodation, another job, was unrelated to his limitation.

*Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 14 A.D. Cas. 580 (7th Cir. 2003) – Plaintiff suffered from severe depression which caused him to sleep on the job – he was fired but contended he should have been given the accommodation of a leave of absence to allow him to recover – the depression was so severe that he hallucinated and attempted suicide – two months of treatment enabled him to surmount his mental difficulties but his employer refused to convert his discharge to a leave of absence – the term “qualified individual with a disability” means “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the [job]” (Id. at 380) – plaintiff contends that he should have been accommodated by being allowed not to work. That is not what the ADA says . . . . Not working is not a means to perform the job’s essential functions.” (Id. at 380-81) – “Time off may be an apt accommodation for intermittent conditions.” (Id. at 381) – but plaintiff here did not want a few days off or a part-time position – however, summary judgment vacated for consideration of whether plaintiff should have been granted leave under the FMLA.

*Felix v. N.Y. City Transit Auth.*, 324 F.3d 102, 14 A.D. Cas. 193 (2d Cir. 2003) – Plaintiff had two impairments: insomnia and a fear of returning to the underground subway system – plaintiff asked for an accommodation to be transferred to an above-ground position – but only insomnia met the ADA definition of disability and transferring to above ground would not accommodate that disability – fear of going underground did not substantially limit a major life activity.

*Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 14 A.D. Cas. 295 (9th Cir. 2003) – No reasonable accommodation is required for an employee who is merely “regarded as” disabled – in a prior opinion, the Ninth Circuit had found that the plaintiff was not disabled, but remanded for consideration as to whether he was “regarded as” – the Ninth Circuit joins the Third, Fifth, Sixth and Eighth Circuits in so holding – the First Circuit is to the contrary – “[T]here is no duty to accommodate an employee in a ‘regarded as’ case.” (Id. at 1233)

*Mann v. Am. Airlines*, 324 F.3d 1088, 14 A.D. Cas. 433 (9th Cir. 2003) – An employer does not have a duty to accommodate an employee who is regarded as having a disability, but who in fact is not disabled – police officer injured his right wrist and thumb – in a prior
opinion the Ninth Circuit sustained a finding that plaintiff was not disabled but remanded for consideration as to whether he was regarded as disabled – he clearly could not perform the essential job functions of restraining a prisoner without accommodation – the issue is thus whether a “regarded as” plaintiff is entitled to a reasonable accommodation – the weight of circuit authority disfavors accommodation for “regarded as” plaintiffs, and the Ninth Circuit in this case of first impression joins that view – the right to reasonable accommodation cannot be based on a misperception about whether or not someone was disabled – summary judgment affirmed.

Wood v. Green, 323 F.3d 1309, 14 A.D. Cas. 100 (11th Cir. 2003) – Indefinite leave of absence is not a reasonable accommodation.

Rauen v. U.S. Tobacco Mfg. L.P., 319 F.3d 891, 13 A.D. Cas. 1797 (7th Cir. 2003) – Software engineer’s request to work at home as an accommodation for the effects of cancer was unreasonable – working at home is rarely a reasonable accommodation because most jobs require personal interaction, teamwork, and supervision.

Peters v. City of Mauston, 311 F.3d 835, 13 A.D. Cas. 1351 (7th Cir. 2002) – Construction operator with shoulder injury not entitled to help to do heavy lifting – this proposed accommodation would not be reasonable where the City would be forced to hire a second person to assist the employee with an essential job function.

Watson v. Lithonia Lighting, 304 F.3d 749, 13 A.D. Cas. 969 (7th Cir. 2002) – ADA does not require indefinite light-duty positions – employer maintained pool of light-duty positions for workers recovering from temporary injuries – setting aside light-duty positions indefinitely would close the pool to employees recovering from temporary injuries.

Cosme v. Henderson, 287 F.3d 152, 88 FEP 840 (2d Cir. 2002) – Sabbatarian offered accommodation of transfer to other postal stations – Sabbatarian contended offers were unenforceable since they would violate seniority provisions of collective bargaining agreement – fact that employer was not obligated to breach seniority agreement with union did not mean it could not do so in appropriate circumstances – court characterized employee’s argument as contending that Postal Service was being more accommodating than is required by law – this is a novel theory of liability.

Ballard v. Rubin, 284 F.3d 957, 12 A.D. Cas. 1646 (8th Cir. 2002) – Plaintiff who used crutches as a result of childhood polio alleged disability discrimination in being denied a promotion – neither a memo withdrawing from a management training program because of additional travel not being feasible due to disability nor EEO complaint constituted a request for reasonable accommodation - thus IRS had no duty to work with him to overcome barriers caused by his disability.

Morton v. United Parcel Serv., Inc., 272 F.3d 1249, 12 A.D. Cas. 897 (9th Cir. 2001) - Ninth Circuit reverses district court dismissal of deaf driver’s claim of discrimination - as a result
of her deafness plaintiff could not be certified by the Department of Transportation to
drive trucks weighing more than 10,000 pounds - Ninth Circuit concludes that there’s
nothing in the collective bargaining agreement that prevents UPS from accommodating
plaintiff by hiring her as a swing driver to drive only lighter package cars not subject to
DOT regulation.

Stafne v. Unicare Homes, 266 F.3d 771, 12 A.D. Cas. 424 (8th Cir. 2001) - It was harmless
error not to give an instruction on the interactive process since the plaintiff presented no
evidence that a reasonable accommodation would have been available - the only
accommodation suggested by the plaintiff would not have enabled her to perform the
essential functions of her job and thus plaintiff failed to prove that she was a qualified
person with a disability.

Kvorjak v. Maine, 259 F.3d 48, 12 A.D. Cas. 160 (1st Cir. 2001) - No violation in rejecting,
without interactive process, disabled employee’s request to work at home - there are
situations in which a failure to engage in the interactive process would constitute a failure
to provide reasonable accommodation, but here there is no evidence to support plaintiff’s
contention that he could perform the essential functions of his position at home.

Williams v. United Ins. Co., 253 F.3d 280, 11 A.D. Cas. 1613 (7th Cir. 2001) - Door-to-door
salesperson with ankle injury asked for training to qualify her for promotion - reasonable
accommodation obligation does not require either promotion or training for promotion
unless routinely granted to non-disabled persons.

Reed v. LePage Bakeries, Inc., 244 F.3d 254, 11 A.D. Cas. 1150 (1st Cir. 2001) - Employee
with bipolar disorder sought accommodation that would allow her to walk away from any
discussions with supervisors - court analyzes interplay between reasonableness of
accommodation and undue hardship affirmative defense - here accommodation is not
objectively reasonable - court approves cost-benefit analysis set forth by Seventh Circuit in
Vande Zande v. Wis. Dept’ of Admin., 44 F.3d 538, 3 A.D. Cas. 1636 (7th Cir. 1995) -
discharge for insubordinate conduct toward supervisor upheld.

Tyler v. Ispat Inland Inc., 245 F.3d 969, 11 A.D. Cas. 1136 (7th Cir. 2001) – Mentally ill
employee who suffered from delusions asked for a transfer or fuller investigation of alleged
conspiracy among co-workers to harm him – company had accommodated him once
before with a transfer – company’s refusal upheld – “A plaintiff seeking damages and
injunctive relief under the [ADA] by virtue of a mental illness faces a treacherous road to
recovery.” (Id. at 970) – “[I]f his mental illness manifests itself in the form of delusions or
hallucinations, it is difficult to argue that an employer should have accommodated the
disability by addressing working conditions that are the product of the employee’s
imagination.” (Id.) - in any event lateral transfer not adverse employment action.

Willis v. Pac. Mar. Ass’n, 244 F.3d 675, 11 A.D. Cas. 1046 (9th Cir. 2001) – Transfer of
disabled employee to light duty is not reasonable accommodation where collective
bargaining contract provides that assignment to light duty is based on seniority – public policy supports adoption of per se rule that accommodation is unreasonable if it compels violation of collective bargaining contract’s bona fide seniority system – balancing approach would leave the law too vague – per se rule is applicable only when there is a direct conflict – opinion amended after en banc decision in Barnett v. U.S. Air but prior to grant of certiorari in Barnett.

Humphrey v. Mem’l Hosps. Ass’n, 239 F.3d 1128, 11 A.D. Cas. 765 (9th Cir. 2001) – Opinion by Stephen Reinhardt – summary judgment against employee with obsessive compulsive disorder whose employer initiated interactive process and provided her with a flexible start time reversed – duty to accommodate continued when initial accommodation did not work - once employer was aware that flexible start time was not working employer should have restarted interactive process – factual issue exists as to whether working at home was a reasonable accommodation since other transcriptionists were permitted to work at home - leave of absence was another reasonable accommodation that should have been offered prior to discharge even though plaintiff did not request a leave of absence – employee was terminated for absenteeism and tardiness – under the ADA conduct resulting from a disability is considered to be part of the disability and not a separate basis for termination – [Note: Seems to conflict with First Circuit decision in Reed v. LePage Bakeries, Inc., 244 F.3d 254, 11 A.D. Cas. 1150 (1st Cir. 2001).]

Downey v. Crowley Marine Servs., Inc., 236 F.3d 1019, 11 A.D. Cas. 481 (9th Cir. 2001) - Summary judgment for employer denied even though employee did not request an accommodation - employer’s duty to accommodate employee with multiple sclerosis arose as soon as the employer knew employee had multiple sclerosis - decision under Washington law against discrimination, which does not require that an employee request an accommodation - even though employee preferred to continue working at former job, employer had duty to help him apply for jobs he could perform once it knew that his condition interfered with his ability to perform his present job.

EEOC v. Sara Lee Corp., 237 F.3d 349, 11 A.D. Cas. 595 (4th Cir. 2001) - ADA does not override seniority system - ADA does not require accommodation that “tramples on the rights of other employees” (Id. at 355) - “The ADA does not require employers to penalize employees free from disability in order to vindicate the rights of disabled workers.” (Id.) - no right to bump.

Disability - Effect of Representations in Applying for Disability Benefits (Ch. 9)

Johnson v. ExxonMobil Corp., 426 F.3d 887, 96 FEP 1171 (7th Cir. 2005) – Summary judgment proper in ADA case based on social security disability insurance application that stated employee unable to work because of epilepsy – this contradicted prima facie requirement that employee was performing to employer’s legitimate expectations.
Opsteen v. Keller Structures, Inc., 408 F.3d 390, 16 A.D. Cas. 1281 (7th Cir. 2005) – Representations made to obtain Social Security and employer benefits bar ADA claim – employee represented and medical evaluation supported the fact that he was not employable – he represented to the employer’s plan that he could not work even with a reasonable accommodation.

Voeltz v. Arctic Cat, Inc., 406 F.3d 1047, 16 A.D. Cas. 1208 (8th Cir. 2005) – Laid-off employee with multiple sclerosis not estopped from pursuing ADA claim by application for Social Security disability benefits which indicated he was unable to work – employee claimed that if he had been called back to work with a reasonable accommodation he could have worked, and jury could conclude that his ADA claim was not inconsistent with his Social Security application in that he had a good-faith belief he was unable to work but nonetheless with accommodation could have performed essential job functions.

Williams v. London Util. Comm’n, 375 F.3d 424, 15 A.D. Cas. 1363 (6th Cir. 2004) – Employee applied for disability benefits one day after being discharged and asserted he was totally disabled – this is absolutely inconsistent with lawsuit which says that on day of discharge he could perform job functions.

Detz v. Greiner Indus., Inc., 346 F.3d 109, 92 FEP 1185 (3d Cir. 2003) – ADEA plaintiff barred from asserting he was qualified for purposes of establishing prima facie case because he successfully asserted before the Social Security Administration that he was completely disabled as of the date of his discharge – in order for a plaintiff who successfully contended he was disabled to proceed with his lawsuit he must explain the inconsistency in a manner that would be sufficient to warrant a reasonable juror’s conclusion that assuming the employee’s good-faith belief in the earlier statement, the employee could nevertheless perform the essential functions of the job – that is not possible in this case.

Lee v. City of Salem, 259 F.3d 667, 12 A.D. Cas. 10 (7th Cir. 2001) - Jury verdict reversed based on Social Security disability application - in Social Security application, he claimed he was physically unable to perform the heavy physical labor required of a cemetery sexton - at trial he explained that in reality he was able to perform the work, but applied for benefits and claimed an inability to work because his disability had been “hammered into his head” and “he believed that was the only thing to do, sign up for disability” - this is insufficient as a matter of law under the Cleveland case - in order to qualify for disability benefits one must be unable to engage in any kind of substantial gainful work - but a prima facie case of ADA discrimination requires one to show that he is a “qualified individual with a disability” and that with a reasonable accommodation could perform the essential functions of the job - at first blush one might think that a successful application for SSDI forecloses ADA - but the Cleveland case pointed out that Social Security and ADA do not employ the same criteria - ADA envisions that someone with a disability might be able to work with an accommodation, whereas the Social Security Act does not take potential accommodations into account - moreover, disabilities can change over time and one might be deemed
unable to work for purposes of benefits and yet be able to perform the essential functions of the job with an accommodation - but to proceed with an ADA lawsuit there must be a reasonable explanation for the apparent conflict - Cleveland suggests that an ADA plaintiff may not simply disavow a prior claim - the plaintiff must proceed from the premise that the prior claim was true or in good faith believed to be true and demonstrate that the assertion was nevertheless consistent with his ability to perform the essential functions of his job - in short, the explanations that Cleveland requires are contextual, explanations that resolve the seeming discrepancy between a claim of disability and a later claim of entitlement to work - here the unmistakable import of the benefits application was “I went back to work to see if I could do it but I couldn’t” - the plaintiff's explanation was simply a disavowal of the prior claim, which is insufficient - accepting what plaintiff now says, what he told the Social Security Administration was not true - judgment in plaintiff's favor reversed with directions to enter judgment in favor of defendant.

Lane v. BFI Waste Sys. of N. Am., 257 F.3d 766, 11 A.D. Cas. 1795 (8th Cir. 2001) - Summary judgment affirmed based on representations in applying for Social Security disability benefits - benefits application stated “that he was unable to engage in any substantial work” - plaintiff asked for a remand in light of Cleveland v. Policy Management.

Holtzclaw v. DSC Communs. Corp., 255 F.3d 254, 86 FEP 777 (5th Cir. 2001) - Employee represented in applying for benefits that his conditions and medications “play havoc on his thinking and memory skills,” “make it impossible to have a clear and normal mind,” "keep him from being able to think and concentrate,” and that he was simply “unable to function in the real world” (Id. at 258) - he also represented that his “illness is chronic and will never go away” (Id.) - presentation of medical release releasing him for work does not rebut the prior sworn statements and therefore summary judgment is appropriate in ADEA and ADA action – “Cleveland teaches that a plaintiff cannot change his story during litigation without a sufficient explanation for his inconsistent assertions.” (Id. at 259)

Race and Color (Ch. 10)

EEOC v. Target Corp., 460 F.3d 946, 98 FEP 1356 (7th Cir., Aug. 23, 2006) – African-American applicants were invited by email to call and schedule an interview but were denied interviews after calling – employer contended it did not know their race – EEOC expert indicated that some people can determine a speaker’s race based on his or her voice or name, which created a factual issue barring summary judgment.

El-Hakem v. BJY Inc., 415 F.3d 1068, 96 FEP 84 (9th Cir. 2005), cert. denied, 126 S. Ct. 1470 (2006) – Plaintiff’s first name was Mamdouh – the CEO of his employer insisted on calling him “Manny” – plaintiff strenuously objected – the CEO insisted that a “western” name would increase plaintiff’s chances for success and be more acceptable to the company’s clientele – judgment of race discrimination under § 1981 affirmed despite employer’s contention that “Manny” is not a racial epithet – employer’s contention that race
discrimination must be based on physical or genetically determined characteristics such as skin color “ignores the broad reach of § 1981” – “Names are often a proxy for race and ethnicity” (Id. at 1073) – hostile work environment found – even though the conduct “may not have been especially severe” it was frequent and pervasive – the CEO persisted in calling the plaintiff “Manny” once a week for approximately two months and in e-mails for at least twice a month thereafter.

Patrolmen’s Benevolent Ass’n of City of New York, Inc. v. City of New York, 310 F.3d 43, 90 FEP 1 (2d Cir. 2002) – Involuntary transfer of Black and Black-Hispanic police officers into precinct where white police officers brutally beat and tortured a black violates the Equal Protection Clause – City admitted the transfers were race based but contended it was necessary to prevent a delicate situation from getting out of control – strict scrutiny test applied – “To survive that strict scrutiny, a racial classification must be narrowly tailored to further a compelling governmental interest” (Id. at 52) – the mere assertion of an operational need to make race-conscious employment decisions does not meet this test – issue of race-based transfers analyzed at 171 LRR 8.

National Origin and Citizenship (Ch. 11)

Maldonado v. City of Altus, Okla., 433 F.3d 1294, 97 FEP 257 (10th Cir. 2006) – Summary judgment in favor of employer with English-only policy reversed – reasonable jury could find that the policy had both a disparate impact and constituted disparate treatment – reasonable jury could find that the policy created a hostile environment for Hispanic employees.

Storey v. Burns Int’l Sec. Servs., 390 F.3d 760, 94 FEP 1601 (3d Cir. 2004) – Plaintiff discharged for insisting on displaying Confederate flag – he alleged national origin and religious discrimination – he identified himself as a “Confederate Southern-American” – plaintiff’s religion claim based on assertion that Confederate flag incorporates the Cross of St. Andrew, a religious symbol – since plaintiff would not have been terminated had he removed the Confederate flag symbol, he chose to be terminated and therefore has not suffered an adverse employment action – concurring judge found that discharge was adverse but that it was not religious or national origin discrimination.

Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 91 FEP 785 (9th Cir.), as amended, 91 FEP 1760 (9th Cir. 2003) – Summary judgment against teacher reversed – comments of decisionmaker about her accent is evidence of discrimination even though other favorable comments about her made - all that is required is a prima facie case and disbelieving the employer – employer’s explanation of relative qualifications could be rejected since plaintiff has presented evidence she was substantially more qualified – “We have never followed the Fifth Circuit in holding that the disparity in candidates’ qualifications must be so apparent as to jump off the page and slap us in the face to support a finding of pretext.” (Id. at
1194) – adverse employment decision can be predicated upon a teacher’s accent only if it interferes with job performance – opinion by Betty Fletcher.

*Kang v. U. Lim Am., Inc.,* 296 F.3d 810, 89 FEP 566 (9th Cir. 2002) – Korean plaintiff alleged that his Korean supervisor harassed him and expected more work from him than was expected from Mexican co-workers because Korean supervisor believed “Korean workers were superior to Mexicans and Americans” – case is unique because most national origin cases involve negative stereotypes – “The form is unusual, but such stereotyping is an evil at which the statute is aimed.” (Id. at 817)

**Native Americans** (Ch. 12)

*EEOC v. Karuk Tribe Hous. Auth.,* 260 F.3d 1071, 86 FEP 705 (9th Cir. 2001) - ADEA does not apply to Indian tribes - EEOC subpoena quashed - issue analyzed at 167 LRR 457.

**Sex** (Ch. 13)

*Reeves v. Swift Transportation Co., Inc.,* 446 F.3d 637, 98 FEP 97 (6th Cir. 2006) – No violation in denying light-duty work to pregnant trucker – light-duty work reserved for those injured on the job – Pregnancy Discrimination Act does not impose affirmative obligation of special treatment – it merely requires employer’s policies to be pregnancy neutral.

*Tenge v. Phillips Modern Ag Co.,* 446 F.3d 903, 97 FEP 1667 (8th Cir. 2006) – Female employee engaged in sexual behavior with male owner – wife of owner found torn note of a sexual and intimate nature from female employee to owner in the company dumpster and pieced it together – wife of owner terminated plaintiff – owner reinstated plaintiff – shortly thereafter owner terminated plaintiff, stating that his wife was “making me choose between my best employee or her” (Id. at 906) – plaintiff was not terminated because she was a woman – she alleged that “arousing the jealousy of the boss’s wife is an illegal criterion for discharge” (Id. at 907) – but here the plaintiff admitted engaging in sexually suggestive behavior so we are not dealing with someone who was terminated simply because the supervisor’s spouse perceives the employee to be a threat – when an employee is favored because of consensual sexual activity with the boss, assuming it is not widespread, Title VII is not implicated – the converse should also be true – other courts have concluded that terminating an employee because she engages in consensual sexual conduct with the boss does not violate Title VII – “The ultimate basis for . . . dismissal was not her sex, it was [the owner’s] desire to allay his wife’s concern over [her] admitted sexual behavior with him.” (Id. at 910)
Jespersen v. Harrah’s Operating Co., Inc., 444 F.3d 1104, 97 FEP 1473 (9th Cir. 2006) (en banc) – Grooming standards that imposed generally comparable requirements on men and women but required women to wear facial makeup and prohibited men from wearing facial makeup upheld 7-4 - reasonable grooming standards that differentiate between the sexes will be upheld absent evidence that the grooming policy imposed unequal burdens – the policy here contains “requirements that, on their face, are not more onerous for one gender than the other,” (Id. at 1109) – “While [the] individual requirements differ according to gender, none on its face places a greater burden on one gender than the other. Grooming standards that appropriately differentiate between the genders are not facially discriminatory.” (Id. at 1109-109) – dissent contended that despite no affidavits in the record establishing differential burdens, judicial notice should be taken – majority refused to do so – with respect to sex stereotyping, majority refused to apply PriceWaterhouse to grooming standards – unlike PriceWaterhouse, the “policy does not single out Jespersen” (Id. at 1111) – majority indicated dissent improperly divides an overall grooming policy that contains numerous elements “into separate categories of hair, hands and face, and then focuses exclusively on the makeup requirement.” (Id. at 1112) – “This parsing . . . conflicts with established grooming standards analysis” (Id.) – the law does not preclude a claim of sex stereotyping on the basis of appearance codes – this record is devoid of any evidence of a stereotypical motivation – it “is essentially a challenge to one small part of what is an overall apparel, appearance and grooming policy that applies largely the same requirements to both men and women . . . . [T]he touch-stone is reasonableness.” (Id. at 1113)

Quick v. Wal-Mart Stores, Inc., 441 F.3d 606, 97 FEP 1227 (8th Cir. 2006) – Summary judgment affirmed in case where manager was discharged the day she returned from maternity leave – decision 2-1 – temporal proximity insufficient to establish causal relationship to pregnancy leave – employer learned she had committed misconduct while she was off on maternity leave.

Hulteen v. AT&T Corp., 441 F.3d 653, 97 FEP 1025 (9th Cir. 2006) – Prior to 1979, when the Pregnancy Discrimination Act (PDA) became effective, the employer did not provide full credit for leaves of absence caused by pregnancy with respect to retirement plans, although it did provide full credit for leaves of absence caused by other disabilities – many years later, when plaintiffs retired, they claimed discrimination because, in calculating retirement benefits, the full duration of their pregnancy leaves was not counted – plaintiffs contended that this calculation constituted a present act of discrimination – PDA is not retroactive – what the employer did was lawful at the time – to conclude that making a calculation based on conduct that was lawful at the time is presently unlawful would be to give retroactive effect to the statute – decision was 2-1 – dissent argued that the decision to deny benefits was post-PDA and thus to rule for plaintiffs would not be to apply the PDA retroactively.
Johnson v. Univ. of Iowa, 431 F.3d 325, 97 FEP 109 (8th Cir. 2005) – Biological mothers but not biological fathers allowed to use six weeks of accrued paid sick leave after birth – adoptive parents of both sexes but not biological fathers allowed to use one week of sick leave – no violation of Title VII or Equal Protection Clause – not unreasonable to establish six-week period of presumptive disability during which no proof of disability is required – enables employer to avoid burden of reviewing medical records for each and every employee who gives birth – allowing adoptive parents but not biological fathers to use one week of accrued paid sick leave is reasonable in light of adoption-related administrative concerns.

Barnes v. Cincinnati, 401 F.3d 729, 95 FEP 994 (6th Cir.), cert. denied, 126 S. Ct. 624 (2005) – Sexual stereotyping verdict upheld – trans-gendered Cincinnati police officer found to be demoted from sergeant’s training program for not conforming to male stereotypes – Title VII contains a cause of action for failure to conform to the stereotypes applicable to one’s sex.

Kratzer v. Rockwell Collins, 398 F.3d 1040, 95 FEP 549 (8th Cir. 2005) – Sex discrimination claim dismissed – female machinist failed to meet minimum physical strength requirements for job – allegation that employer failed to accommodate her physical injury is not relevant to a sex discrimination claim.

Preston v. Wis. Health Fund, 397 F.3d 539, 95 FEP 234 (7th Cir. 2005) – Male replaced by female because she was the paramour of the CEO does not have a claim of sex discrimination – summary judgment affirmed – such favoritism was not based on a belief that women are better workers than men – the disadvantaged competitor could have been a man or a woman.

O’Neal v. City of Chicago, 392 F.3d 909, 94 FEP 1821 (7th Cir. 2004) – No adverse employment action when female sergeant, allegedly because of who she was dating, was transferred from narcotics unit to district – no proof this impeded promotion opportunities.

Everson v. Mich. Dep’t of Corr., 391 F.3d 737, 94 FEP 1542 (6th Cir. 2004), cert. denied, 126 S. Ct. 364 (2005) – Sex is BFOQ for working in women’s prison – district court reversed – district court had relied on the fact that nationally men are employed in women’s prisons – this was error – must examine particular circumstances of the individual employer – prison administrators must be afforded great flexibility to ensure safety and security.

Groves v. Cost Planning & Mgmt Int’l, Inc., 372 F.3d 1008, 93 FEP 1769 (8th Cir. 2004) – Summary judgment despite fact that selection for layoff immediately followed disclosure of pregnancy – temporal proximity insufficient to raise issue of fact since employer’s justification not shown to be unworthy of credence – employer’s justification was that it discharged the least valuable employee in each department after considering factors such as productivity, project load, flexibility and seniority.
Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 93 FEP 1430 (2d Cir. 2004) – Sexual stereotyping actionable under § 1983 – factual issue exists as to whether female school psychologist with young children was denied tenure because of perception that women with young children could not devote adequate hours to the job – contention that stereotype was “gender plus parenthood” does not in any way mean it is not actionable as sex discrimination.

Steinhauer v. DeGolier, 359 F.3d 481, 93 FEP 429 (7th Cir. 2004) – Summary judgment affirmed on allegations of short-term male employee that female executive director terminated him because of his sex – numerous comments by decisionmakers which were anti-male have insufficient nexus to discharge decision – executive director hired him six months before she discharged him and he was replaced by a male – statement that executive director intended to alter the “male power structure” has no relevance to plaintiff’s low-level position – jokes in newsletter making fun of men included: “The surest way to make a monkey out of a man is to quote him.” (Id. at 487) – this merely portrays “common humor that could be expressed in almost any setting” (Id.) and other newsletters made “fun of lawyers, doctors and police officers” (Id.) – the man who replaced plaintiff was a supporter of the female executive director – “What was motivating [the female decisionmakers] was not sex, but on which side of the power struggle various employees fell. Those on [the decisionmakers’] side fared well; those – both men and women – sticking to their former ways and battling the new management had problems. . . .” (Id. at 488) – no reasonable jury could find sex discrimination.

Cullen v. Ind. Univ. Bd. of Trs., 338 F.3d 693, 92 FEP 513 (7th Cir. 2003) – No pay violation despite fact that male was paid almost 50% more than female – both were respiratory therapy professors – internal pay equity study found a statistically significant gap between the salaries of male and female faculty members and concluded that discrimination could not be ruled out – female plaintiff was defined in the study as a “outlier,” which meant she was more than one standard deviation below her projected salary – nevertheless summary judgment affirmed based on conclusion that male had substantially more responsibilities – program supervised by the male generated much more revenue – moreover, the program was on probation from the certifying authority and extra pay was necessary to induce someone of ability to take over a floundering program – pay equity study was insufficient to establish gender discrimination.

Venturelli v. ARC Cmty. Servs., Inc., 350 F.3d 592 (7th Cir. 2003 – Pregnant temporary employee hired through temporary agency was told she would be offered permanent employment if she in fact wanted to return to work after the birth of her baby – failure to hire her permanently prior to her maternity leave is not pregnancy discrimination.

Saks v. Franklin Covey Co., 316 F.3d 337, 90 FEP 1266 (2d Cir. 2003) – Exclusion of surgical impregnation procedures from health plan does not violate pregnancy discrimination amendment to Title VII – even though the procedure is performed only on women,
Infertility is a condition that affects both men and women, so the exclusion is gender-neutral – issue analyzed at 171 LRR 295.

_Lautermilch v. Findlay City Schs._, 314 F.3d 271, 90 FEP 1028 (6th Cir. 2003) - Substitute teacher in tutoring a female student at his home told inappropriate jokes, commented on the size of a female teacher’s breasts, and made the statement that “[l]ips who touch alcohol may not touch mine, but it does not rule out any other part of my body” (Id. at 273) – when the principal explained why he was not going to be utilized further, she among other things said he was “too macho” – this is not direct evidence or any evidence that the decision not to use him further was based on his sex – the comment was critical of his behavior not his sex.

_Prebulich-Holland v. Gaylord Entm’t Co._, 297 F.3d 438, 89 FEP 662 (6th Cir. 2002) – Pregnancy discrimination cannot be found without adequate proof that decisionmaker knew of pregnancy – employee discharged two days after telling supervisor she was pregnant admitted she had no idea when the decision was made – unrebutted testimony that decision was made four days before supervisor learned of pregnancy determinative.

_Stout v. Baxter Healthcare Corp._, 282 F.3d 856, 88 FEP 282 (5th Cir. 2002) – Discharge of pregnant employee who missed three days of work after suffering a miscarriage did not violate Title VII – no disparate impact shown in applying standard policy of terminating probationary employees who miss three days of work.

_Clay v. Holy Cross Hosp._, 253 F.3d 1000, 87 FEP 387 (7th Cir. 2001) - Summary judgment affirmed in RIF case - plaintiff alleged she was chosen because she was pregnant - makes no difference on pretext if employer lied about fact other than reason for choosing plaintiff for RIF - plaintiff’s “burden is to squarely rebut the articulated reason for her discharge” (Id. at 1007) [internal quotations omitted] - “[S]he must present facts to rebut each and every legitimate, non-discriminatory reason advanced by the [employer] in order to survive summary judgment.” (Id.) - it is enough if the employer’s decisionmaker honestly believed that plaintiff did not compare favorably to those retained.

_Grube v. Lan Indus., Inc._, 257 F.3d 723, 86 FEP 374 (7th Cir. 2001) - Female claimed that transfer to evening shift “preyed upon her wifely instincts” and forced her to quit knowing that she would choose to take care of her husband in the evening rather than work – employee’s position is based on stereotype that women should be family caregivers - it cannot be the law that every transfer of a married female employee to a less desirable shift leads to an actionable constructive discharge claim.

_Irizarry v. Bd. of Educ._, 251 F.3d 604, 85 FEP 1169 (7th Cir. 2001) - Employer that provides health benefits to domestic partners of homosexual employees need not provide those benefits to domestic partners of heterosexual employees – plaintiff’s contention that limiting benefit to same-sex partners violates equal protection and due process rights rejected.
Sexual Orientation (Ch. 14)

Vickers v. Fairfield Medical Center, 453 F.3d 757, 98 FEP 673 (6th Cir. 2006) – No Title VII protection for individual taunted and harassed because co-workers perceived he was gay – the perceptions that he was gay were based on away-from-the-job conduct – he therefore was not discriminated against because he did not conform to traditional gender stereotypes at work.

Medina v. Income Support Div., State of N.M., 413 F.3d 1131, 95 FEP 1765 (10th Cir. 2005) – Heterosexual employee alleged she was discriminated against because her supervisor and most other women in the agency were lesbians and she failed to conform to the stereotypical woman in her agency – she was thus alleging discrimination because she is heterosexual – this is a sexual orientation claim, and Title VII does not afford a cause of action for discrimination on the basis of sexual orientation.

Dawson v. Bumble & Bumble, 398 F.3d 211, 95 FEP 365 (2d Cir. 2005) – Openly lesbian female fired by avant garde hairstylist company claimed protection under the sexual stereotyping theory – Bumble & Bumble regularly employs sexually non-stereotypical individuals, including female to male transsexual, openly bisexual individual, numerous openly gay employees, and lesbian employees with “very androgynous looks” – Second Circuit rejected sexual stereotyping theory to the extent it is simply a bootstrap to insert protection for sexual orientation into Title VII – plaintiff here does not contend a failure to conform to gender stereotypes through behavior – plaintiff did contend that she did not conform to traditional expectations of the way a woman should look – but there is no substantial evidence that plaintiff was subjected to any adverse employment action as a result of her appearance – thus, there is no substantial evidence that plaintiff’s appearance was the cause of her adverse employment action.

Smith v. City of Salem, 378 F.3d 566, 94 FEP 273 (6th Cir. 2004) – Transsexual fire department lieutenant claimed that he was discriminated against because of his failure to conform to sex stereotypes – he alleged he had female mannerisms and appearance – this sufficiently pleaded claims for sex stereotyping under Price Waterhouse v. Hopkins – “because of sex” encompasses both biological differences and failure to conform to stereotypical norms (gender discrimination) – older cases denying relief to transsexuals no longer valid after Price Waterhouse - discrimination against men who act in a feminine manner is because of sex because the discrimination would not have occurred but for the victim’s sex.

Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 92 FEP 89 (7th Cir. 2003) – Being perceived to be gay is not the same as sexual harassment – harassment could be linked to perception that plaintiff was gay and co-worker concern that he was not pulling his weight – thinking someone is gay is not enough to prove the co-workers believed he did not fit the sexual stereotype of a male – fact that he was called a “girl scout” diminished by the fact that the co-worker called other men “girl scout” – in concurrence Judge Posner wrote:
The case law has gone off the tracks in the matter of “sex stereotyping” and that if it got back on, this case could be decided on a simpler and more intuitive ground . . . . The case law as it has evolved holds . . . that although Title VII does not protect homosexuals from discrimination on the basis of their sexual orientation, it protects heterosexuals who are victims of “sex stereotyping” or “gender stereotyping.” . . . . The origin of this curious distinction . . . is the Supreme Court’s decision in Price Waterhouse v. Hopkins . . . . Part of the evidence that the plaintiff in that case had been denied promotion because she was a woman was that her male superiors hadn’t liked her failure to conform to their expectation regarding feminine dress and deportment . . . . But there is a difference that subsequent cases have ignored between, on the one hand, using evidence of the plaintiff’s failure to wear nail polish (or, if the plaintiff is a man, his using nail polish) to show that sex played a role in the adverse employment action . . . and, on the other hand, creating a subtype of sexual discrimination called ‘sex stereotyping’ as if there were a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels, or for female ditch diggers to strip to the waist in hot weather. If a court of appeals requires lawyers presenting oral argument to wear conservative business dress, should a male lawyer have a legal right to argue in drag provided that the court does not believe he is a homosexual, against whom it is free to discrimination? That seems to me a very strange extension of the Hopkins case. . . . If an employer refuses to hire unfeminine women, its refusal bears more heavily on women than men, and is therefore discriminatory. That was the Hopkins case. But if . . . an employer whom no woman wants to work for (at least in the plaintiff’s job classification) discriminates against effeminate men, there is no discrimination against men, just against a subclass of men. They are discriminated against not because they are men, but because they are effeminate. If this analysis is rejected, the absurd conclusion follows that the law protects effeminate men but only if they are (or believed to be) heterosexuals. To impute such a distinction to the authors of Title VII is to indulge in a most extravagant legal fiction . . . . Hostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter, especially the former . . . . To suppose courts capable of disentangling the motives for disliking the non-stereotypical man or woman is a fantasy. . . . “Sex stereotyping” should not be regarded as a form of sex discrimination, though it will sometimes, as in the Hopkins case, be evidence of sex discrimination. [In an all-male work force] the
“discrimination” that results from such stereotyping is discrimination among members of the same sex. (332 F.3d at 1066-68)

Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 89 FEP 1569 (9th Cir. 2002) (en banc) – Ninth Circuit by 7-4 vote overturned summary judgment against gay employee who admitted at his deposition that the male-on-male harassment was because of his sexual orientation – five of 11 Justices would hold that male-on-male harassment of a sexual nature is actionable even when motivated by sexual orientation bias as opposed to “because of sex” – the five Justices said that sexual orientation is simply irrelevant as long as the offensive conduct has a sexual component – the remainder of the seven-judge majority did not accept the “motivated by sexual orientation” concept, but based their concurrence on viewing the case as one of actionable gender stereotyping – the gay employee did not conform to the stereotypical view of a male – one judge who concurred in the plurality opinion did so only because the Supreme Court in Oncale ordered a trial, but suggested she would rule for the employer on the merits - the four-judge dissent stated that harassment must be “because of sex” and that sex refers to gender – there simply is no protection where the basis is sexual orientation – the dissent further noted that the Supreme Court in Oncale gave three examples of ways in which a same-sex sexual harassment case could be proven – motivated by sexual desire, motivated by general hostility to the presence of individuals of that gender in the workplace, and direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace – according to the dissent, none of these factors are present – issue is discussed in BNA Analysis at 170 LRR 479, which contends that while Oncale indicated that there was not an absolute bar to same-sex harassment, Oncale “offered only limited suggestions as to what might be within that coverage.”

Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 88 FEP 500 (7th Cir. 2002) – Gay teacher objected to verbal and physical assaults, which were anonymous – school district’s response was less than 100% effective – nevertheless, summary judgment affirmed on assertion that inadequate response violated Equal Protection Clause – teacher argued that school district was much more vigorous in reacting to anonymous racial harassment – it is not irrational for school administrators to devote more time and effort to defusing racial tensions among many students than to preventing harassment of one gay teacher.

S.D. Myers, Inc. v. City & County of San Francisco, 253 F.3d 461, 85 FEP 1802 (9th Cir. 2001) - San Francisco ordinance requires contractors doing business with City to provide same benefits to employees with domestic partners as to employees with spouses - ordinance subject to interpretation that its coverage is limited to employees who have direct contact with the City on the City contract - therefore assertion that it applies to employees nationwide with no relationship to the contract and is invalid under the Commerce Clause rejected - panel included Judges Wallace and Fisher.
Equal Pay (Ch. 15)

_Wernsing v. Department of Human Services_, 427 F.3d 466, 96 FEP 1153 (7th Cir. 2005) – Practice of setting salaries for new employees based on wages they earned in their prior employment that results in male employees earning substantially more than female employees does not violate the Equal Pay Act since prior wages are a factor other than sex – other circuits’ view that an employer must show an acceptable business reason for relying on the prior wages relies on the disparate impact theory of Title VII and is a variant of comparable worth – no evidence that former employers discriminated.

_Varner v. Ill. State Univ._, 226 F.3d 927, 83 FEP 1361 (7th Cir. 2000) - Despite _Kimel_, in which the Supreme Court held that states are immune from suit under the ADEA, states are not immune from liability under the Equal Pay Act - it will be rare that an equal pay violation would not also be a constitutional violation.

Age - Summary Judgment, Directed Verdict, JNOV, and Reversals of Jury Verdicts (Ch. 16)

_Luks v. Baxter Healthcare Corp._, 467 F.3d 1049, 99 FEP 166 (7th Cir. 2006) – Summary judgment affirmed in discharge case – second-level superior had remarked that he wanted to get rid of the “good old boys” and bring an end to the “good old boys club” – also indicated he was looking for “higher energy” employees – he referred to older employees as “old timers” and introduced plaintiff as “the old guy in the department” – these comments are insufficient to show age animus, but in any event the decision to let plaintiff go was made by the first-level supervisor, not her superior – while her superior supported the decisionmaker, there is no evidence that he directed or urged her to terminate plaintiff – “[T]here is no evidence that [the decisionmaker] was a party to [a plan to terminate plaintiff regardless of performance] and concocted false criticisms . . . in an effort to carry the plan out.”  (_Id._ at 1057)

_Lewis v. St. Cloud State University_, 467 F.3d 1133, 99 FEP 113 (8th Cir. 2006) – Summary judgment affirmed despite inquiry into retirement plans and supervisor’s suggestion that employee start retirement planning – positive performance reviews came from prior supervisor, and some of incidents occurred after last evaluation.

_Wittenburg v. American Express Financial Advisors_, 464 F.3d 831, 98 FEP 1697 (8th Cir. 2006) – RIF summary judgment affirmed – several protected-age employees survived the RIF, including one who was the same age as plaintiff – younger analysts were let go – reliance on fact that largest disparity between plaintiff and retained younger individuals who took over her work was six years - age-related comments allegedly made unpersuasive – comment during prior RIF that employer wanted to retain younger people was non-contemporaneous and made by a non-decisionmaker.
Bender v. Hecht’s Department Stores, 455 F.3d 612, 98 FEP 1648 (6th Cir. 2006) – RIF – plaintiffs were older than each of the persons retained in Nashville area – must look at broader sample, the sample for which the decisionmaker was responsible – average age in broader sample was 41.7 – average age of those whose positions were eliminated was 43.4 – of eight positions eliminated, three were held by persons under the age of 40 – difference in average ages is not significant – summary judgment affirmed.

Pippin v. Burlington Resources Oil and Gas Co., 440 F.3d 1186, 97 FEP 745 (10th Cir. 2006) – Summary judgment affirmed in RIF case alleging both disparate treatment and adverse impact – with respect to disparate treatment, no reasonable jury could conclude that Pippin’s selection for layoff was based on age discrimination – with respect to adverse impact, Smith v. City of Jackson controls – the criteria the employer used for the RIF in this case constitute reasonable factors other than age – this is very different from business necessity – “[T]o prevail on an ADEA disparate impact claim, an employee must ultimately persuade the factfinder that the employer’s asserted basis for the neutral policy is unreasonable.” (Id. at 1200) (emphasis in original) – plaintiff contended that basing the RIF on prior job performance and also honoring prior commitments to hire several new employees fresh out of school were unreasonable – “[A]s a matter of law, these were not unreasonable policies. Certainly, relying on prior performance ratings and the determination of which employees had the skills most useful to the company going forward are reasonable criteria . . . .” (Id. at 1201) – honoring prior commitments to new hires in order to protect the company’s hiring reputation at the schools involved is also reasonable – “Corporate restructuring, performance-based evaluations, retention decisions based on needed skills, and recruiting concerns are all reasonable business considerations.” (Id.)

Warch v. Ohio Casualty Insurance Co., 435 F.3d 510, 97 FEP 563 (4th Cir. 2006), cert.denied, 127 S. Ct. 53 (2006) – Summary judgment affirmed – in light of long history of warnings reasonable jury could not determine that discharge was meeting employer’s legitimate expectations – proper for district court to view this issue as part of a prima facie case – employee’s contention that prima facie case required only showing of minimum qualifications rejected – plaintiff’s position would relegate prima facie case to mere burden of production – mixed-motive instruction properly denied since evidence insufficient to allow reasonable jury to find that age was a motivating factor.

Bagir v. Principi, 434 F.3d 733, 97 FEP 473 (4th Cir. 2006), cert. denied, 127 S. Ct. 659 (2006) – Decisionmaker told plaintiff’s wife that “age [was] the major and only factor” (Id. at 739) for her husband’s discharge and that his job, interventional cardiology, was “meant for people in their 30s” (Id. at 740) – for purposes of summary judgment court accepted as true age-based animus by the decisionmakers – summary judgment nevertheless affirmed under mixed-motive theory – 1991 amendments did not affect the Age Act, so Price Waterhouse is still good law – employer has established that it would have terminated plaintiff absent any age-based animus.

Glanzman v. Metro. Mgmt. Corp., 391 F.3d 506, 94 FEP 1680 (3d Cir. 2004) – Summary judgment affirmed despite ageist statements – since the Civil Rights Act of 1991 does not apply to the ADEA, Price Waterhouse continues to govern ADEA mixed-motive cases – under Price Waterhouse, employer must establish that there is no doubt that a rational jury would find that it would have fired the plaintiff even if it had not been for the discriminatory statements – that burden is met because of multiple instances of misconduct on the part of the plaintiff.

Mitchell v. Vanderbilt Univ., 389 F.3d 177, 94 FEP 1290 (6th Cir. 2004) – Adverse employment action for purposes of discrimination laws not established by medical school professor based on the following: (1) deprivation of a graduate research assistant during one summer; (2) removal as a mentor in graduate program; (3) removal from position as medical director of pathology laboratory; and (4) imposing requirement that he submit for internal review research applications – none of this significantly reduced his responsibilities – “Mere inconvenience or an alteration of job responsibilities is not enough to constitute an adverse employment action.” (Id. at 182) – proposals to reduce pay never implemented – “Mere threats of alleged adverse employment action are generally not sufficient to satisfy the adverse action requirement.” (Id.) - non-selection for position of medical director of clinical laboratories similarly was not an adverse employment action – “Non-selection for a position of employment is not always an adverse employment action. In cases where the sought position is a lateral transfer, without additional material benefits or prestige, it would be improper to conclude that a denial of such a transfer would be a materially adverse action.” (Id. at 183) – the position would have involved some different duties but nothing indicates it would be a promotion – plaintiff’s subjective belief about desirability of the position insufficient.

Rowan v. Lockheed-Martin Energy Sys., Inc., 360 F.3d 544, 93 FEP 545 (6th Cir. 2004) – Summary judgment in layoff case affirmed – Congress ordered the Department of Energy to conduct an inquiry into whether the nuclear work force that possessed critical skills was aging too rapidly and too many would soon retire – the plaintiffs were not in the critical skills category – plaintiffs point to several statements allegedly made by management about the general need to lower the average age of the work force – when understood in context these statements could not lead a reasonable jury to find age-based discrimination – a concern about impending retirements of nuclear scientists and skilled workers is not the same as a bias against age – “[T]his court has recognized that the ADEA was not intended to prevent an employer from achieving a reasonable age balance.” (Id. at 548 (citation omitted)) – Congress recognized that at times an industry may be faced with the problem of an aging work force and such situations have to be dealt with on a case-by-case basis – we must ignore statements made by supervisors not involved in selecting the plaintiffs for...
layoff – the fact that their immediate supervisor called plaintiffs “old farts” is not direct evidence since the statements were not made in relation to the termination decision, and the immediate supervisor was not the decisionmaker.

Mernish v. Walker, 359 F.3d 330, 93 FEP 608 (4th Cir. 2004) – Summary judgment in layoff case affirmed – many scientists older than the oldest laid-off scientist were retained.

Grosjean v. First Energy Corp., 349 F.3d 332, 92 FEP 1583 (6th Cir. 2003) – Summary judgment affirmed since plaintiff “was not replaced by a person significantly younger than himself” (Id. at 334) – plaintiff was 54, and his two replacements were 48 and 51 – three and six years younger – age difference of six years or less in the absence of direct evidence is insufficient to establish a prima facie case – “Age differences of 10 or more years have generally been held to be sufficiently substantial” (Id. at 336) to meet the requirement of the prima facie case that the individual be replaced by someone “significantly younger” ([92 FEP at 1585]) – “The overwhelming body of cases in most circuits has held that age differences of less than 10 years are not significant enough to make out the fourth part of the age discrimination prima facie case. (extensive citation of authorities omitted).” (Id. at 338-39) - “The Ninth Circuit has not settled on a standard for substantial age difference and its case law is accordingly inconsistent.” (Id.) – “As [plaintiff] was not more than six years older than [his replacements] and he presents no direct evidence that [the employer] considered age to be significant, his federal age discrimination claim fails.” (Id. at 340)

McKay v. U.S. Dep’t of Transp., 340 F.3d 695, 92 FEP 905 (8th Cir. 2003) – Summary judgment affirmed against older candidate for interline safety position whose objective qualifications were superb, including 40 years as a commercial airline pilot – although “by many relevant criteria he was the best qualified,” (Id. at 700) the decisionmakers “presented unrefuted evidence that they rated other criteria more highly” (Id.) – the successful candidate was selected “because of her superior communication skills evidenced in an interview process” (Id.) – since there is no evidence that the explanation was pretextual summary judgment was affirmed.

Pottenger v. Potlatch Corp., 329 F.3d 740, 91 FEP 1530 (9th Cir. 2003) – Before Reinhardt, Fletcher and Gould – summary judgment affirmed under both disparate treatment and disparate impact theory – longtime executive let go because division losing money and CEO did not have confidence he could turn it around – lack of confidence that executive could turn around money-losing division is legitimate, nondiscriminatory reason – comments like “old management team,” “old business model,” and “deadwood” insufficient to create reasonable inference of discrimination – in past cases we have found the following comments insufficient: getting rid of “oldtimers” because they would not “kiss his ass” – “We don’t necessarily like gray hair.” – “old boy network” – and description of preferred younger employee as “bright, intelligent, knowledgeable young man” insufficient – “deadwood” does not have an age connotation – on adverse impact, plaintiff’s statistics take into account only two variables: age and whether terminated – “This court and others have treated skeptically statistics that fail to account for other
relevant variables.” (Id. at 748) – there was no consideration of job performance in plaintiff’s statistics – “[W]e conclude that Pottenger’s statistical analysis is insufficient to raise a triable issue of fact regarding pretext.” (Id.) – it is not surprising that the company would want to change leadership of a money-losing division – with respect to disparate impact, plaintiff was not terminated as part of the RIF – his termination preceded it – he was a high-level executive while the RIF targeted rank-and-file employees.

*Vesprini v. Shaw Contract Flooring Servs., Inc.*, 315 F.3d 37, 90 FEP 1038 (1st Cir. 2002) – Summary judgment affirmed – statement to 71-year-old plaintiff, who had sold his business to the defendant employer, that he was not going to be with the employer much longer and the time had come to “step back and let the young stallions run the [day-to-day] business” (Id. at 39) and that he should mentor the next generation of executives is not direct evidence of discrimination warranting a mixed-motive approach or any evidence of age bias.

*Calder v. TCI Cablevision of Mo., Inc.*, 298 F.3d 723, 89 FEP 910 (8th Cir. 2002) – Summary judgment affirmed – positive reviews under prior management not probative of performance under new management – referring to older woman as “grandma” is a stray remark even though remark was patronizing at best but was not said within a year of termination – no factual issue created even though some of the mistakes that management relied upon to justify discharge were not fault of plaintiff – memorandum between managers setting forth agreement to “document heavily” plaintiff’s errors does not raise factual issue of pretext – 17-month gap between her attorney’s letter claiming discrimination and discharge does not raise inference of retaliation.

*Lesch v. Crown Cork & Seal Co.*, 282 F.3d 467, 88 FEP 381 (7th Cir. 2002) – Employer’s explanation that it did not consider protected-age controller who was terminated after his division was eliminated for an entry-level junior accountant position because he was overqualified is not pretextual – it is legitimate for an employer to deem someone overqualified for a position – summary judgment affirmed.

*Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 87 FEP 1074 (6th Cir. 2001) - Plaintiff, employed in computer operations, discharged for increasingly poor work - summary judgment affirmed despite contention that younger employees who also committed performance errors were retained - no showing they were comparably situated - plaintiff’s disagreement with employer’s honest business judgment regarding his work does not create sufficient evidence of pretext.

*Bennington v. Caterpillar Inc.*, 275 F.3d 654, 87 FEP 1050 (7th Cir. 2001) - Five-year difference in age between preferred employee and plaintiff insufficient to establish prima facie case without other evidence - summary judgment affirmed.

*Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 85 FEP 1025 (2d Cir. 2001) - Summary judgment affirmed in discharge case despite statements by Chairman that he intended to
make the employer’s image younger and bragging that he had reduced average employee age to 39 - statement is relevant and admissible even though it was not shown that Chairman was personally involved in employment decisions, but reasonable jury could not have found discriminatory motive in light of employer’s evidence of dissatisfaction with employee’s performance and failure to bring in new business despite being warned that job depended upon doing so - furthermore, plaintiff had been promoted at age of 49 pursuant to Chairman’s new policy. [Retaliation portion of case briefed in Chapter 17.]

**Age - General Issues** (Ch. 16)

*Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 93 FEP 257 (2004) – ADEA does not prohibit favoring “the old over the young” – collective bargaining agreement provided better benefits for those over the age of 50 – age was not included in Title VII because Congress recognized that there were legitimate reasons for making employment decisions based on age and directed a study by the Secretary of Labor – Congressional hearing testimony “dwelled on unjustified assumptions about the effect of age on ability to work” – nothing in the voluminous records of the hearings suggested any problem of favoring older workers – *Hazen Paper Co. v. Biggins* recognized that the essence of age discrimination was an assumption “that productivity and competence decline with old age” (*Id.* at 592) (citation omitted) – the ADEA is “a remedy for unfair preference based on relative youth” (*Id.* at 593) – the overwhelming consensus of the lower courts is to the same effect – plaintiffs rely on the EEOC’s interpretation of the statute – “[D]eference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent” (*Id.* at 600) – here the congressional intent is clear and contrary to the EEOC’s construction – “[T]he statute does not mean to stop an employer from favoring an older employee over a younger one” (*Id.*) – 6-3 decision (Scalia, Thomas and Kennedy, dissenting).

*Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 FEP 970 (2000) - ADEA cannot be applied to the states under the enforcement section of the Fourteenth Amendment - age is not a suspect classification under the Equal Protection Clause - unlike race or gender, age cannot be characterized as seldom relevant to the achievement of any legitimate state interest - the ADEA sweep is disproportionate to any unconstitutional conduct and unsupported by adequate congressional findings of unconstitutional age discrimination by the states - it therefore exceeds Congress’s enforcement authority to apply it to the states - while Congress can under the Fourteenth Amendment enact “appropriate legislation” to “enforce” the Amendment, that is limited to constitutional rights - there must be “congruence and proportionality” between the legislation and the constitutional rights at issue - while Congress intended to apply the ADEA to the states, it does not satisfy the “congruence and proportionality” test - age classifications are not suspect and are frequently legitimate - old age does not define a discrete and insular minority - states may therefore discriminate on the basis of age without offending the Fourteenth Amendment if there is a rational relationship to a legitimate state interest - a state may rely on age as a
proxy for other qualities, including ability - the ADEA is out of proportion with these realities - *Hazen Paper* for private employers means employers cannot rely on age as a proxy for an employee’s characteristics but must focus on the characteristic directly - but states can rely on age as a proxy for other characteristics - the legislative history reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating - the dissent argued that Congress’s power to authorize federal remedies against state agencies is coextensive with its power to impose those obligations in the first place, and that the Eleventh Amendment cannot properly be read as a basis for creating a doctrine of state sovereign immunity - open question whether decision forestalls ADEA lawsuits against government employers such as cities and counties - decision may have significance to issue of whether disparate impact analysis under Title VII can be applied to the states - case analyzed at 163 LRR 72.

*Smith v. City of Jackson, Miss.*, 544 U.S. 228, 95 FEP 641 (2005) – The Supreme Court held 5-3 that disparate impact claims may be asserted under the ADEA, but that such claims are substantially limited by (1) the “reasonable factors other than age” (*Id.* defense and (2) the *Wards Cove* Supreme Court decision, which was modified by the Civil Rights Act of 1991, but not modified as to the ADEA – *Wards Cove* remains fully applicable, requiring that the plaintiff identify a specific test, requirement or practice that has an adverse impact – at issue was the City’s decision for competitive reasons to give more raises to employees with less seniority, which had an adverse impact based on age – the Court held that meeting the competition was on its face a reasonable factor other than age, and thus ruled for the employer – “It is . . . in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was ‘reasonable.’” (*Id.* at 239) – “Congress’ decision to limit the coverage of the ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications . . ., not uncommonly has relevance to an individual’s capacity to engage in certain types of employment.” (*Id.* at 229) – “[I]t is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers.” (*Id.* at 241) – in the case at bar almost two-thirds of the officers under 40 received raises of more than 10 percent while only 45 percent of those over 40 received such raises.

*Kellogg Co. v. Sabhlok*, 471 F.3d 629, 99 FEP 741 (6th Cir. 2006) – Executive signed severance agreement when position was eliminated – subsequently sued for failure to rehire – subsequent action barred by severance agreement – he expressly agreed company was not obligated to offer him a future job.

*EEOC v. Jefferson Sheriff’s Department*, 467 F.3d 571, 99 FEP 180 (6th Cir. 2006) (en banc) – Plan that mandates that employees must become disabled before they reach the normal retirement age of 55 to be eligible for disability retirement benefits and pays employees who become disabled before age 55 lower benefits than it pays to even younger disabled employees is facially discriminatory and constitutes a prima facie case.
Mendelsohn v. Sprint/United Management Co., 466 F.3d 1223, 99 FEP 172 (10th Cir. 2006) – RIFed employee should have been allowed to present testimony from other protected-age employees who had been selected for the same RIF – does not matter that they did not have the same supervisor.

Meacham v. Knolls Atomic Power Lab, aka PL Inc., 461 F.3d 134 (2d Cir. 2006) – Prior to Smith v. City of Jackson Supreme Court decision, Second Circuit affirmed a judgment for 22 age-protected former employees who lost their jobs in a RIF, concluding that reliance on subjective assessments is not a “business necessity” – on remand, Smith makes it clear that “business necessity” is not the test, that unreasonableness is the test, and it was not unreasonable for the employer to use subjective criteria.

Cooper v. IBM Personal Pension Plan, 457 F.3d 636 (7th Cir. 2006) – IBM’s cash balance plan was age-neutral and did not violate ERISA’s age discrimination prohibition – while younger employees had more time to accrue interest under the plan, this did not mean that the plan discriminated against older workers – it simply recognized the time value of money. [Note: The Pension Protection Act passed in 2006 explicitly states that employers “who offer cash balance” pension plans or other plans that feature hypothetical accounts for individual workers do not violate the ADEA – this language is prospective only.]

Kruchowski v. Weyerhaeuser Co., 446 F.3d 1090 (10th Cir. 2006) – No longer holds that OWBPA requires the employer to inform the employees of the eligibility factors for the program – however, release still held invalid because it did not specify the correct decisional unit, which was only those salaried employees who reported to the mill manager.

Burksen v. McDonald’s Corp., 455 F.3d 1242, 98 FEP 778 (11th Cir. 2006) – ADEA waivers valid under OWBPA – contention that employees should have been provided with nationwide data on cutback rejected – data was provided for the decisional unit, and that is what is required – extending data provision requirements beyond the decisional unit would just obscure the data and make the patterns harder to detect – in nationwide cutback one group of managers decided which of 208 employees from three former regions would be retained in a new combined region, and they ended up discharging 66 of the 208 employees – that was the decisional unit about which statistics were provided.

Rowell v. BellSouth Corp., 433 F.3d 794, 97 FEP 131 (11th Cir. 2005) – Protected-age employee accepted offer of $91,500 in severance benefits to voluntarily early retire – if did not voluntarily retire and laid off would receive only $61,500 in benefits – no constructive discharge – does not matter that categories used for ranking employees for RIF different from categories from prior review or that RIF evaluation lower than previous evaluations – no certainty plaintiff would have been discharged.

Vines v. Univ. of La. at Monroe, 398 F.3d 700, 95 FEP 144 (5th Cir. 2005), cert. denied, 126 S. Ct. 1019 (2006) – EEOC sued on behalf of two terminated university professors under the ADEA, lost, and elected not to appeal – the two professors asserted the same age claims in a state suit under state law – the federal court found that there was privity, that the two former professors were barred from re-litigating the age claims, and enjoined continuation of the state proceedings.

Miller v. Eby Realty Group LLC, 396 F.3d 1105, 95 FEP 65 (10th Cir. 2005) – Employer did not preserve insufficient evidence challenge to willful finding – employer moved for judgment as a matter of law as to age discrimination at the close of the evidence, which preserved an insufficient evidence challenge to age discrimination, but did not separately move for judgment as a matter of law with respect to the willful claim.

Rachid v. Jack In The Box, Inc., 376 F.3d 305, 93 FEP 1761 (5th Cir. 2004) – Desert Palace v. Costa Supreme Court decision applies under ADEA also – plaintiff can recover under mixed-motive theory without direct evidence by showing that age was a motivating factor – does not matter that Title VII was specifically amended in 1991 to cover mixed motive and ADEA was not – direct evidence is not required under either statutory scheme – summary judgment for employer reversed and case remanded.

Stone v. First Union Corp., 371 F.3d 1305, 93 FEP 1550 (11th Cir. 2004) – ADEA opt-in class decertified – employees who had opted in may intervene in resulting individual action as a matter of right even though they did not individually file charges.

Minshall v. McGraw Hill Broad. Co., 323 F.3d 1273, 91 FEP 1095 (10th Cir. 2003) – Willfulness finding in age discrimination case based on fact that station, having discharged protected-age individual, instructed hiring official not to hire anyone “under the age of 40” – this demonstrates a knowledge that they had violated the ADEA in terminating the plaintiff.

Wexler v. White’s Fine Furniture, Inc., 317 F.3d 564, 90 FEP 1551 (6th Cir. 2003) (en banc) – Same-actor inference is not mandatory – CEO and controlling shareholder hired plaintiff when he was age 55, two years later promoted him to be a store manager, and two years after that demoted him back to his previous job – the claimant asserted that the CEO asked him about his age, told him he was getting older, and further cited evidence that the company’s executive vice president had made numerous references to the claimant’s age, including that he was a “bearded grumpy old man,” “Pops,” and “old man” – the replacement was younger – summary judgment by trial court and affirmance by three-judge panel overturned – the comments permitted an inference that an older manager cannot perform in a high-stress management position – same actor is not a mandatory inference – other appeals courts are divided on the amount of weight that should be given to the inference – while a fact finder can infer from “same actor” a lack of discrimination, the inference is insufficient to warrant summary judgment if the claimant has otherwise raised
a genuine issue of material fact – vote was 6-3 – “same actor” issue analyzed at 171 LRR 344.

EEOC v. N. Gibson Sch. Corp., 266 F.3d 607, 86 FEP 1275 (7th Cir. 2001) - EEOC may not seek individual relief under ADEA for teachers who did not file timely charges.

Bettcher v. Brown Schs., Inc., 262 F.3d 492, 86 FEP 929 (5th Cir. 2001) - ADEA claimant who did not file charge cannot rely on another’s charge if the person who filed the charge elects not to bring a lawsuit - there is no pending ADEA action for the non-filing person to join - issue analyzed at 168 LRR 55.

Cooney v. Union Pac. R.R. Co., 258 F.3d 731, 86 FEP 829 (8th Cir. 2001) - Protected age accounting clerks claimed age discrimination because railroad offered buyouts to younger clerks but not to them - they did not suffer an adverse employment action even if buyouts can be characterized as benefits since they continued to work under the same terms and conditions with no loss of salary or benefits - this case is different from cases which held unlawful denials of severance benefits to retirement-eligible employees - buyout here was designed to induce employees who were legally entitled to continue to work to give up that entitlement – employees’ contention that UP’s reason for denying them buyouts had to do with union political purposes is inconsistent with an age claim - the case did not appear to involve age-eligibility criteria - summary judgment affirmed.

Reyes-Gaona v. N.C. Growers Ass’n, 250 F.3d 861, 85 FEP 1153 (4th Cir. 2001) - Mexican national told by farm labor contractor in Mexico that he would not be hired for agricultural work in the United States because he was over the age of 40 - ADEA does not apply - ADEA was amended to cover American citizens working for American employers abroad, but Congress made no provision for foreign citizens who claim they were discriminated against in other countries with respect to potential work in this country - does not matter that job sought was in United States.

Retaliation (Ch. 17)

Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 98 FEP 385 (2006) – At issue was the type of conduct that could support a Title VII retaliation claim – the Supreme Court made three holdings of significance: (1) the type of discrimination prohibited by the anti-retaliation provision is not confined to employment-related discrimination – employers can retaliate in ways that have nothing to do with employment; (2) the anti-retaliation provision covers only those employer actions that would have been materially adverse to a reasonable employee or applicant – this is an objective standard (N.B. thus presumably resolvable by summary judgment); and (3) the fact that the employer reinstated a suspended employee with back pay did not negate the suspension as a possible form of retaliation that could result in compensatory or punitive damages – the Court stated the standard as follows: “[T]he provision covers those (and only those) employer actions that would have been
materially adverse to a reasonable employee or job applicant. . . . [T]hat means that the employer’s actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” (Id. at 2409) – the Supreme Court thus adopted the standard set forth by the Seventh and D.C. Circuits – it cited but did not accept the Ninth Circuit standard set forth in Ray v. Henderson (“reasonably likely to deter the charging party or others”) – the Supreme Court emphasized that the conduct must be “material”: “We speak of material adversity because we believe it is important to separate significant from trivial harms. . . . An employee’s decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 669 (3d ed. 1996) (noting that ‘courts have held that personality conflicts at work that generate antipathy’ and ‘snubbing by supervisors and co-workers’ are not actionable under § 704(a)).” (Id. at 2415) (emphasis in original) – “We refer to reactions of a reasonable employee because we believe that the provision’s standard for judging harm must be objective. An objective standard is judicially administrable.” (Id.) – the Court went on to hold that reassignment of duties can in some circumstances, and did in this circumstance, constitute a judicially cognizable adverse action, but noted: “To be sure, reassignment of job duties is not automatically actionable.” (Id. at 2417)

Garrett v. Ceballos, 126 S. Ct. 1951, 24 IER Cas. 737 (2006) – “We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” (Id. at 1960) – 5-4 decision - courts do not play an “intrusive role, mandating judicial oversight of communications between and among . . . employees and their superiors in the course of official business. The displacement of managerial discretion by judicial supervision finds no support in our precedents.” (Id. at 1961) – “Our precedents do not support the existence of a . . . cause of action behind every statement a[n] . . . employee makes in the course of doing his or her job.” (Id. at 1962) – “The significant point is that the memo was written pursuant to [plaintiff’s] official duties. Restricting [that] speech . . . simply reflects the exercise of employer control over what the employer itself has commissioned or created.” (Id. at 1960) – “When he went to work and performed the tasks he was paid to perform, Ceballos acted as a[n] . . . employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.” (Id.) [Note: Private employers can argue by analogy that when the employee’s job requires the employee to speak out on an issue, there is no retaliation protection.]

Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 95 FEP 669 (2005) – By vote of 5-4 the Supreme Court held that a coach of a girls’ basketball team who spoke out against sex discrimination prohibited by Title IX could bring a claim for retaliation, even though such a claim was not expressly set forth in Title IX – “We conclude that when a funding recipient retaliates against a person because he complains of sex discrimination, this
constitutes intentional ‘discrimination’ ‘on the basis of sex’ in violation of Title IX . . . .” (Id. at 1504) (emphasis in original).

Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 85 FEP 730 (2001) (per curiam) – [See Chapter 20 for sexual harassment portion of case.] – Ninth Circuit 2-1 decision [Reinhardt and Canby in majority] held that since the EEOC had issued a right to sue letter three months before supervisor announced a transfer and the actual transfer occurred one month after the lawsuit was filed created a factual issue of causation – reversed – “Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed.” (Id. at 272) - Ninth Circuit suggests right to sue letter provided first notice of charge before the EEOC which allowed an inference that the transfer proposal made three months later was retaliation - “This will not do.” (Id. at 273) – if assume supervisor knew about right to sue letter must also assume knew about two years earlier EEOC charge – “The cases that accept mere temporal proximity between an employer’s knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be ‘very close.’” (Id.) – Supreme Court cited cases holding “three-month period insufficient” and “4-month period insufficient” – “Action taken (as here) 20 months later suggests, by itself, no causality at all.” (Id. at 274)

Humphries v. CBOCS West, Inc., ___ F.3d ___, 99 FEP 872 (7th Cir. 2007) – Retaliation is cognizable under Section 1981 – Seventh Circuit prior decision overruled.

Velez v. Janssen Ortho LLC, 467 F.3d 802, 99 FEP 161 (1st Cir. 2006) – Retaliation case dismissed because plaintiff did not apply for a specific position – former employee who had previously filed sexual harassment action against employer submitted two general letters expressing interest in wide range of available positions, but did not “apply” for specific position as required under the anti-retaliation provisions of Title VII – an open-ended request for employment should not put a burden on an employer to search for jobs that met the applicant’s credentials.

EEOC v. SunDance Rehabilitation Corp., 467 F.3d 4909 FEP 1 (6th Cir. 2006) – Offer of severance agreement which contained prohibition against filing EEOC charge not retaliation but prohibition probably unenforceable.

Thompson v. Bi-State Development Agency, 463 F.3d 821, 98 FEP 1537 (8th Cir. 2006) – Summary judgment affirmed in retaliation case based on alleged temporal proximity of adverse action to protected action – suspension occurred only four months after plaintiff filed second of two discrimination lawsuits against employer – the temporal connection was “mere coincidence of timing.” (Id. at 826) (citation omitted) (internal quotation marks omitted).
**Tomanovich v. City of Indianapolis**, 457 F.3d 656, 98 FEP 1206 (7th Cir. 2006) – Plaintiff discharged four months after filing EEOC complaint and two months after filing Title VII action – four months is insufficient to show causal connection – decisionmaker unaware of Title VII action – refusal to provide more than dates of hire to those who inquired after discharge was not retaliation but simply prudent – comparator allegedly treated more favorably not similarly situated and there was a different decisionmaker.

**Kessler v. Westchester County Dep’t of Social Sers.**, 461 F.3d 199, 98 FEP 1185 (2d Cir. 2006) – Lateral transfer without change in salary, title or other conditions of employment can be adverse employment action – at new office plaintiff assigned clerical tasks instead of previous executive functions – was told his skills were not needed in the new office and transfer was simply to remove him from his previous office.

**Treadwell v. Office of Ill. Secretary of State**, 455 F.3d 778, 98 FEP 956 (7th Cir. 2006) – Summary judgment affirmed in retaliation case – lack of knowledge by decisionmaker that plaintiff had filed EEOC charges is determinative of retaliation claim – with respect to contention that retaliation was caused by internal complaint, employer’s evidence that co-worker who had not complained was subject to the same adverse employment action is determinative.

**Robinson v. Potter**, 453 F.3d 990, 18 A.D. Cas. 198 (8th Cir. 2006) – No retaliation although decisionmakers aware of EEOC complaint – being overqualified for entry-level secretarial position by virtue of college degree and specialized statistical knowledge, among other reasons, is legitimate basis for non-selection.

**Scaife v. Cook County**, 446 F.3d 735, 98 FEP 1 (7th Cir. 2006) – Black investigator suspended twice for being late after allegations of discrimination – summary judgment affirmed – failed to prove that white investigators who were late were treated more favorably by the same supervisor.

**Garner v. Mo. Dep’t of Mental Health**, 439 F.3d 958, 97 FEP 1141 (8th Cir. 2006) – Mixed-motive case – jury found that employer unlawfully retaliated against plaintiff but that she would have been discharged in any event regardless of her opposition to discrimination – no attorneys’ fees can be awarded since the 1991 mixed-motive amendments to Title VII did not apply to retaliation cases.

**Rochon v. Gonzales**, 438 F.3d 1211, 97 FEP 944 (D.C. Cir. 2006) – Summary judgment reversed – FBI agent who had complained about race discrimination alleged retaliation – the alleged retaliation was that the FBI had not investigated credible death threats made by a prisoner against the agent and his wife – acts of retaliation need not be related to the claimant’s employment in order to state a claim of retaliation under Title VII.
Jensen v. Potter, 435 F.3d 444, 97 FEP 555 (3d Cir. 2006) – A hostile work environment is an adverse employment action for purposes of the retaliation provisions of Title VII – there is a split in the circuits on this issue with the Fifth and Eighth Circuits holding that the retaliation provisions are limited to “ultimate employment decisions” – in this case plaintiff alleged she was harassed because she filed a sexual harassment complaint against a supervisor, who was then discharged – her co-workers allegedly resented the discharge, created a hostile work environment, which the postal service did nothing about for 19 months.

Jones v. District of Columbia Department of Corrections, 429 F.3d 276, 96 FEP 1441 (D.C. Cir. 2005) – Transfer without diminution in pay or benefits is not an adverse employment action – two and one-half months after filing a sexual harassment charge employee was transferred to a work location that was “cold in the winter, hot in the summer, and infested with bugs and had inadequate bathroom facilities” (Id. at 278) – the assignment was one of three that might arise in the ordinary course of employment, and no inference can be drawn from the temporal proximity.

Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 96 FEP 481 (2d Cir. 2005) – Retaliation claimant who volunteered to testify in support of sexual harassment lawsuit but was never called entitled to protection under the Participation Clause – it protects employees who participate “in any manner” in a Title VII proceeding.

Washington v. Ill. Department of Revenue, 420 F.3d 658, 96 FEP 545 (7th Cir. 2005) – No need to show “adverse employment action” in Title VII retaliation case – in this case retaliating manager eliminated a flex-time schedule that had allowed plaintiff to leave work by 3:00 p.m. to care for her disabled son – although this was not an adverse employment action an employer’s retaliatory response to protected activity need not necessarily affect the terms and conditions of employment in order to constitute a valid claim – opinion by Judge Easterbrook.

Wallace v. Sparks Health Sys., 415 F.3d 853, 96 FEP 253 (8th Cir. 2005) – Layoff in company-wide reduction in force not retaliation – it occurred nearly a year after settlement of discrimination claim – mild criticism of employee in otherwise favorable evaluation and comment by supervisor after settlement mediation that employee should stop causing problems insufficient to establish causal connection – temporal gap was too long – no showing that irritation caused by discrimination claim played a part in selection for RIF.

Zhuang v. Datacard Corp., 414 F.3d 849, 96 FEP 95 (8th Cir. 2005) – Summary judgment affirmed – employee selected for layoff four weeks after filing EEOC charge and charge was discussed by decisionmakers – temporal proximity can establish causal relationship but in this case no such inference is proper – if one automatically inferred a prima facie case from mere temporal proximity, this “would amount a determination that an employee can insulate herself from an otherwise valid termination by filing an EEOC complaint” (Id. at 857) – even assuming, arguendo, there was a prima facie case, the employer’s legitimate
nondiscriminatory reason, an economically motivated layoff and negative job performance evaluations, would be determinative.

Moser v. Ind. Dep’t of Corr., 406 F.3d 895, 95 FEP 1237 (7th Cir. 2005) – Claim of retaliation because plaintiff’s duties as affirmative action coordinator were removed and she was transferred to a different facility – contention that duties at new facility diminished in importance, challenge and variety – there was no adverse employment action – transfer did not change her title, salary or benefits – any lateral transfer by definition alters employee’s responsibilities and work conditions – subjective preference for former position without more does not demonstrate adverse employment action.

Henderson v. Ford Motor Co., 403 F.3d 1026, 95 FEP 970 (8th Cir. 2005) - Long and contentious history between employee and employer, including trial which resulted in successful claims of sexual harassment in 1991 cannot support a claim of retaliation with respect to a 1999 discharge for failing to report for examination by the employer while on medical leave – employee’s last protected activity was two and one-half years before the discharge – contentious history does not eliminate burden to show causal connection between protected activity and adverse action.

Noviello v. City of Boston, 398 F.3d 76, 95 FEP 810 (1st Cir. 2005) – Creation of a hostile environment can constitute retaliation – plaintiff’s complaint of sexual harassment led to the discharge of a popular co-worker – she alleged that her remaining co-workers created a hostile environment of which the employer was aware, but which the employer tolerated – if proven, such facts could constitute retaliation.

Septimus v. Univ. of Houston, 399 F.3d 601, 95 FEP 129 (5th Cir. 2005) – Plaintiff’s jury verdict reversed – error to instruct jury that in retaliation case complaints of discrimination had to be a “motivating factor” – the Fifth Circuit has consistently required a “but for” standard in retaliation cases – the rights of the employer were prejudiced because “motivating factor” is a lower standard.

Pardi v. Kaiser Found. Hosps., Inc., 389 F.3d 840, 16 A.D. Cas. 289 (9th Cir. 2004) – Summary judgment on retaliation claim overturned – employee of hospital discharged for unprofessional conduct – post-discharge employee and employer entered into general settlement agreement with employer paying $130,000 and agreeing to characterize termination as resignation – nevertheless, when post-settlement regulatory body investigated, employer did not provide exculpatory information, such as settlement and conversion of discharge to resignation – supplying personnel file that showed termination for cause to regulatory agency breached settlement obligation – employer stonewalled employee’s attempts to obtain confirmation of employment for use in obtaining another job - temporal proximity supports conclusion that motive was retaliatory.
Herron v. DaimlerChrysler Corp., 388 F.3d 293, 94 FEP 1219 (7th Cir. 2004) – No adverse action found with respect to the following occurring after employee claimed discrimination: (1) two-month delay in paying him for overtime; (2) transfers to various departments and shifts; and (3) refusal to pay him for two-day absence after verbal confrontation with supervisor – these are minor annoyances and not matters involving quantitative or qualitative changes in the terms and conditions of employment.

Stover v. Martinez, 382 F.3d 1064, 94 FEP 655 (10th Cir. 2004) – Individual complaints of retaliation insufficiently severe to constitute adverse employment action – “[E]ven aggregating her claims -- was moved to an isolated office, she did not receive work commensurate with her experience, she was not offered a [promotion], she once received a [lowered performance appraisal]; and she did not receive the level of recognition she believed she deserved for work on [a particular] case -- we cannot conclude that these actions constitute harassment severe enough to constitute an adverse action for the purposes of a retaliation prima facie case. Mere inconveniences or alterations of job responsibilities do not constitute adverse employment actions.” (Id. at 1075) – summary judgment granted.

Mattson v. Caterpillar Inc., 359 F.3d 885, 93 FEP 486 (7th Cir. 2004) – EEOC sexual harassment charge filed by discharged male employee against female supervisor was objectively and subjectively unreasonable and made in bad faith – it thus did not constitute an activity protected by Title VII despite contention that participation clause does not require good faith or reasonableness – utterly baseless claims do not receive protection under Title VII.

Erenberg v. Methodist Hosp., 357 F.3d 787, 93 FEP 467 (8th Cir. 2004) – No causal link between internal grievance and discharge – summary judgment affirmed – employee “was consistently disciplined for the same performance and attendance issues throughout her employment, both before her complaint and after” (Id. at 793) – plaintiff alleged she was called “Malibu Barbie,” that other employees exchanged backrubs in the workplace, that other employees told sexual jokes in the workplace, and that a female co-worker placed her hands on male employees’ shoulders, arms and backs – this is insufficiently severe as a matter of law.

Hernandez v. SpaceLabs Med. Inc., 343 F.3d 1107, 92 FEP 1065 (9th Cir. 2003) (Reinhardt, Fletcher and Gould) – Opinion by William Fletcher – retaliation summary judgment reversed – retaliation for reporting sexual harassment of a female coworker – although decisionmakers testified they were unaware that plaintiff was the one who reported the harassment, circumstantial evidence could have led the decisionmakers to suspect that it was the plaintiff – summary judgment would be appropriate if “no rational fact-finder could conclude that [the] action was discriminatory,” (Id. at 1116) under Reeves, but here a reasonable fact-finder could so conclude.
Deravin v. Kerik, 335 F.3d 195, 92 FEP 472 (2d Cir. 2003) – For purposes of retaliation protection, employee who defended himself from charges of co-worker sexual harassment was covered by the participation clause of Title VII, which “is expansive and seemingly contains no limits” (Id. at 203) – plaintiff contended he was passed over for promotion several times following his defense of the harassment charges – case had been dismissed below on the pleadings – court emphasized its interpretation of the participation clause “should not be read as prohibiting employers from legitimately disciplining employees who engage in discriminatory conduct” (Id. at 205) – the allegation in this case, that promotion was denied solely because the employee defended himself against Title VII allegations does on its face state a cause of action.

Fabela v. Socorro Indep. Sch. Dist., 329 F.3d 409, 91 FEP 1107 (5th Cir. 2003) – Summary judgment reversed – reasonable jury could find that employee was discharged 6 1/2 years after a frivolous EEOC charge because of the EEOC charge – decisionmaker, when asked why she was discharged, told her she was a “problem employee” and pointed to the fact that she had filed an “unsubstantiated” EEOC charge and directed the personnel director to read the EEOC’s determination letter to her – while lack of temporal proximity can render a retaliation claim meritless, the time lapse was rendered irrelevant when the decisionmaker listed the plaintiff’s protected activity as among the factors leading to his decision.

Twisdale v. Snow, 325 F.3d 950, 91 FEP 706 (7th Cir. 2003) – Employee supported employer in responding to charge of black employee – later claimed he was retaliated against by his black superiors – there is no retaliation protection for one who participated in an investigation on the side of the respondent – the purpose of the retaliation provision is to protect those who assert claims and those who assist – court therefore does not read the retaliation provisions literally – issue analyzed at 172 LRR 56.

Hernandez v. Crawford Bldg. Material Co., 321 F.3d 528, 91 FEP 97 (5th Cir. 2003) – When discharged employee sued for discrimination, employer on the basis of inadequate evidence counterclaimed for theft – trial court granted summary judgment for plaintiff on retaliation theory based on counterclaim since employer had insufficient evidence – Fifth Circuit reversed – only an ultimate decision by an employer can form the basis for liability – issue analyzed at 171 LRR 415, which cites a recent district court decision to the contrary.

Peters v. Renaissance Hotel Operating Co., 307 F.3d 535, 91 FEP 293 (7th Cir. 2002) – Plaintiff may not litigate retaliation claim where only EEOC charge alleged discriminatory discharge – retaliation claim is not like or reasonably related to discrimination claim.

Spadola v. New York City Transit Auth., 242 F. Supp. 2d 284, 90 FEP 1484 (S.D.N.Y. 2003) – Male employee had verbal altercation with female supervisor, and in response to her writing him up for inappropriate conduct accused her of sexual harassment – comment of female employee was innocuous and was not actually believed by plaintiff to be sexual harassment – there therefore was no protected activity which could provide the basis for a
retaliation claim – “Congress could not have contemplated . . . as a legitimate purpose of Title VII retaliation claims: to arm employees with a tactical coercive weapon that may be turned against the employer as a means for the asserted victims to advance their own retaliatory motives and strategies and thereby extract employment concessions on account of minor social lapses or harmless infractions in the workplace, or even to escape appropriate disciplinary measures.” (Id. at 292)

_Dressler v. Daniel_, 315 F.3d 75, 90 FEP 1089 (1st Cir. 2003) – Male and female had romantic relationship in college in 1988, and resumed their consensual relationship in 1996 – female then went to work for male’s restaurant, and charged him with sexual harassment for his conduct during that time period – she left restaurant’s employ and a negotiated settlement was reached – they then resumed their sexual relationship – that relationship ended – male filed a complaint with the police department claiming female was stalking him – female sued alleging police complaint was retaliation for her earlier, settled sexual harassment charge – “[C]lose temporal proximity . . . was lacking. Since the . . . sexual harassment claim, the parties had a rather unusual relationship. [Female] claims that she and [male] engaged in a sexual relationship extending for over one year after the sexual harassment claim had been settled.” (Id. at 79) – no reasonable trier of the fact could conclude that the 1999 stalking complaint to the police was motivated by the 1997 sexual harassment charge – the record in fact suggests that the police complaint was based on the fact that female contacted male’s wife and informed her of the relationship and was coupled with constant calls and visits to him at his place of business and home.

_Pool v. VanRheen_, 297 F.3d 899, 89 FEP 793 (9th Cir. 2002) – No retaliation when black female sheriff’s office commander was demoted following letter to the editor that critiqued the office and the “good ol’ boy atmosphere” – even if she was demoted because of the letter, the letter does not allege unlawful discrimination against anyone based on race or sex.

_Fogleman v. Mercy Hosp., Inc._, 283 F.3d 561, 88 FEP 513, 12 A.D. Cas. 1505 (3d Cir. 2002) – Plaintiff discharged after his father, also an employee, sued for age and disability discrimination – Title VII requires that the person retaliated against also be the person who engaged in the protected activity, so merely being a relative of the person who engaged in protected activity would not be sufficient – however, the ADA contains a second anti-retaliation provision protecting any individual who aids or encourages another individual to engage in protected activity so that might be implicated – furthermore, under both Title VII and the ADA, the plaintiff could pursue a claim that the employer retaliated against him because it perceived that he was assisting his father to engage in protected activity.

_Stone v. City of Indianapolis Pub. Utilities Div._, 281 F.3d 640, 88 FEP 162 (7th Cir. 2002) - Posner opinion addressed the proper standard for summary judgment when a plaintiff claims retaliation for complaining about discrimination – if the plaintiff produces evidence creating a prima facie case and the defendant responds with evidence of a lawful reason,
the case has to go to the jury unless the defendant can produce uncontradicted evidence that it would have fired the plaintiff anyway, in which case the defendant gets summary judgment – McDonnell Douglas is designed to give the plaintiff a boost when he has no actual evidence of discrimination, but if the plaintiff has direct evidence he doesn’t need McDonnell Douglas – the Fifth and Eleventh Circuits have held that the plaintiff’s burden with respect to a “causal link” is simply that the protected expression and the adverse action “were not wholly unrelated” – this is “both obscure and . . . superfluous. It should be jettisoned.” (Id. at 644) – the plaintiff in a retaliation case has two and only two routes to obtaining or preventing summary judgment – the first is to present direct evidence that the reason for the adverse action was the protected activity – if the evidence is uncontradicted the plaintiff gets summary judgment – if contradicted the case must be tried unless, as noted, the employer’s uncontradicted evidence establishes that it would have taken the same action absent the protected activity – mere temporal proximity is rarely sufficient to create a triable issue – the second route to summary judgment is an adaption of McDonnell Douglas – if there is a prima facie case and the defendant presents no evidence the plaintiff gets summary judgment – if the defendant presents unrebutted evidence of a non-invidious reason the defendant is entitled to summary judgment – otherwise there must be a trial.

Lewis v. Holsum of Fort Wayne, Inc., 278 F.3d 706, 12 A.D. Cas. 1228 (7th Cir. 2002) – Four-month interval between protected activity and discharge was too long to support an inference of retaliation.

Chen v. County of Orange, 96 Cal. App. 4th 926 (2002) – Retaliation claim rejected: “[T]he possibility of a retaliation claim creates the problem of conferring a de facto immunity on the complainant despite poor job performance or the meritlessness of any complaint. Consider a hypothetical of a ne’er-do-well employee who wants to manipulate the system to his or her advantage: ‘Not doing your job well? Ax about to fall? Never fear: file a discrimination claim, no matter how meritless. Your employer will be afraid to take any action because now you can sue for retaliation.’ Accordingly, courts have balanced the state interest in protecting the right to complain against discrimination while at the same time protecting employers from meritless discrimination claims by requiring a causal link between what labor lawyers call the ‘protected activity’ (e.g., filing a complaint) and the adverse action (e.g., not getting a promotion). . . . Significantly, the necessity of a causal link is a part of a plaintiff’s prima facie case of retaliation.” [Emphasis in original.] (Id. at 948-49)

Fierros v. Tex. Dep’t of Health, 274 F.3d 187, 87 FEP 503 (5th Cir. 2001) - Denial of pay increase can be ultimate employment action covered by retaliation prohibitions - Fifth Circuit’s Mattern case distinguished.

Holtzclaw v. DSC Communications Corp., 255 F.3d 254, 86 FEP 777, 12 A.D. Cas. 178 (5th Cir. 2001) - In prior portion of opinion court dismissed ADEA and ADA discrimination claims because plaintiff’s benefit representations made it clear he was not qualified (case
brief in Ch. 9) - plaintiff nevertheless asserts that qualifications are not an essential aspect of an ADEA retaliation claim – “We have never expressly made qualification a prima facie element of an ADEA retaliation claim, but today we decide that such an element is necessary.” (Id. at 260) - because being qualified is an element of all other discrimination claims, it would be illogical not to require one in the retaliation setting.

Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 85 FEP 1025 (2d Cir. 2001) - Summary judgment despite temporal proximity between EEOC charge and subsequent probation and discharge - temporal proximity can demonstrate a causal nexus but does not here because in this case “the adverse employment actions were both part, and the ultimate product, of ‘an extensive period of progressive discipline’ which began when [the employer] diminished Slattery’s job responsibilities a full five months prior to his filing of the EEOC charges” (Id. at 95 (emphasis in original)) – “Where . . . gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise.” (Id)

Krause v. City of La Crosse, 246 F.3d 995, 87 FEP 1475 (7th Cir. 2001) – Letter of reprimand and transfer to a back room of City’s finance department after complaining of sex discrimination not adverse employment action – “[A] materially adverse change in employment conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities.” (Id. at 1001 (citation omitted)).

Clockeildle v. N. H. Dep’t of Corr., 245 F.3d 1, 85 FEP 570 (1st Cir. 2001) – Employee retaliated against after filing sexual harassment claim with EEOC need not file separate charge with respect to harassment – First Circuit’s previous rule rejected – EEOC stated it is likely that the alleged retaliation would have been uncovered in a reasonable investigation of the sexual harassment charge – jury verdict which had been overturned by trial judge reinstated.

Von Gunten v. Maryland, 243 F.3d 858, 85 FEP 385 (4th Cir. 2001) – Retaliatory act that has an adverse effect but is not an ultimate employment decision is actionable – employee alleged the following retaliation after complaining of sexual harassment: removal from her job assignment, withdrawing state car she had been issued, downgrading her evaluation, reassigning her from preferred boat duty to shoreline survey work, requiring her to provide documentation for all prior and future sick leave, placing her on paid administrative leave while investigating a citizen’s complaint against her, and denying her request to attend seminars – issue analyzed at 166 LRR 425.

McMenemy v. City of Rochester, 241 F.3d 279, 85 FEP 237 (2d Cir. 2001) - Retaliation laws protect employee of Employer 1 who is retaliated against by Employer 1 for opposing discrimination against employee of Employer 2 – plaintiff alleged he was retaliated against for investigating a female union employee’s complaint of sexual harassment against the union’s president – it makes no difference that the female was employed by a different employer – issue analyzed at 166 LRR 361.

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Contreras v. Suncast Corp., 237 F.3d 756, 84 FEP 1273, 11 A.D. Cas. 600 (7th Cir. 2001) - Summary judgment affirmed on retaliation and disability claim - retaliation claim cannot be based solely on temporal proximity - discharge was one month after EEOC charge and followed requests for accommodation following injury - summary judgment appropriate because employee was unquestionably not meeting employer’s legitimate expectations - evidence uncontradicted that he did not come to work regularly, falsified documents, and was insubordinate.

Hiring (Ch. 18)

Lee v. Rheem Mfg. Co., 432 F.3d 849, 97 FEP 118 (8th Cir. 2005) – Plaintiff retired as human resources manager, took his pension and profit sharing in a lump sum, invested in the stock market, lost a lot of money, and six years after his retirement, needing the money, applied for a position in the company’s HR department – younger applicant hired – “The search committee believed that [plaintiff’s] goal was not to begin a challenging career . . . , but to earn short-term money necessitated by his losses in the stock market.” (Id. at 854) – legitimate for company to want to hire someone who would work for more than a few years and who had the potential to succeed the present human resources manager.

EEOC v. Joe’s Stone Crabs, Inc., 296 F.3d 1265, 89 FEP 522 (11th Cir. 2002) – Two female claimants allowed to proceed as deterred applicants despite failure to apply – two others not allowed to proceed – restaurant clearly had reputation of hiring only males – two claimants allowed to proceed demonstrated they possessed real and present interests in positions – one claimant testified that she moved to the area in 1990 with the intention of attending the restaurant’s roll call and another testified she made inquiries about roll calls – both testified they were told that the restaurant discriminated – two other claimants not allowed to proceed because of insufficient testimony that they had real and present interest in applying at particular roll calls – federal district court did not err in finding that restaurant that had all-male servers and had not hired any women for at least four years had a reputation that effectively deterred women from applying even though the policy against hiring women was implicit rather than explicit.

Millbrook v. IBP, Inc., 280 F.3d 1169, 88 FEP 297 (7th Cir. 2002) – Janitor’s failure-to-hire $132,500 race discrimination verdict overturned 2-1 – evidence that plaintiff was more qualified than other job applicants not probative unless the differences are glaring – only if the differences are glaring can a plaintiff use them to show that the employer’s rationale for hiring another applicant was a pretext.

Mathis v. Phillips Chevrolet, Inc., 269 F.3d 771, 87 FEP 219 (7th Cir. 2001) - Defendant automobile dealership was unsuccessful in attempting to introduce evidence that the plaintiff had sued numerous other automobile dealerships alleging a refusal to hire on account of age - while it would not have been proper to admit the evidence in order to show that the applicant was likely filing a frivolous claim as he had done in the past, it
would have been proper to admit the evidence, with a proper limiting instruction, to show that the plaintiff was engaged in a plan or scheme to harass area car dealerships and that his methods in prior suits were very similar to the approach in this suit - nevertheless, the court acted within its discretion in ruling that any relevance the evidence might have was outweighed by prejudice - the plaintiff claimed that the other suits were meritorious, and this would have resulted in a series of mini-trials.

**Promotion (Ch. 19)**

*Lockridge v. Bd. of Trustees*, 315 F.3d 1005, 90 FEP 1319 (8th Cir. 2003) (en banc) – Failure of black faculty member to apply bars promotion claim – faculty member claimed that all deans were promoted from within, and this changed only when he was the logical choice – however, the job opening was posted, the faculty member knew about it, and was not excused from being required to apply to make out a prima facie case – a number of deanships have been held by African Americans, and no reasonable person could conclude it would have been futile to apply – “[T]here is no claim here that there was a consistently enforced practice of refusing to hire black individuals for the position of dean, such that a black applicant would face ‘certain rejection,’ see Teamsters, 431 U.S. at 365 97 S. Ct. 1843. Having reviewed all of the evidence, we believe that no reasonable person could conclude from the present record that ‘gross and pervasive discrimination’ made it futile for [plaintiff] to apply for the promotion.”  (*Id.* at 1011)

*Walker v. Prudential Prop. & Cas. Ins. Co.*, 286 F.3d 1270, 88 FEP 982 (11th Cir. 2002) – In 2-1 decision court rejected promotion discrimination allegation because two plaintiffs did not meet their burden of establishing an expression of interest in the job position in question – dissent contended there was no duty to apply, and that an employer has the duty to consider all those who might reasonably be interested.

*Gentry v. Georgia-Pacific Corp.*, 250 F.3d 646, 87 FEP 1185 (8th Cir. 2001) - Failure to apply because of mistaken belief applicant pool would be persons who had applied in the previous year fatal to prima facie case.

*Dotson v. Delta Consol. Indus., Inc.*, 251 F.3d 780, 85 FEP 1673 (8th Cir. 2001) - Failure to apply for position bars plaintiff from establishing prima facie promotion discrimination case - irrelevant that employee contended that employer did not post position so there was no chance to apply - employer never posted positions so all employees had the same amount of information about job openings.
Sexual and Other Forms of Harassment – Cases
Interpreting Faragher/Ellerth (Ch. 20)

Pa. State Police v. Suders, 542 U.S. 129, 124 S. Ct. 2342, 93 FEP 1473 (2004) – Constructive discharge allegedly caused by sexual harassment can be established and can constitute a tangible employment action under Faragher/Ellerth if plaintiff shows that “the abusive working environment became so intolerable that her resignation qualified as a fitting response” (124 S. Ct. at 2347) – however, such a constructive discharge is subject to a Faragher/Ellerth defense unless “the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions” (Id.) – “Under the constructive discharge doctrine, an employee’s reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law, 838-839 (3d ed. 1996).” (Id. at 2351) – but Faragher/Ellerth clarifies that Title VII “borrows from tort law the avoidable consequences doctrine” (Id. at 2354) (citing Ellerth, 524 U.S. at 764) – thus, a hostile environment constructive discharge claim requires more than simply a hostile environment – “[W]hen an official act does not underlie the constructive discharge, the Ellerth and Faragher analysis, we here hold, calls for extension of the affirmative defense to the employer.” (Id. at 2355) – in such circumstances the Faragher/Ellerth affirmative defense will enable the employer to prove that “it should not be held vicariously liable.” (Id.)

Gordon v. Shafer Contracting Co., Inc., 469 F.3d 1191, 99 FEP 513 (8th Cir. 2006) – Faragher/Ellerth affirmative defense available in race hostile environment case – employee’s belief that reporting the alleged supervisorial harassment would have been ineffective was insufficient to avoid summary judgment.

Ferraro v. Kellwood Co., 440 F.3d 96, 17 A.D. Cas. 1160 (2d Cir. 2006) – Plaintiff in disability harassment case did not use employer’s complaint procedure – this was unreasonable despite contention that co-worker’s similar complaint had been ignored – co-worker’s complaint was factually distinguishable and thus not evidence that employer ignored such complaints.

Roebuck v. Washington, 408 F.3d 790, 95 FEP 1350 (D.C. Cir. 2005) – Affirmative defense available because there was no tangible employment action – proposals to transfer to an undesirable assignment and to switch her duties were never implemented.

Williams v. Mo. Dept of Mental Health, 407 F.3d 972, 95 FEP 1345 (8th Cir. 2005), cert. denied, 126 S. Ct. 1037 (2006) – Faragher/Ellerth affirmative defense bars sexual harassment claims of two female employees who did not utilize the employer’s grievance procedure – their temporary supervisor sexually harassed them for several weeks by exposing himself to them and offensively touching them – contention that they had a cause of action from the beginning because of the severe nature of the harassment and thus the affirmative defense
was not applicable rejected – this case involved ongoing sexual harassment of the exact type addressed by the affirmative defense.

*Clark v. United Parcel Service, Inc.*, 400 F.3d 341, 95 FEP 513 (6th Cir. 2005) – Summary judgment based on *Faragher/Ellerth* reversed – employer had reasonable sexual anti-harassment policy which was not utilized – however, supervisors allegedly witnessed several incidents by department manager of inappropriate behavior toward female employees and did nothing to stop the harassment – if true, that would violate the sexual harassment policy which placed a duty on all supervisors to report such incidents – courts must look not only to the existence of a reasonable anti-harassment policy, but also the effectiveness of its implementation.

*Hesse v. Avis Rent-A-Car Sys.*, 394 F.3d 624, 94 FEP 1805 (8th Cir. 2005) – Summary judgment affirmed – employer responded promptly and effectively to initial incidents and harasser’s conduct improved – with respect to allegation that there were nevertheless later incidents, she never complained despite the fact that she was aware of the employer’s harassment policy and toll-free number.

*McCurdy v. Ark. State Police*, 375 F.3d 762, 94 FEP 228 (8th Cir. 2004), cert. denied, 543 U.S. 1121 (2005) – Employer prevails under *Ellerth/Faragher* despite the fact that it could not prove the second prong of the defense, that the employee unreasonably failed to take advantage of its procedures – this was a one-incident sexual harassment, the plaintiff promptly complained, and the employer promptly took appropriate action – the second prong of the defense was established in the context of repeated sexual harassment – the underlying theme behind Title VII is that an employer should nip sexual harassment in the bud, that is what occurred, and therefore the employer should not be liable.

*Ackel v. Nat’l Communs., Inc.*, 339 F.3d 376, 92 FEP 744 (5th Cir. 2003) – Summary judgment based on *Faragher/Ellerth* affirmative defense overturned – factual issue is whether harasser was so high in the employer’s hierarchy that he could be treated as the employer’s “proxy” – if so, affirmative defense unavailable.

*Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 92 FEP 1284 (11th Cir. 2003), cert. denied, 541 U.S. 959 (2004) – Affirmative defense is available despite fact that employee did not return to work after short-term disability benefits ended when she had been told that if she did not return to work she would be terminated – employer acted reasonably in terminating alleged harasser even though it did not believe complainant’s story – complainant did not utilize grievance procedure after harasser groped her breasts and buttocks and tried to kiss her the day after he promised to behave – she claimed she went back to his apartment one week later knowing he was intoxicated and had wine with him and was subjected to a more serious incident of sexual harassment – she then acknowledges returning to his apartment the following week, accepting wine again, lying down on the floor to be massaged again, whereupon she alleged she was assaulted again –
the bottom line is that she could have avoided most if not all of the alleged incidents by utilizing the employer’s grievance procedure.

*Durkin v. City of Chicago*, 341 F.3d 606, 92 FEP 865 (7th Cir. 2003) – Summary judgment affirmed on sexual harassment claim brought by police recruit who “was subjected to a pattern of offensive remarks and repulsive behavior” (Id. at 609) which included extremely frequent use of the “F” word and the “C” word – since there was no tangible employment action under *Faragher/Ellerth* plaintiff must show that City was negligent in discovering or remedying the harassment – although plaintiff frequently complained she did not follow the City’s procedures – “[T]he City has a proper system for the making and forwarding of complaints about sexual harassment.” (Id. at 612) – the procedure called for probationary officers to make complaints of sexual harassment to their homeroom instructor – plaintiff failed to do this because she believed it would be futile since her homeroom instructor was a friend of the harasser – plaintiff contended that since she complained to so many people this must have put the City on notice – her complaints were too vague – she also complained that the City analyzed the complaints in a piecemeal fashion when the harassment was persistent and pervasive – “[R]evieeing the totality of the circumstances reveals boorish conduct and unexplained animosity toward Durkin, but not to the extent that meets the legal requirements of Title VII.” (Id. at 613) – with respect to “the plaintiff’s allegations of outrageous behavior on the part of police trainers,” (Id. at 615) “the charges are sufficiently explicit to merit scrutiny by the City. And we trust that steps will be taken to assure that such behavior, if it did occur, will be brought to a halt.” (Id)

*Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 92 FEP 705 (9th Cir. 2003) – Judge Reinhardt opinion – joining the Second Circuit, court holds that a woman who grants sexual favors in order to avoid threatened discharge has been the victim of a tangible employment action and thus the *Faragher/Ellerth* defense would not be available – however, in this case, summary judgment for employer affirmed since facts were insufficient to indicate anything more than a supervisor’s desire for sex – this desire was not linked to threat of discharge or tangible employment benefits – therefore, plaintiff cannot prevail on a tangible employment action theory – with respect to hostile environment, assuming *arguendo* a prima facie case, Cal Tech has established both parts of the *Faragher/Ellerth* defense – reasonable efforts to prevent and correct harassment and the plaintiff’s unreasonable failure to take advantage of opportunities to avoid harm.

*Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 89 FEP 1861 (5th Cir. 2002) – Employer with well-publicized policy forbidding discrimination, grievance procedure, and training not entitled to JNOV because of evidence that employer did not appropriately respond to complaints about supervisorial harassment – however, this same evidence bars punitive damages.

*Jaros v. LodgeNet Entm’t Corp.*, 294 F.3d 960, 89 FEP 1268 (8th Cir. 2002) – Affirmative defense not available in constructive discharge case – constructive discharge constitutes a tangible employment action.
Jin v. Metro. Life Ins. Co., 310 F.3d 84, 91 FEP 1027 (2d Cir. 2002) – Requirement of tangible employment action satisfied when supervisor threatened discharge unless sexual favors were granted, the sexual favors were granted, and the threatened discharge never materialized – although a tangible employment action in most cases inflicts direct economic harm, that will not be the case when the employee submits to a threat of direct economic harm.

Moisant v. Air Midwest, Inc., 291 F.3d 1028, 88 FEP 1739 (8th Cir. 2002) – Three instances of sexual harassment – employee promptly complained of sexual harassment with respect to incidents one and three, employer took prompt and appropriate action, but nevertheless employer is liable – with respect to second incident, although employee complained, employee did not relate the incident to sexual harassment – this provides the employer “with a defense to liability based on that incident” (Id. at 1031) – employee quit after harasser fired based on allegations of poor treatment of her by co-workers who objected to her complaints of sexual harassment against the supervisor – this is insufficient to establish a constructive discharge which requires “that her employer deliberately created objectively intolerable working conditions with the intention of forcing the employee to resign.” (Id. at 1032).

Hall v. Bodine Elec. Co., 276 F.3d 345, 87 FEP 1240 (7th Cir. 2002) - Employer’s failure to institute formal sexual harassment policy does not bar Faragher/Ellerth affirmative defense - issue is whether employer had reasonable mechanism in place for detecting and correcting harassment - plaintiff’s admission that she knew exactly where to file a complaint and company’s prompt response when complaints were filed establishes the major elements of the defense - complaints of sexual harassment that she did not report therefore are subject to the defense - it is difficult to see how a formal policy would have been any more effective than the mechanism the employer had in place - when she complained investigation revealed inappropriate conduct by plaintiff and harasser, and both were discharged - female plaintiff and alleged male harasser were constantly “telling each other sexual jokes, patting each other on the buttocks, and talking about their sexual deeds,” (Id. at 359 n.10) and female plaintiff regularly talked about the size of men’s penises, the number of times she had sex, and the ways in which she had sex - a complaint of sexual harassment does not immunize the complainant from discharge for her own inappropriate workplace behavior - even if offensive conduct by female plaintiff was not at the level to amount to sexual harassment, employer was still permitted to discharge her - summary judgment affirmed - “Even if we assume that [plaintiff’s] tawdry conduct did not amount to Title VII sexual harassment, [the employer] was still permitted to terminate her. In fact, the company’s failure to do so would have most likely constituted a Title VII violation (i.e., sex discrimination against [the male harasser]), as well as subjecting the company to future liability if another complaint of harassment was filed against [the female complainant].” (Id. at 359)

Gawley v. Ind. Univ., 276 F.3d 301, 87 FEP 1116 (7th Cir. 2001) - Harassee’s failure to utilize university’s procedures bars sexual harassment claim - other than protesting to the
harasser, plaintiff waited seven months before availing herself of formal complaint procedures - as soon as she utilized the formal procedures, the university took action and the harassment stopped - summary judgment affirmed - it makes no difference that it was unclear whether the harasser was a supervisor or a mere co-employee - if a co-employee, summary judgment was still proper because there was no showing the university was negligent.

*Mativia v. Bald Head Island Mgm't, Inc.*, 259 F.3d 261, 86 FEP 803 (4th Cir. 2001) - Affirmative defense applicable - female contended that she did not report harassment which was pervasive and unwelcome because she was waiting to see whether the harasser was a “predator” or merely an “interested man.”

*Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 85 FEP 990 (10th Cir. 2001) - Affirmative defense not available even though employer promptly responded to employee’s complaint, disciplined appropriately, and stopped the harassment - defense requires that employee acted unreasonably in failing to take advantage of employer opportunities - the view of one judge in *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 78 FEP 1527 (5th Cir. 1999), to the effect that employer should be relieved of liability if it acts promptly rejected.

*Leopold v. Baccarat, Inc.*, 239 F.3d 243, 84 FEP 1660 (2d Cir. 2001) – Affirmative defense applicable and summary judgment affirmed – while employer bears ultimate burden of persuasion to prove that female employee acted unreasonably in failing to avail herself of its internal sexual harassment complaint procedures, employer met this burden by showing existence of procedures and that an employee’s explanation for not using the procedures was absent or inadequate – here the employee claimed she was afraid, but there was no evidence the fear was credible.

*Gentry v. Export Packaging Co.*, 238 F.3d 842, 84 FEP 1518 (7th Cir. 2001) - Employer liable for sexual harassment despite clear policy against sexual harassment because policy was not clear on to whom sexual harassment should be reported - there was no designated person in the human resources department to field complaints of sexual harassment from employees - this lack of a clear reporting procedure undermines the company’s other efforts.

**Sexual and Other Forms of Harassment - General (Ch. 20)**

*Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 85 FEP 730 (2001) (per curiam) – Summary reversal of Ninth Circuit 2-1 (Reinhardt and Canby in majority) decision which reversed trial court’s summary judgment – retaliation alleged after complaint of sexual harassment – female plaintiff met with male supervisor and another male employee to review psychological evaluation reports of four job applicants: “The report for one of the applicants disclosed that the applicant had once commented to a co-worker, ‘I hear making love to you is like making love to the Grand Canyon.’ . . . [R]espondent’s supervisor read
the comment aloud, looked at respondent and stated, ‘I don’t know what that means.’ The other employee then said, ‘Well, I’ll tell you later,’ and both men chuckled.” (Id. at 269) – Ninth Circuit protects employee opposition not just to practices that are actually unlawful but to practices an employee could reasonably believe are unlawful – no one could believe that this incident violated Title VII – “Just three Terms ago, we reiterated, what was plain from our previous decisions, that sexual harassment is actionable under Title VII only if it is so ‘severe or pervasive’ as to alter the conditions of [the victim’s] employment and create an abusive working environment.” (Id. at 270) (Internal quotations omitted.) – “Workplace conduct is not measured in isolation; instead, whether an environment is sufficiently hostile or abusive must be judged by looking at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” [Internal quotations omitted.] (Id. at 270-71) – “Hence, [a] recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.” (Id. at 271) [Retaliation portion of case briefed in Chapter 17.]

**Pruitt v. City of Chicago**, 472 F.3d 925, 99 FEP 737 (7th Cir. 2006) – Black and Hispanic City workers alleged that a foreman harassed them for 20 years – if true, action should have been brought long ago – action dismissed based on laches – deaths and serious illnesses of many witnesses and unavailability of documents and fading memories relied upon – plaintiffs contend that *Morgan* makes the 20-year history of the hostile behavior actionable – *Morgan* authorized the district judges to invoke the doctrine of laches – in *Morgan*, having given generously with one hand to allow hostile environment suits despite the short statute of limitations under Title VII, the court took back with the other by allowing applicability of the doctrine of laches – one possibility would be to apply laches only to bar harassment that was more than four years old, the applicable statute of limitations under Section 1981 – this is one possible interpretation of *Morgan* – but plaintiffs waived this by not seeking a limitation of their action to four years before filing.

**Green v. Franklin National Bank of Minneapolis**, 459 F.3d 903, 98 FEP 1367 (8th Cir. 2006) – Divided court affirms summary judgment in co-worker harassment case – three months of racial slurs which included eight racial and two physically intimidating comments were sufficiently severe and pervasive to constitute a hostile environment, but since the Bank fired the harasser, it was not liable for this hostile environment.

**Yeager v. City Water and Light Plant of Jonesboro**, 454 F.3d 932, 98 FEP 545 (8th Cir. 2006) – Male discharged for pinching female co-worker on breast – contended same female had engaged in comparable conduct violating employer’s sexual harassment policy – however, male’s conduct elicited a complaint, and female’s conduct was tolerated without complaint – an employer may reasonably distinguish between such situations, even when there is arguably comparable conduct which is tolerated.
Nitsche v. CEO of Osage Valley Electric Cooperative, 446 F.3d 841, 97 FEP 1850 (8th Cir. 2006) – Male utility employee alleged sexually hostile environment because of fellow line employees' unwanted sexual banter about women – although the conduct was “crude and immature,” it occurred sporadically over 20 years, was not physically threatening, did not unreasonably interfere with work performance, and was not because of sex – does not matter that the words used had sexual content or connotations.

Schiano v. Quality Payroll Sys., 445 F.3d 597, 97 FEP 1684 (2d Cir. 2006) – District court erred in evaluating harassing conduct separately by type of conduct – it compared frequency to the frequency in reported cases, it compared whether it was physically threatening or humiliating, and other factors in isolation – it should have evaluated the conduct as a whole – moreover, the district court's conclusion that “occasional threats or insinuations” that employment benefits would be granted or denied based on sexual favors is quintessential sexual harassment.

Pomales v. Celulares Telefonica Inc., 447 F.3d 79, 98 FEP 6 (1st Cir. 2006) – Single incident sexual harassment not severe or pervasive enough to establish hostile environment – a supervisor made a crude gesture indicating a desire to have sex with plaintiff – “The alleged harassing conduct, while certainly crude, comprised only a single incident.” (Id. at 83)

Wilson v. City of Des Moines, 442 F.3d 637, 97 FEP 1230 (8th Cir. 2006) – Trial court admitted testimony of co-workers of sexual harassment plaintiff that she herself had engaged in lewd talk, including talk about vibrators and men's sex organs – this was done without compliance with Rule 412, which excludes in civil proceedings involving sexual misconduct evidence about a victim’s sexual behavior unless certain conditions are met, including: (1) a motion 14 days before trial; and (2) an in-camera hearing – Rule 412 does apply to sexual harassment cases – the evidence was clearly relevant to the issue of welcomeness – the evidence in this case consisted of public comments and its probative value substantially outweighed any prejudice – therefore failure to follow procedural requirements of Rule 412 was harmless.

Cottrill v. MFA Inc., 443 F.3d 629, 97 FEP 1487 (8th Cir.), cert. denied, 127 S. Ct. 394 (2006) – Female plaintiff asked to assist company in catching supervisor who spied through a peephole into woman’s restroom – this did not create a hostile environment because until she assisted the company in catching the miscreant, she had no knowledge she was being spied upon – supervisor apparently placed substance containing poison ivy on the toilet seat – plaintiff’s rash, which she did not know the cause of, could also not create a hostile work environment – summary judgment affirmed 2-1.

Canady v. Wal-Mart Stores, Inc., 440 F.3d 1031, 97 FEP 1133 (8th Cir. 2006) – Summary judgment affirmed – direct supervisor of African-American employee described himself as a “slave driver” and on one occasion, mimicking the actors in the film “Rush Hour,” asked plaintiff, “What's up, my nigga?” (Id. at 1033) – some weeks later plaintiff mentioned the comments, and the supervisor apologized for both – the supervisor's comments were
offensive, but insufficient to meet the threshold of actionable harm” (*Id.* at 1035) – *Ash v. Tyson Foods, Inc.* does not affect this analysis – “However ill chosen [the supervisor’s] comments, including his . . . racially tinged statements, and however ill advised his attempts at racial humor, [the supervisor’s] conduct did not give rise to an actionable claim of racial hostility.” (*Id.*) – the dissent pointed out that the supervisor used the “N” word and also told plaintiff and another African-American employee that a black man’s skin color rubs off on towels – the supervisor also said, “African Americans all look alike” (*Id.* at 1036) – the dissent alleged that an apology is not a panacea for harassment that has already occurred, and that the supervisor did not apologize for all of the statements.

*Dunn v. Washington County Hospital*, 429 F.3d 689, 96 FEP 1647 (7th Cir. 2005) – Summary judgment for hospital reversed – nurse harassed by non-employee physician who was independent contractor with staff privileges – Judge Easterbrook opinion – it makes no difference under Title VII whether the alleged harasser is an employee, an independent contractor, or a customer – hospital’s responsibility is to provide a nondiscriminatory working environment.

*Chacko v. Patuxent Institute*, 429 F.3d 505, 96 FEP 1633 (4th Cir. 2005) – Co-worker harassment verdict of $1.1 million overturned since the only charges that were filed alleged supervisory harassment – thus no exhaustion of administrative remedies.

*Hardage v. CBS Broadcasting, Inc.*, 427 F.3d 1177, 96 FEP 1353 (9th Cir. 2005), cert. denied, 127 S. Ct. 55 (2006) – Male employee complained about female supervisor’s sexual advances, but insisted to employer on handling the matter himself – employer acceded to his request - no right to sue employer for sexual harassment – employee merely complained about “unwanted sexual advances” (*Id.* at 1182) but failed to provide specific details in addition to stating he would take care of it himself – as a result employee could not establish that employer failed to investigate.

*Singletary v. Missouri Department of Corrections*, 423 F.3d 886, 96 FEP 807 (8th Cir. 2005) – No race-based hostile environment despite second-hand information that some workers and managers had referred to plaintiff with a racial slur, that racially derogatory terms and phrases were common, and that plaintiff’s vehicle was vandalized several times – racial slurs alone do not render work environment hostile – incidents were not frequent enough for hostile environment – many of the difficulties related to the individual’s position as internal investigator and not his race – vandalism does not have a sufficient racial character without proof that race motivated the vandalism.

*EEOC v. National Education Association Alaska*, 422 F.3d 840, 96 FEP 556 (9th Cir. 2005) – Sex-specific conduct not necessary for hostile work environment against females – male supervisor screamed, yelled and used foul language in dealing with female employees – summary judgment reversed – because of sex does not require either a sexual nature to the conduct or that the conduct be motivated by sexual animus – here there was circumstantial
evidence of qualitative and quantitative differences in harassment suffered by female and male employees.

*Venezia v. Gottlieb Memorial Hospital, Inc.*, 421 F.3d 468, 96 FEP 561 (7th Cir. 2005) – Husband and wife who worked in different departments of hospital may proceed with separate sexual harassment claims – Seventh Circuit precedent that husband and wife who allege sexual harassment by the same supervisor cannot show it was because of sex (the so-called “equal opportunity harasser” situation) is not applicable – here the husband and wife suffered from different harassing actions at the hands of different people.

*Racicot v. Wal-Mart Stores, Inc.*, 414 F.3d 675, 95 FEP 1880 (7th Cir. 2005) – Alleged harassment not sufficiently severe or pervasive to support hostile environment claim – co-workers cursed at her and used vulgar language in her presence – the incidents in this case “are more reflective of run of the mill uncouth behavior than an atmosphere permeated with discriminatory ridicule and insult” (*Id.* at 678) – summary judgment properly granted.

*Tatum v. Ark. Dep’t of Health*, 411 F.3d 955, 95 FEP 1697 (8th Cir. 2005) – JNOV on co-worker sexual harassment case affirmed – for co-worker harassment plaintiff must show that employer was aware of the harassment and failed to take prompt and effective remedial action – employee complained about harassment but no investigation began for two weeks – the investigation then took eight weeks to conclude, an investigation which included 19 interviews – the investigator was unable to conclude whether or not sexual harassment had occurred – the alleged harasser was not disciplined – “The fact that the investigation took two and a half months does not lead us to the conclusion that the investigation was necessarily faulty.” (*Id.* at 959) – plaintiff resigned prior to the conclusion of the investigation – fact that plaintiff was required to work in the same office as the alleged harasser and “cold shoulder” given by other employees (friends of the alleged harasser) were insufficient to establish a constructive discharge.

*Walker v. Mueller Indus.*, 408 F.3d 328, 95 FEP 1258 (7th Cir. 2005) – Summary judgment affirmed with respect to white employee’s claim that being forced to watch racially animated harassment directed at his African-American co-workers rendered his work environment hostile – even assuming that the conduct against the African-American employees was severe and/or pervasive enough to render the environment hostile for them, as a bystander plaintiff was unable to establish that the conduct was so offensive to him as a third party as to render the workplace hostile to any reasonable employee who likewise was a bystander – claim of retaliation in receiving a warning slip following plaintiff’s complaint of harassment insufficient since it had no effect on wages or benefits – summary judgment appropriate even though EEOC found cause to believe plaintiff’s claims.
Miller v. Dep’t of Corr., 36 Cal. 4th 446, 96 FEP 258 (2005) – An untargeted employee who is not personally harassed may be deemed sexually harassed by the consensual affairs of others in the workplace with her superior and favoritism shown to such individuals – California Supreme Court cited 1990 policy statement by the EEOC which rejected isolated instances of sexual favoritism as a Title VII violation, but stated that “widespread sexual favoritism” may constitute hostile environment harassment – case analyzed at 177 LRR 404.

Pedroza v. Cintas Corp. No. 2, 397 F.3d 1063, 95 FEP 303 (8th Cir.), cert. denied, 126 S. Ct. 769 (2005) – Standards for female harassing female same-sex harassment same as male harassing male – summary judgment affirmed – no reasonable jury could conclude that the harassment was based on sexual desire.

Dick v. Phone Directories Co., Inc., 397 F.3d 1256, 95 FEP 293 (10th Cir. 2005) – Same-sex harassment plaintiff need not establish that her harasser was homosexual but must establish that the motivation was sexual desire.

Eliserio v. United Steelworkers of America, 398 F.3d 1071, 95 FEP 421 (8th Cir. 2005) – Summary judgment for union reversed – plaintiff, an Hispanic, crossed union picket line and was thereafter subjected to numerous insults demeaning his national origin – a reasonable jury could find that the union supported the discriminatory campaign which created a hostile work environment.

Septimus v. Univ. of Houston, 399 F.3d 601, 95 FEP 129 (5th Cir. 2005) – Alleged sexual harassment not severe or pervasive enough as a matter of law – plaintiff relied primarily on three incidents, including a two-hour “harangue” in her office, and a comment that she was “like a needy old girlfriend” – “All of [plaintiff’s] other summary judgment evidence . . . pertained to other women . . . and therefore is not relevant.” (95 FEP at 135) – although much of the conduct was “boorish and offensive,” the plaintiff “did not personally experience most (if not all) the conduct complained of by the other women.” (Id.) – summary judgment affirmed.

LeGrand v. Area Res. for Cmty. & Human Servs, 394 F.3d 1098, 95 FEP 14 (8th Cir.), cert. denied, 126 S. Ct. 335 (2005) – Same-sex case not severe enough to be actionable – parish priest alleged to have propositioned plaintiff, hugged and kissed him, and brushed his hand against plaintiff’s crotch – the three alleged incidents occurred over a nine-month period and thus were not severe or pervasive enough to poison the employee’s work environment – the priest was a board member of the plaintiff’s employer.

Kriescher v. Fox Hill Golf Resort, 384 F.3d 912, 94 FEP 1007 (7th Cir. 2004) – Female golf resort front desk manager was discharged after she directed security personnel to gather information about male food and beverage manager after he was found in his office after hours with female bartender – claim of comparative evidence rejected – fact that another manager was in the club pool at 3:00 in the morning with several naked strippers and not
disciplined not comparable to her directing security to gather information on a manager –
“Identifying similarly situated employees is an essential piece of the prima facie case, and without this evidence [plaintiff’s] claim must fail.” (Id. at 916) - claim that new general manager created a sexually permissive environment that was permeated with misconduct and rule violations not shown to relate to plaintiff’s discharge – sexually permissive atmosphere of the golf club was insufficient to establish a hostile environment for plaintiff since none of the acts or remarks in question were directed at or affected her – “Beyond her knowledge that the incidents occurred, [plaintiff] offers no evidence or explanation of how they objectively altered her work environment in any way.” (Id. at 915)

_Bainbridge v. Loffredo Gardens, Inc._, 378 F.3d 756, 94 FEP 283 (8th Cir. 2004) – An employer’s racial slurs uttered about once per month for a two-year period were not severe or pervasive enough as a matter of law to create a hostile work environment – the timing rendered them sporadic - in general the slurs were not directed at the employee but were used in reference to customers, competitors and other employees.

_Williams v. ConAgra Poultry Co._, 378 F.3d 790, 94 FEP 266 (8th Cir. 2004) – In racially hostile environment case court did not err in admitting evidence about race-related incidents at plant that did not concern plaintiff or of which plaintiff was unaware since it made more credible claimant’s testimony about what he endured and also related to condonation by management of racism.

_Rhodes v. Ill. Dep’t of Transp._, 359 F.3d 498, 93 FEP 491 (7th Cir. 2004) – Alleged harassers were not supervisors even though they managed work assignments, investigated complaints, and made recommendations about sanctions for rule violations – they are not supervisors because they could not make decisions affecting the terms and conditions of employment, such as hire, fire, promote, demote, discipline or transfer – sexual harassment policy “identifies designated contact persons to accept complaints of discrimination or harassment” (Id. at 507) and gives “the names and phone numbers of these contact persons, along with civil rights newsletters and posters” (Id.) – although the co-worker harassment was severe enough to constitute a hostile work environment, because plaintiff complained only about one isolated incident, she cannot impute to the company knowledge of the hostile work environment – summary judgment affirmed.

_Riske v. King Soopers_, 366 F.3d 1085, 93 FEP 1119 (10th Cir. 2004) – Store manager anonymously over a period of two or three years sent plaintiff flowers, which disturbed her – he then followed her around the store and whistled at her in a taunting manner – conduct held sufficiently outrageous for court to reverse dismissal as a matter of law of outrageous conduct claim under state law – however, sexual harassment claim reversed because a reasonable jury could not find that the conduct was because of her sex – only a few of the comments were gender-related – there were no explicit or implicit sexual proposals.
Mormol v. Costco Wholesale Corp., 364 F.3d 54, 93 FEP 1045 (2d Cir. 2004) – Department manager demanded sex from part-time employee, and punished her for refusing by threatening to terminate her if she did not return early from unpaid vacation, wrote her up for being five minutes late, and reduced her working hours from seven days to three days – employee complained – harasser was terminated – disciplinary warning never went into effect – no claim of lost wages since seven-day schedule for part-time employee apparently a mistake – summary judgment granted since no adverse employment action – similarly, no hostile work environment – incidents not sufficiently severe or pervasive to create a hostile work environment – “The episodes of harassment, far from being pervasive, were few and occurred over a short span of time, most of which plaintiff spent on vacation.” (Id. at 58-59).

Cooper-Schut v. Visteon Auto. Sys., 361 F.3d 421, 93 FEP 705 (7th Cir. 2004) – Summary judgment affirmed in sexual/racial harassment case – black female supervisor during her four months on the job had numerous problems with co-workers – subordinate said “I don’t like women” (Id. at 424) and left a business card at her desk with the location of where he purchased guns – subordinate being disciplined pushed a heavy industrial basket toward her, screaming at her that he was “sick of this shit” (Id. at 425– she was told that there was a competition in the plant to see who would be the first to have sex with her – she was injured by a falling tray which she believes was not accidental – she was told by other workers that the employee she believes threw the tray used the “N” word – when she returned to work after the injury she found a derogatory caricature of her taped to the refrigerator in her work area – it used the “N” and “B” words – she reported this latest incident and a new employee was assigned to interview the various employees who worked with plaintiff – the investigator told plaintiff she could not guarantee plaintiff’s safety at the plant – plaintiff then resigned – although some of the incidents may have been severe or pervasive enough to rise to an actionable level there is no basis for employer liability – the employer responded reasonably on the few occasions when she reported the events – none of the serious incidents were done by a supervisor – the first inquiry is whether the employer was on notice and the next inquiry is whether the employer acted reasonably – most of what plaintiff complained about were work-related incidents that did not involve racial or sexual insults – “While [the company] may have been on notice that she was experiencing friction with her co-workers, it did not have reason to believe the majority of these problems fell into the more serious umbrella of race or sex discrimination.” (Id. at 427) – the company’s “response of immediately conducting multiple interviews with the employees involved was a reasonable response, and was not negligent” (Id.) – with respect to the offensive caricature, which was clearly related to both race and sex, there was a full investigation and the company retained a forensic expert to analyze the handwriting – the company could not determine who was responsible, so instead of disciplining employees it reviewed its zero tolerance policy with all employees at the plant – this was a reasonable action to remedy the violations – the constructive discharge claim fails because plaintiff quit before the employer had a chance to complete its investigation of the caricature.
Wheeler v. Aventis Pharms., 360 F.3d 853, 93 FEP 641 (8th Cir. 2004) – Black female discharged for grabbing male co-worker’s genitalia was not similarly situated to white employee who was not disciplined for exposing her breasts upon request – the situations were not comparable – sexually offensive conduct that involves physical contact is more serious than offensive comments or lewd displays – black employee received the same discipline as the only other employee accused of grabbing genitalia.

McGinest v. GTE Serv. Corp., 360 F.3d 1103, 93 FEP 557 (9th Cir. 2004) – Racial harassment case – continuing violation theory used despite time gaps of several years without any harassing conduct – “Reasonable racial group member” standard used in determining whether the conduct had sufficient severity to violate Title VII – partial dissent on continuing violation holding (majority appears to hold that the statute of limitations is irrelevant if a single act occurs within the relevant time frame).

Tran v. Trs. of State Colls. in Colo., 355 F.3d 1263, 93 FEP 137 (10th Cir. 2004) – After complaining of harassment employee was transferred to jobs that required her to learn new skills – it is a legitimate nondiscriminatory reason to reassign an employee who complained about harassment – in any event, it is not an adverse employment action to be reassigned without loss of pay or benefits to a job that required learning new skills, especially in a “rapidly evolving field” such as computer programming.

Lee-Crespo v. Schering-Plough Del Caribe, Inc., 354 F.3d 34, 93 FEP 47 (1st Cir. 2003) – Following sexual harassment complaint, employer reassigned alleged harassee to different sales territory which allegedly had less potential for sales but reporting to someone other than the supervisor who allegedly harassed her – this is not a tangible employment action since there is no proof that the supervisor who allegedly harassed her was the one who caused her reassignment – she had requested a new supervisor – separating the alleged harasser from the alleged harassee was a reasonable response by management – no constructive discharge since the incidents of alleged sexual harassment do not rise to the level of creating an intolerable environment – management moved swiftly once there was a complaint – complained-of conduct was episodic and not frequent enough to become severe – it was never physically threatening even if it was mildly humiliating.

Thomas v. Town of Hammonton, 351 F.3d 108, 92 FEP 1701 (3d Cir. 2003) – Supervisor sexually harassed female probationary despite contention that male probationary observed and was subject to the identical conduct and therefore it was not because of sex – instructor of probationaries was directly in front of female when he engaged in the objectionable conduct – but even if both probationaries had been exposed to the same conduct, there could be a hostile work environment because the conduct contained comments that were disparaging to women, and the conduct, coming in the context of a male instructor having control over the fate of a female probationary, could be intimidating in a way not experienced by the male probationary.
McCown v. St. John’s Health Sys., Inc., 349 F.3d 540, 92 FEP 1569 (8th Cir. 2003), cert. denied, 541 U.S. 974 (2004) – Same-sex sexual harassment case dismissed – boorish supervisor of male construction worker who supervised only men continually subjected the plaintiff to vulgar, offensive conduct which included grinding his genitals against the worker’s buttocks and simulated intercourse – no evidence to indicate boss was homosexual and motivated by sexual desire or that the boss was motivated by a general hostility in the presence of males in the workplace – no comparative evidence since no women in the workplace – therefore no proof that the boorish conduct was “because of sex” – these are the three methods of proving a same-sex case laid out in Oncale – summary judgment affirmed.

Ottman v. City of Independence, Mo., 341 F.3d 751, 92 FEP 932 (8th Cir. 2003) – A supervisor’s belittling comments toward women and slighting of women in job assignments not severe enough to support a sexual harassment claim.

Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 92 FEP 433 (4th Cir. 2003) (en banc), cert. denied, 540 U.S. 1177 (2004) – Reversing panel decision, by 9-3 vote Fourth Circuit en banc upholds jury verdict in sexual harassment case but reverses punitive damages – fact that men use the same type of offensive and sexual language before female came to work is not a defense because a reasonable jury could find that she was the individual target of harassment because of her sex - the harassment was in such sex-specific and derogatory terms as to make it clear that the men were motivated by general hostility to the presence of women – the evidence is not legally sufficient to support punitive damages – dissent contended, as the panel decision found, that the vulgar talk was experienced by all production shop workers regardless of gender and there was no nexus between the conduct and the plaintiff’s gender.

Linville v. Sears, Roebuck & Co., 335 F.3d 822, 92 FEP 132 (8th Cir. 2003) – Male employee who was backhanded in the scrotum by a male co-worker on several occasions did not prove a claim of gender discrimination because he did not prove the motivation was sex – the striking and laughing was gender-specific vulgarity but by itself not probative of gender discrimination – no indication co-worker motivated by hostility toward men.

Scarberry v. ExxonMobil Oil Corp., 328 F.3d 1255, 91 FEP 1320 (10th Cir. 2003) – Summary judgment affirmed – co-employee harassment – after first incident employer counseled male employee and warned him – fact that he subsequently spray-painted sexually demeaning graffiti does not mean that initial actions were not proportionate to the incident – when spray-painted graffiti incident occurred, employer did everything possible – handwriting experts, immediate removal, interviewing employees, and successfully locating harasser and terminating him – employer’s actions will not be deemed inadequate simply because the harassment occurred again if actions were proportional to the offense and reasonably calculated to end harassment - other incident in which a different co-worker showed female employee one-page document entitled “Men’s Rules for Women” that contained sexually-oriented crass statements was properly handled –
employer suspended male co-worker for three days without pay and required him to apologize in writing and warned him that further violations could result in termination.

_Alagna v. Smithville R-II Sch. Dist._, 324 F.3d 975, 91 FEP 878 (8th Cir. 2003) – Conduct of male teacher toward female counselor, including frequent unwanted “I love you” comments, appears to be effort of troubled, insecure, and depressed person to seek reaffirmance of his self-worth – in the absence of any sexual advances comments are more indicative of one in search of friendship than of a sexual predator.

_Watson v. Blue Circle Inc._, 324 F.3d 1252, 91 FEP 609 (11th Cir. 2003) – Summary judgment for employer reversed despite well-disseminated anti-sexual harassment policy – constructive notice of many incidents that were not complained about was issue of fact – existence of a well-disseminated policy standing alone is not sufficient to entitle the employer to rely on the policy’s procedural framework when evidence has been presented challenging the effectiveness of the policy.

_Quantock v. Shared Mktg. Servs., Inc._, 312 F.3d 899, 90 FEP 883 (7th Cir. 2002) (per curiam) – In one conversation the president of the company, seriatim, made three different propositions, each of which was rejected: oral sex, a “threesome,” and then “phone sex” – the district court judge granted summary judgment on the ground that all of the conduct occurred in the course of only a few minutes and thus the conduct was not pervasive enough – the Seventh Circuit reversed, since given this severity, there was no necessity to show the conduct was also pervasive.

_Schobert v. Ill. Dep’t of Transp._, 304 F.3d 725, 89 FEP 1420 (7th Cir. 2002) – Preferential treatment given to the sole female employee in a department because of her alleged grant of quid pro quo sexual favors did not constitute sexual harassment of a male co-worker – Title VII does not prevent an employer from showing favoritism to an employee because of a personal relationship – this is not a sex discrimination problem, because if there had been other women working in the department they would have suffered the same way the male plaintiff suffered.

_Woodland v. Joseph T. Ryerson & Son, Inc._, 302 F.3d 839, 89 FEP 1485 (8th Cir. 2002) – Summary judgment granted in racial harassment case – plaintiff testified plant was rife with co-worker racial hostility that created a hostile work environment – issue was whether the conduct was severe or pervasive enough to alter terms and conditions of employment – the conduct “was certainly offensive” but insufficient to establish “severe and pervasive racial hostility” – “Woodland chose not to report many of the incidents about which he now complains. When two of the incidents were reported by others, Woodland declined the plant manager’s offer to fire the offending co-worker. This is strong evidence that, while offensive, these incidents did not subjectively affect the conditions of Woodland’s employment.” (Id. at 844) – racial graffiti inexcusable but plaintiff furnished with spray paint to cover up the graffiti – “[T]he sporadic racially-motivated misconduct by
[plaintiff’s] co-workers was neither severe nor pervasive enough to create a hostile work environment.” (Internal quotations omitted.) (Id.)

Duncan v. Gen. Motors Corp., 300 F.3d 928, 89 FEP 1105 (8th Cir. 2002) – One-million-dollar sexual harassment award overturned 2-1 – the offensive behavior was not severe or pervasive enough – after plaintiff rejected sexual overtures, the alleged harasser inappropriately touched her several times, displayed a nude woman screen saver on his computer to her, displayed a planter in his office of a man with a cactus protruding from his zipper, and twice showed her a phallic-shaped child’s pacifier – he then created a poster for a “man-hater’s club of America” and portrayed her as president and CEO – these “actions were boorish, chauvinistic, and decidedly immature, but we cannot say they created an objectively hostile work environment permeated with sexual harassment.” (Id. at 935) “Numerous cases have rejected hostile work environment claims premised upon facts equally or more egregious than the conduct at issue here.” (Id. at 934) – dissent contended that the harassment went “far beyond gender-related jokes and occasional teasing.” (Id. at 936) (Citation omitted.)

Alfano v. Costello, 294 F.3d 365, 89 FEP 193 (2d Cir. 2002) – 12 incidents of sexual harassment do not meet the threshold of severity or pervasiveness – incidents were infrequent and episodic, and more than half of them lacked a sexual overtone – those with sexual overtone were difficult to remedy because they were largely anonymous – jury verdict overturned and JNOV granted – fact that everyone is protected by sex, race or ethnicity and that many bosses are harsh, unjust and rude makes it important in hostile environment cases to exclude personnel decisions lacking linkage or correlation to claimed ground of discrimination – five incidents with sexual correlation over span of four years is insufficient – incidents included using a carrot and two potatoes in plaintiff’s mailbox to suggest male genitalia and a hand-drawn cartoon containing vulgar sexual remarks.

Herberg v. Cal. Inst. of the Arts, 101 Cal. App. 4th 142, 89 FEP 1025 (2002) – Art school which displayed a student’s drawing depicting a female administrative employee in various sexual acts did not constitute severe or pervasive harassment – employee herself did not see the drawing until long after it had been taken down, and it was not intended to harass but to make a point about representational art.

Patt v. Family Health Sys., Inc., 280 F.3d 749, 88 FEP 52 (7th Cir. 2002) – Physician sued for sexual harassment – her department chief’s eight gender-related comments insufficiently severe as a matter of law – the comments were “indeed offensive” but “too isolated and sporadic to constitute severe or pervasive harassment” – also relevant is the fact that only two of the comments were made directly to her – the others were conveyed to her by other employees – “[T]he impact of such ‘second-hand’ harassment is obviously not as great as harassment directed toward [her] herself.” (Id. at 754) – “Title VII does not mandate admirable behavior from employers, and [the doctor’s] conduct, though offensive, thus falls short of ‘severe’ or ‘pervasive’ harassment.” (Id.)
**Rizzo v. Sheahan**, 266 F.3d 705, 87 FEP 1583 (7th Cir. 2001) – “Deplorable” conduct of a sexual nature by plaintiff’s supervisor not actionable because it was a product of a supervisor’s animosity toward the employee’s husband and was not motivated by sex – summary judgment affirmed.

**Bibby v. Pa. Coca-Cola Bottling Co.**, 260 F.3d 257, 86 FEP 553 (3d Cir. 2001) - Summary judgment affirmed on claim of employee perceived to be homosexual that he was harassed because he was so perceived - he offered no evidence to prove he was harassed “because of sex” - the basic allegation was that a co-worker used anti-gay epithets against him - the question on appeal is whether there is sufficient evidence to support a claim of same-sex sexual harassment - that requires a finding that plaintiff was not harassed because of his sexual orientation but was harassed because of his sex - *Oncale* mandates evidence that the harassment was because of sex - the question of how to prove same-sex harassment is because of sex is not an easy one to answer - in same-sex harassment cases there can be evidence that the harasser sexually desires the victim as when a gay supervisor desires a same-sex subordinate - same-sex harassment can be found where there is no sexual attraction but where the harasser displays hostility to the presence of a particular sex in the workplace - for example, a female chief executive of an airline might believe that women should not be pilots - a male doctor might believe that men should not be nurses - although less clear, a plaintiff might be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender - examples might be a male harassing a male who wore an earring - the gender stereotype is based on *Price Waterhouse v. Hopkins* where a woman was denied a partnership because she was “macho” and “masculine” and used foul language - thus, there are at least three ways by which a plaintiff alleging same-sex sexual harassment might demonstrate it is because of sex - in this case the only one arguably applicable is that plaintiff did not conform to societal stereotypes - but plaintiff’s “claim was, pure and simple, that he was discriminated against because of his sexual orientation” (86 FEP at 558) - no reasonable fact finder could conclude that he was in fact discriminated against because he was a man - harassment on the basis of sexual orientation is morally reprehensible but Congress has not yet prohibited it.

**Longstreet v. Ill. Dep’t of Corr.**, 276 F.3d 379, 87 FEP 1375 (7th Cir. 2002) - Co-worker harassment - employer acted appropriately with respect to first instance of harassment (an alleged offer of money for sex), and therefore is not liable for second incident of harassment committed by the same harasser against another co-worker - after first complaint of harassment, the harasser was reassigned, but not disciplined, and the harassee never had to work with him again - later the harasser harassed a second co-worker - the harasser was discharged - since the employer’s response to the first complaint solved the harassee’s problem, it was not obviously unreasonable - therefore it cannot form the basis for liability in a second case where the employer’s response was also sufficient - an employer is not subject to what amounts to strict liability every time a second incident of harassment is committed by an employee who was not discharged the first time - had the
first instance of harassment been more severe, the result might have been different – issue analyzed at LRR 112.

**Little v. Windermere Relocation, Inc.**, 301 F.3d 958, 87 FEP 1452 (9th Cir. 2002) - Summary judgment for defendant reversed - plaintiff, a salesperson, had dinner and drinks with a high-level client representative, passed out, and was repeatedly raped by the client in his car and later in his apartment - a co-worker advised plaintiff not to report it - she did not report it for nine days - when she did report it to management she was advised to put it behind her - there was no investigation - she was left on the client's account - when some time later she finally told the president of the company, he indicated he did not want to hear anything about it - she was promptly informed that her pay was being cut - when she said this was unacceptable, she was terminated - it does not matter that there was only one instance since rape is unquestionably among the most severe forms of sexual harassment - based on the evidence a fact finder could conclude that her employer effectively condoned the rape and its effects - the company’s failure to take appropriate remedial measures raises factual issues about ratification or acquiescence in the harassing conduct.

**B.K.B. v. Maui Police Dep’t**, 276 F.3d 1091, 87 FEP 1306 (9th Cir. 2002) - County was properly sanctioned in sexual harassment case when its counsel introduced testimony concerning the plaintiff’s fantasies and autoerotic sexual practices - trial court had twice denied pretrial motions to allow the evidence.

**Ferris v. Delta Air Lines Inc.**, 277 F.3d 128, 87 FEP 899 (2d Cir. 2001) - Hotel room in which male flight attendant raped female flight attendant while on layover was part of “work environment” for purposes of sexual harassment claim under Title VII - male flight attendant drugged and raped female flight attendant - three other female flight attendants had previous incidents with the male flight attendant which they reported but the airline took no action - the district court had dismissed the case, holding that a hotel room is not a work environment for which the employer was responsible - the court of appeal reversed, finding it was part of the work environment and that a reasonable fact finder might conclude that the airline’s negligence made the rape possible - the Second Circuit took note of cases involving off-premises behavior by supervisors, but did not cite any decisions relating to off-premises and off-duty behavior by co-workers - case and other authorities analyzed at 169 LRR 8.

**Woods v. Delta Beverage Group, Inc.**, 274 F.3d 295, 87 FEP 737 (5th Cir. 2001) - Co-worker harassment - after female complained of male’s harassment employer warned male to stop or face further disciplinary action - female’s failure to inform the employer of further harassment as the employer had instructed bars hostile environment claim - employer cannot be held liable for conduct of which it had no knowledge.

**Swenson v. Potter**, 271 F.3d 1184, 87 FEP 620 (9th Cir. 2001) - Employer’s response to complaint by deaf mute of co-worker harassment was prompt and appropriate - employer promptly began investigating - fact that investigation did not conclude for four months was
attributable to the fact that complaining employee was off work for much of that time and
necessity to get sign-language interpreters - jury verdict for employee overturned - 2-1
decision - although the employer’s investigation did not turn up enough evidence to
warrant discipline of the accused harasser, the employer took appropriate steps to end the
unwelcome behavior - steps were taken to separate Swenson from the alleged harasser - “If
[an employer] decides to separate the two employees in the workplace, the employer may
properly consider the relative ease of moving them and their respective importance to its
business operations. The employer has wide discretion in choosing how to minimize
contact between the two employees, so long as the accuser is not moved to an objectively
less desirable position. Whether the position to which the employee is moved is less
desirable is determined by objective factors . . .” (Id. at 1194) - opinion written by Judge
Kozinski.

Pipkins v. City of Temple Terrace, Fla., 267 F.3d 1197, 86 FEP 1413 (11th Cir. 2001) -
Employee alleged that her evaluations became less favorable after she ended a relationship
with the City’s Finance Director/Assistant City Manager - when the allegations came to
light, the Finance Director was fired - the employee quit six months later, and claimed a
constructive discharge based on sex - the court of appeal held that she could not establish
that any of the actions were based on sex as opposed to personal animosity - most of the
objected-to actions were committed by the employee’s immediate supervisor, who the
employee contended was motivated by a friendship between the immediate supervisor and
the Finance Director’s wife - once again, this would be personal animosity rather than sex-
issue of distinction between negative actions motivated by personal animosity as opposed
to sex analyzed at 168 LRR 175.

Lipphardt v. Durango Steakhouse of Brandon, Inc., 267 F.3d 1183, 86 FEP 1409 (11th Cir.
2001) - After waitress ended consensual affair, supervisor continued to demand sexual
favors and brushed up against her at work - she complained of sexual harassment, and was
fired based on the harasser’s assertion that she had engaged in improprieties, a false
assertion - the trial court granted a JNOV for the employer on the ground that the
animosity was personal and not based on sex - the Eleventh Circuit reversed on the ground
that the plaintiff could have had a reasonable belief that she was the victim of sexual
harassment, and that was sufficient to sustain a retaliation finding - the issue of when,
following the termination of a personal relationship, harassment is based on sex or
personal animosity is analyzed at 168 LRR 175.

EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 86 FEP 1387 (6th Cir. 2001) - Male-on-male
vulgar horseplay claim rejected 2-1 - Title VII is not a generic anti-harassment statute -
conduct must be because of sex - dissent claimed that because employer employed three
women who were not harassed, rational fact finder could conclude that the
disadvantageous conditions of employment were because of sex.

Rheineck v. Hutchinson Tech., Inc., 261 F.3d 751, 86 FEP 1217 (8th Cir. 2001) - Phony picture
of plaintiff supposedly exposing her breasts circulated at plant - summary judgment for
employer - no reasonable juror could find employer's remedial actions to be anything but prompt and reasonably designed to end harassment - no supervisorial involvement - nine employees were disciplined and required to take sexual harassment training.

_Nichols v. Azteca Rest. Enters.,_ 256 F.3d 864, 86 FEP 336 (9th Cir. 2001) - Effeminate male harassed - district court after bench trial concluded that harassment was not “because of sex” - Ninth Circuit reverses - _Oncale_ established that male-on-male sexual harassment could be because of sex - _Price Waterhouse_ found actionable the denial of a partnership because a forceful and aggressive woman did not match a sex stereotype - Ninth Circuit 2-1 concludes that plaintiff’s complaints were sufficient to place the company on notice of the harassment even though he did not follow formal reporting procedures - actions taken after complaint to human resources manager were insufficient, since there was no investigation, no discussion with the perpetrators, no demand to end the conduct, and no threat of more serious discipline if the harassment continued - Judges Reinhardt and Gould conclude the company did not exercise reasonable care - Judge Wardlaw dissents, finding that plaintiff’s complaints to the managers who were themselves the harassers were insufficient and that plaintiff failed to follow the company’s sexual harassment policy - issue of tension between Title VII’s non-coverage of sexual orientation discrimination and finding same-sex discrimination to be “because of sex” analyzed at 167 LRR 384.

_Mosher v. Dollar Tree Stores, Inc.,_ 240 F.3d 662, 85 FEP 220 (7th Cir. 2001) – Following facts negate claim of sexual harassment and constructive discharge: no complaints; he paid half of rent; she regularly had sex with him; she accepted his gifts; she met his parents; she referred to him as her boyfriend; and she gave a positive report of their relationship to her counselor and treating physician.

_Star v. West_, 237 F.3d 1036, 84 FEP 1384 (9th Cir. 2001) - Trial court judgment rejecting hostile environment sexual harassment claim affirmed - co-worker harassment - two instances of unwelcome physical contact - co-worker grabbed or put his arms around plaintiff and grabbed her shoulders, hips and, according to trial testimony, which conflicted prior statements, her breasts - immediately reported - supervisor confronted co-worker, “told him that the allegations were serious, and told [him] to stay away from [plaintiff]” (Id. at 1037) - the next day supervisor, acting on instructions from his superior, informed co-worker that allegations were serious and the parties were not to confront each other - one month after incidents plaintiff filed internal charge and two days later co-worker was transferred to a different shift - employer is liable for co-worker harassment once on notice unless the employer takes adequate remedial measures - claim that employer response must always involve some form of discipline rejected - “[C]ounseling or admonishing the offender can constitute an adequate ‘disciplinary’ response.” (Id. at 1039) - our prior cases “do not hold that counseling can never be a sufficient response” (Id.) - “An employer’s refusal to apply the label ‘discipline’ to [its] actions is not determinative of their adequacy as a remedy. What is important is whether the employer’s actions, however labeled, are adequate to remedy the situation.” (Id.)
Discharge - General (Ch. 21)

_Cigan v. Chippewa Falls Sch. Dist._, 388 F.3d 331, 16 A.D. Cas. 193 (7th Cir. 2004) – No constructive discharge – teacher was told six months before the end of the school year that superintendent would recommend against renewing her contract – she therefore decided to retire at the end of the school year, six months later – no demonstration working conditions unendurable – limitations period for filing charges could expire if a notification of intent to discharge was equated with the actual discharge.

_De la Vega v. San Juan Star, Inc._, 377 F.3d 111, 94 FEP 379 (1st Cir. 2004) – Summary judgment on constructive discharge claim – reliance on fact that in letters of resignation plaintiff did not refer to intolerable working conditions or any age-based discrimination.

_James v. Booz-Allen & Hamilton, Inc._, 368 F.3d 371, 93 FEP 1418 (4th Cir.), _cert. denied_, 543 U.S. 959 (2004) – Critical comments by supervisor in partners’ meeting and suggestion that black senior associate should start looking for another job is insufficient to establish constructive discharge – reassignment to a different project, a lowered evaluation, and criticisms about level of hours similarly did not create the kind of harsh working conditions that would compel any reasonable employee to quit.

_Lawson v. Washington_, 296 F.3d 799, 89 FEP 385 (9th Cir. 2002) – Ninth Circuit 2-1 (Betty Fletcher in dissent) found no constructive discharge in situation where Jehovah’s Witness resigned from state patrol trooper class because of his religious belief against saluting the flag and the academy’s practice of twice-daily flag formations – does not matter that no one on academy staff tried to talk employee out of resigning – there was no threat of discipline or termination even though manual indicates discipline can be imposed for rule violations.

_Agnew v. BASF Corp._, 286 F.3d 307, 88 FEP 871 (6th Cir. 2002) – Employee quit after being put on performance improvement plan that employee contended would inevitably have resulted in discharge – no constructive discharge – cannot show that working conditions were so intolerable a reasonable person would have felt compelled to quit.

_Duffy v. Paper Magic Group, Inc._, 265 F.3d 163, 86 FEP 1197 (3d Cir. 2001) - No constructive discharge despite exclusion from committees, hiring decisions, staff meeting, and supervisor seminar - testimony by doctor that such exclusions had negative effect on her health insufficient to establish constructive discharge - at most they made her environment more stressful, but stress is not a constructive discharge.

_Johnson v. Nordstrom, Inc._, 260 F.3d 727, 86 FEP 574 (7th Cir. 2001) - Summary judgment in constructive discharge case affirmed - plaintiff claimed he was given disproportionate amount of stock work, that other employees were given sales leads she should have been given, she was excessively monitored, and not promoted because of her race - constructive discharge requires much more egregious allegations - with respect to failure to promote, employer did not promote her because co-workers believed she was stealing customers -
plaintiff claimed that this was disputed and should go to trial - issue was not whether she stole customers - issue was whether her co-workers thought she did - plaintiff claimed that Nordstrom’s gave vacillating reasons for failing to promote her and that this created an issue of fact on pretext - pretext requires “not only shifting but also conflicting” reasons (Id. at 578) - in this case Nordstrom’s simply supplemented its explanations in the context of EEOC charges and litigation - there has been no retraction of prior reasons.

Unions (Ch. 22)

EEOC v. Pipefitters Ass’n Local Union 597, 334 F.3d 656, 92 FEP 360 (7th Cir. 2003) – Judge Posner, writing for a 2-1 majority, holds that union is not liable for failing to prevent co-workers from creating a hostile work environment for African-American pipefitters through graffiti – the employer is totally liable and is in a much better position to take action – nothing is gained “except litigation clutter” by imposing the same liability on the union.

The Civil Rights Acts of 1866 and 1871 (Ch. 24)

Domino’s Pizza Inc. v. McDonald, 546 U.S. 470 (2006) – McDonald, a black man, was the sole shareholder of a company – he alleged that Domino’s broke contracts with his company for racial reasons – McDonald was simply an agent – it was not his contract – he therefore has no rights under § 1981 – the plaintiff must be the “person” whose “right . . . to make and enforce contracts” was impaired.

Jones v. R. R. Donnelley & Sons Co., 541 U.S. 369, 93 FEP 993 (2004) – The catchall four-year limitations period of 28 U.S.C. § 1658 applies to § 1981 actions which “were made possible” (Id. at 370, 383) by the 1991 amendments – the four-year limitations period applies to causes of action arising under any act of Congress enacted after December 1, 1990 - § 1981 was substantially amended by the Civil Rights Act of 1991 – allegations of hostile work environment wrongful termination and failure to transfer could not have been brought prior to the 1991 amendments – therefore, the four-year statute applies.

Ofori-Tenkorang v. American International Group, Inc., 460 F.3d 296, 98 FEP 1089 (2d Cir. 2006) – Section 1981 protection does not extend to overseas workers who allege discrimination with respect to overseas assignments – does not matter that the company was U.S.-based and the decision was allegedly made by a U.S.-based decisionmaker – relevant locus is the location of the subject of the discrimination.

Johnson v. Crown Enters. Inc., 398 F.3d 339, 95 FEP 88 (5th Cir. 2005) – Louisiana one-year statute of limitations applies to § 1981 claim of discrimination in refusal to rehire – U.S. Supreme Court decision applying four-year federal limitations period applies only to claims under the 1991 revisions to § 1981 – the revisions allowed claims for conduct occurring
after contract formation, such as harassment or termination, but this was an assertion of a claim for failing to enter into a new contract, which was clearly covered previously.

*Manatt v. Bank of Am., N.A.*, 339 F.3d 792, 92 FEP 599 (9th Cir. 2003) – Hostile work environment based on race (Asian) and retaliation can be brought under § 1981 – 1981 broad enough to encompass claim of bias based on Asian origin – however, instances of racially insensitive humor directed at plaintiff were not severe or pervasive enough to create a hostile work environment – employer had legitimate business reason for eliminating a position – it was not retaliation for having complained about racial bias – summary judgment for defendant on claim that denial of requested transfer was in retaliation for having made bias complaint 11 months earlier – there was an absence of evidence linking the two events.

*Phillips v. Collings*, 256 F.3d 843, 86 FEP 411 (8th Cir. 2001) - Supervisor unlawfully retaliated against employee who stated that religious beliefs would not permit him to license gays as foster parents - Civil Rights Act of 1871 violated - retaliation took the form of termination recommendation and corrective action plan - even though employee transferred away from biased supervisor and recommendations were never implemented, the retaliation worked a material disadvantage in employee's working conditions.

**Reverse Discrimination and Affirmative Action (Ch. 27)**

*Gratz v. Bollinger*, 539 U.S. 244, 91 FEP 1803 (2003) (freshman admissions); and *Grutter v. Bollinger*, 539 U.S. 306, 91 FEP 1761 (2003) (law school admissions) – In a 6-3 decision the university’s freshman admission policy was struck down as not narrowly drawn to achieve the university’s goal of creating diversity; in a 5-4 decision the Court upheld the narrowly tailored race-conscious admissions policy used by the law school – the law school’s policy stated its commitment to achieving a “critical mass” of minority students – the law school program does not violate the Equal Protection Clause because its use of race is narrowly tailored to further a compelling interest in obtaining the educational benefits that flow from a diverse student body – Justice O’Connor wrote for the Court – for the same reason the law school admission policy does not violate Title VI – Powell’s opinion in *Bakke* endorsed – percentage of minority students in the school over an eight-year period varied between 13.5 and 20%, demonstrating that it is not a quota – law school engages in a highly individualized review of each applicant’s file – there were no mechanical or predetermined diversity bonuses – high numeric scores do not guarantee admission and low numeric scores do not automatically disqualify – the educational benefits of racial diversity are substantial – a race-conscious admissions program cannot use a quota system but may consider race or ethnicity as a plus – to be constitutional a race-conscious admissions program must be limited in time – “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” (*Grutter*, 539 U.S. at 343) – Rehnquist dissent stated that the law school’s program was “a naked effort to achieve racial balancing” (*Id.* at 379) – all four dissenting Justices joined in
that opinion – Justice Thomas’s dissent quoted from Frederick Douglas that whites should not interfere with blacks and instead let them stand on their own legs – the undergraduate admissions program gave an edge to underrepresented minorities and was unconstitutional because it was not narrowly drawn – applicants with a score of over 100 are automatically admitted and a minority applicant automatically receives 20 points – Rehnquist wrote for the majority finding that the admissions policy violated the Equal Protection Clause of the Fourteenth Amendment, Title VI, and § 1981 – Justices O’Connor and Breyer joined the four dissenters in the law school case, making up the majority – issue analyzed at 172 LRR 295.

Alexander v. City of Milwaukee, ___ F.3d ___, 99 FEP 961 (7th Cir. 2007) – City is liable for reverse discrimination by improperly discriminating against white male police officers seeking promotions – race-conscious promotion system not narrowly tailored – damages must be calculated under the lost-chance doctrine – district court erred in not considering the entire number of officers who were qualified for promotion in figuring out the odds.

Mastro v. Potomac Electric Power Co., 447 F.3d 843, 98 FEP 193 (D.C. Cir.), pet. for cert. filed, 74 USLW 3207 (Oct. 6, 2006) (No. 06-49) – Summary judgment reversed – white engineer who was fired claimed that his termination demonstrated reverse discrimination in that his employer was reluctant to discipline similarly situated African-American employees – reliance on 1993 $38 million settlement of race and gender discrimination class action – reasonable jury could conclude that employer was reluctant to take disciplinary action against minority employees.

Kohlbeck v. City of Omaha, 447 F.3d 552, 97 FEP 1742 (8th Cir. 2006) – Affirmative action plan requiring promotions of lower ranked candidates whenever the actual number of minorities in a particular position was not within half a person of the affirmative action goal is illegal and unconstitutional – the standard for preferring lower ranked persons is a showing of discrimination through statistically significant differences.

Młynczak v. Bodman, 442 F.3d 1050, 97 FEP 1377 (7th Cir. 2006) – Decisionmaker was admittedly inclined toward hiring minorities – this direct evidence does not bar summary judgment and does not prove that any particular decision that was made was for discriminatory reasons – this is true even though another decisionmaker commented to an employee that the employee had been “screwed” – it is conjecture that this related to the agency’s affirmative action policy.

Dean v. City of Shreveport, 438 F.3d 448, 97 FEP 454 (5th Cir. 2006) – Reverse discrimination found – persons who achieved the minimum cutoff score on an exam were separated into three lists: white males, black males, and females – all females and the highest 50% from the white-male list and the black-male list proceeded with the hiring process, which resulted in rejecting white males who had higher scores than black males who were allowed to proceed.
*Petit v. City of Chicago*, 352 F.3d 1111, 92 FEP 1731 (7th Cir. 2003), *cert. denied*, 541 U.S. 1074 (2004) – “Standardization” promotional exams to eliminate impact on African-American and Hispanic applicants lawful since it was narrowly tailored to accomplish the compelling state interest of diversity – augmenting the scores of the Hispanic and African-American candidates did not violate the rule of *Gratz v. Bollinger*.

*Walker v. Prudential Prop. & Cas. Ins. Co.*, 286 F.3d 1270, 88 FEP 982 (11th Cir. 2002) – Deviation from affirmative action plan and failure to give preference under affirmative action plan cannot be used to support allegation of discrimination.

*MD/DC/DE Broadcasters Ass’n v. FCC*, 236 F.3d 13, 84 FEP 1376 (D.C. Cir. 2001) - FCC equal employment opportunity affirmative action recruitment rule giving broadcasters a choice between two options is vacated in its entirety because one of the options is unconstitutional - Option A, which the court finds constitutional, required a broadcaster two years out of four to engage in approved recruitment measures from a list of 13 types of recruitment measures, only two of which paid special attention to women and minorities - Option B, subject to strict scrutiny, in the court’s view compelled broadcasters to redirect their necessarily finite recruiting resources so as to generate a larger percentage of applications from minority group candidates - this will mean that some perspective non-minority group applicants who would have learned of job opportunities will not now do so - issue analyzed at 166 LRR 136.

**EEOC Administrative Process (Ch. 29)**

*Edelman v. Lynchburg Coll.*, 535 U.S. 106, 88 FEP 321 (2002) – EEOC regulation allowing charging party who did not sign his charge under oath to do so after the time limits have run is permissible under Title VII – no need to defer to the EEOC since court would have adopted that position if it were interpreting the statute from scratch – requirement of charge has a time limit – requirement of oath does not – Supreme Court does not reach the issue of whether plaintiff’s letter to the EEOC was in fact a charge or the significance of the fact that the EEOC did not provide the employer with notice of the charge within 10 days.

*Doe v. Oberweis Dairy*, 456 F.3d 704, 98 FEP 1022 (7th Cir.), *pet. for cert. filed*, 75 USLW 3296 (Nov. 22, 2006) (No. 06-73) – Teenage alleged harasser, on advice of counsel, refused to be interviewed by EEOC because of belief of psychotherapist that it would upset her – dismissal for failure to cooperate reversed – Title VII imposes no duty of cooperation during 60 days that EEOC has exclusive jurisdiction.

*Shikles v. Sprint United Management Co.*, 426 F.3d 1304, 96 FEP 1156 (10th Cir. 2005) – Charging party must cooperate with EEOC in order to exhaust administrative remedies – ADEA claimant canceled three scheduled telephone interviews and repeatedly failed to return investigator’s calls and did not submit requested information – this was a failure to
exhaust administrative remedies – EEOC has inherent power under Title VII, the ADA and the ADEA to dismiss charges of non-cooperative claimants – summary judgment for employer in subsequent litigation – exhaustion of administrative remedies is a jurisdictional prerequisite under ADEA.

Venetian Casino Resort v. EEOC, 409 F.3d 359, 95 FEP 1373 (D.C. Cir. 2005) – Employer brought suit for declaratory and injunctive relief based on contention that the EEOC follows a policy of disclosing trade secrets produced to it to charging parties without first notifying the party who submitted the information – district court dismissed case on ripeness ground – court of appeal reversed – district court directed to determine whether the EEOC’s policy is inconsistent with the Trade Secrets Act, Administrative Procedure Act, and Freedom of Information Act.

Coleman v. Home Depot, Inc., 306 F.3d 1333, 89 FEP 1876 (3d Cir. 2002) – Trial court has discretion to exclude EEOC findings when the negative factors listed in Rule 403 substantially outweigh the probative value – the court considered particularly significant the fact that the admission of the evidence would have resulted in undue delay and a waste of time since the employer would have had to rebut the EEOC’s allegations by presenting evidence from numerous former employees.

Jasch v. Potter, 302 F.3d 1092, 89 FEP 1377 (9th Cir. 2002) – Plaintiff refused to cooperate with the EEOC during its investigation – the EEOC issued a seven-page finding of no discrimination – the Ninth Circuit reversed a dismissal based on the failure to exhaust administrative remedies – even if the plaintiff refused to cooperate, there was a final decision on the merits by the EEOC, and that precludes dismissal – if the agency had dismissed plaintiff’s claim for failure to cooperate then there would have been no exhaustion – issue analyzed at 170 LRR 431.

Edelman v. Lynchburg Coll., 300 F.3d 400, 89 FEP 1053 (4th Cir. 2002) – By 2-1 vote on remand from U.S. Supreme Court college professor’s unsworn letter found to be a valid charge – dissent argued that it was not since professor characterized the letter as “a request for a charge” and the EEOC did not consider or treat the letter as a charge.

EEOC v. United Air Lines, Inc., 287 F.3d 643, 88 FEP 1018 (7th Cir. 2002) – EEOC subpoena not enforced – treaty with France precludes the airline from making contributions on behalf of the plaintiff to the French social security system – if the EEOC cannot prevail on a lawsuit, there is no reason to allow them to conduct a burdensome investigation – remand to district court to determine whether there is any possibility the EEOC could prevail if it brought a lawsuit on the allegations of the flight attendant living in France.

EEOC v. S. Farm Bureau Cas. Ins. Co., 271 F.3d 209, 87 FEP 332 (5th Cir. 2001) - EEOC subpoena seeking information on sex of employees where only charge filed was race charge denied enforcement - EEOC could have filed Commissioner’s charge in which case the
subpoenaed information would be relevant - EEOC was unable to demonstrate relevance of sex information on race charge filed by African-American male.

_EEOC v. Morgan Stanley & Co., 89 FEP 1791 (S.D.N.Y. 2002)_ – Release agreements that prohibit signatories from communicating with the EEOC without a subpoena, court order or agency request and without first notifying the employer so it can take what action it deems appropriate to prevent such communications are illegal – they violate public policy since they could have a chilling impact on claimants.

**Title VII Coverage (Ch. 30)**

_Arbaugh v. Y&H Corp., d/b/a Moonlight Café, 546 U.S. 500, 97 FEP 737 (2006)_ – 15-employee threshold for determining Title VII coverage is an element of plaintiff’s case and not jurisdictional – it can therefore be waived as it was in this case.

_Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 14 A.D. Cas. 289 (2003)_ – issue was whether four physician shareholders, each of whom owned 25% of professional corporation and had employment agreement with corporation, were employees – common law element of control is the principal guidepost – EEOC Guidelines contained in EEOC Compliance Manual list six factors: (1) “Whether the organization can hire or fire the individual or set the rules and regulations of the individual’s work”; (2) “Whether and, if so, to what extent the organization supervises the individual’s work”; (3) “Whether the individual reports to someone higher in the organization”; (4) “Whether and, if so, to what extent the individual is able to influence the organization”; (5) “Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts”; and (6) “Whether the individual shares in the profits, losses, and liabilities of the organization” – whether a shareholder-director is an employee depends on all the facts and circumstances – fact that the four director-shareholders control the operation of the clinic, share in the profits, and are personally liable support non-employee status – case remanded for further proceedings. [Note: With respect to partnerships the same EEOC Compliance Manual states that bona fide partners will not normally be considered employees.]

_Fields v. Office of Eddie Bernice Johnson, 459 F.3d 1, 98 FEP 993 (D.C. Cir.) (en banc), pet. for cert. filed, 75 USLW 3266 (Nov. 3, 2006) (No. 06-61)_ – Congress not immune under speech or debate clause of U.S. Constitution from discrimination claims under Congressional Accountability Act – legislators may have defense if the claims relate to the functioning of the legislative process – that is not the case here.
Smith v. Castaways Family Diner, 453 F.3d 971, 98 FEP 847 (7th Cir. 2006) – District court erred when it found that restaurant lacked the requisite 15 employees because the husband and the mother of the restaurant’s owner, who managed the place, were not employees – they were employees – they exercised authority at the pleasure of the owner and received regular paychecks – an alleged share in profits is insufficient – “[T]he purpose of the Clackamas test is to distinguish ‘employers’ from ‘employees.’” (citation omitted) ‘Employers’ are those whose authority and interests are so aligned with the business as to render them the legal personification of the business, i.e., principals rather than agents. . . . The six factors set forth in Clackamas thus serve to distinguish individuals whose title or ownership in the business comes without meaningful authority to run the business from those whose office or stake in the company is genuine.” (Id. at 978) – these individuals were analogous to the managers of great corporations, who are employees – employers are “individuals who, if their status is not purely titular, have a right to participate in the governance of the business and to control the work of its employees that is not wholly dependent upon the acquiescence of their superiors.” (Id. at 981).

Solon v. Kaplan, 398 F.3d 629, 95 FEP 289 (7th Cir. 2005) – Law firm had four partners – plaintiff was former managing partner who was not managing partner at the time of expulsion – all partners had voting rights – three other partners got together over lunch and decided to terminate plaintiff – plaintiff was not an “employee” covered by the discrimination laws – he had a $50,000 capital contribution, received a share of the firm’s income, attended compensation meetings, was privy to daily cash reports and other sensitive financial information which was not available to associates – Clackamas highlighted six non-exhaustive factors – the Clackamas test applies to this case – summary judgment affirmed – no reasonable juror could find that plaintiff was an employee – plaintiff’s domination theory that any leverage conferred by the partnership agreement was illusory rejected.

EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 90 FEP 145 (7th Cir. 2002) – EEOC was investigating whether law firm demoted 32 equity partners because of their age – law firm contended EEOC had no jurisdiction because bona fide partners are not covered by the discrimination laws – undisputed that each of the 32 partners shared in profits, shared in losses, had substantial capital accounts, and participated in management – EEOC relied on the fact that a self-perpetuating executive committee had ultimate powers in the firm – firm asked the EEOC to limit its subpoena to facts necessary to resolve the covered/jurisdictional issue – EEOC refused and subpoenaed facts going to not only coverage/jurisdiction but also the merits of why the 32 were chosen – district court enforced the subpoena in its entirety – Seventh Circuit reversed and remanded, directing enforcement only of the portions of the subpoena relevant to the coverage/jurisdictional issue – majority concluded that the coverage issue was murky – one fact the EEOC sought was how evenly profits were spread across the partnership – this would be relevant because coverage murky, it would be inappropriate to enforce the portion of the subpoena addressing the merits of whether the 32 partners were discriminated against on the basis of age – that should be deferred – majority emphasized it was not ruling that the demoted
partners were in fact employees – Posner and Diane Wood in the majority – concurring Judge Easterbrook stated that there was no question but that the 32 were bona fide partners not covered by the discrimination laws – he rejected the majority’s suggestion that one can be a partner under normal agency principles and still be an “employee” for purposes of the discrimination laws – but he concurred in the judgment because of uncertainty about the proper characterization of other lawyers in the firm who might be subject to the firm’s retirement policies – issue of whether persons denominated partners are covered by the discrimination laws analyzed at 171 LRR 31.

Stinnett v. Iron Works Gym/Executive Health Spa, Inc., 301 F.3d 610, 89 FEP 1282 (7th Cir. 2002) – Harassment suit by male plaintiff dismissed - failure to show 15 or more employees for 20 or more calendar weeks – showing number of employees “proved to be an insurmountable task . . . because the Executive Health Spa was a house of prostitution and criminal enterprises rarely keep accurate personnel or payroll records” (Id. at 612) – summary judgment affirmed – spa was a house of prostitution providing sexual services under the guise of “massage” – the sketchy payroll records show that never employed 15 even if counted together, and “even if the ‘spa attendants’ (a creative euphemism for prostitutes) are counted” (Id.) – district court properly struck transcript of audiotape made during criminal investigation – woman wore a wire into a meeting with the head of spa who volunteered they have 25 or 30 people that work there – properly stricken since conversation dealt with a time period two years after the relevant time period – further complicated “by evidence demonstrating that many of the women . . . had volatile employment histories marked by frequent departures” (Id. at 614) – also not clear who paid the prostitutes – plaintiff testified “They were paid by the men that came in there for the service” (Id. at 615) and that “the spa attendants paid . . . rent for using rooms” (Id.)

Kang v. U. Lim Am., Inc., 296 F.3d 810, 89 FEP 566 (9th Cir. 2002) – Despite the fact that company never employed more than six employees in the United States, since it is an integrated enterprise with its Mexican subsidiary which employs at least 50 employees, this establishes Title VII coverage – 2-1 decision – dissent indicated clear language of Title VII precludes counting foreign employees to establish Title VII coverage of American employees.

Washington v. U.S. Tennis Ass’n, 89 FEP 734 (E.D.N.Y. 2002) – Black tennis player contended he was wrongfully denied a wild card entry into the 1998 U.S. Open – tennis player is not employee of the organization that runs the tournament and thus has no claim under Title VII.

Timeliness - General Issues (Ch. 31)

Ledbetter v. Goodyear Tire and Rubber Co., 421 F.3d 1169, 98 FEP 418 (11th Cir. 2005), cert. granted, 126 S. Ct. 2965 (2006) – At issue in this pay discrimination case was whether the plaintiff was limited to challenging the pay decisions made during the limitations period, or,
alternatively, the plaintiff could present evidence outside the charge-filing period to establish that paychecks during the limitations period were discriminatory – like most companies, Goodyear periodically reevaluated pay, and either decided on no pay increase or a pay increase in a specific amount – “We conclude that in the search for an improperly motivated, affirmative decision directly affecting the employee’s pay, the employee may reach outside the limitations period created by her EEOC charge no further than the last such decision immediately preceding the start of the limitations period. We do not hold that an employee may reach back even that far; what we hold is that she may reach no further. . . . We conclude that no reasonable juror could find intentional discrimination in either of the two decisions setting Ledbetter’s salary as it existed during the limitations period.” (Id. at 1177-78) – Morgan decision dramatically changed the continuing violation landscape and negated the Supreme Court’s Bazemore v. Friday [478 U.S. 385 (1986)] decision that so long as plaintiff received within the limitations period at least one paycheck the overall rate of pay could be challenged – in Morgan, the Supreme Court “held that the timely-filing requirement erects an absolute bar on recovery for ‘discrete discriminatory or retaliatory acts’ occurring outside the limitations period” (Id. at 1178) – it rejected the Ninth Circuit’s “serial violations” doctrine – Morgan distinguished claims of hostile environment, where consideration of the entire scope of the claim necessarily involves behavior alleged outside the statutory time period – “We think it clear that pay claims . . . are governed by that part of the Morgan decision addressing claims alleging ‘discrete acts of discrimination.’” (Id. at 1179) – discriminatory pay decisions are “discrete in time, easy to identify, and – if done with the requisite intent – independently actionable. If an employee is denied a raise, given a pay cut, or hired at a deflated pay grade because of a prohibited consideration, the statute is violated and the employee can file suit the moment the decision is made.” (Ibid.) – each issuance of a discriminatory paycheck is separately actionable – “The alleged discriminatory behaviors need not accumulate to some critical mass to become actionable.” (Id. at 1180) – the Seventh Circuit in Reese v. Ice Cream Specialties, Inc., 347 F.3d 1007, 1010 (7th Cir. 2003), reached the same conclusion – the district court allowed evidence of a substantial difference between plaintiff’s pay and those of male area managers, and “put the onus on Goodyear to prove a legitimate, nondiscriminatory reason for every dollar of difference . . . . This necessarily put at issue every salary-related decision made during Ledbetter’s 19-year career.” (Id. at 1181) – pre-Morgan decisions allowing a challenge to overall pay necessarily require the plaintiff to point to discriminatory decisions outside the limitations period – “There must, however, be some limit on how far back the plaintiff can reach. If it were otherwise, the timely-filing requirement would be completely illusory in many pay-related Title VII cases. So long as the plaintiff received one paycheck within the limitations period that was based on the pay level he or she objects to, the plaintiff could effectively call into question every decision made contributing to his or her being paid at that level. This result would be directly contrary to the central purpose of the timely-filing requirement . . . .” (Id. at 1182) – decisions preceding the last pay decision immediately before the charge-filing period are relevant only if they shed light on the motivation of the more recent decisionmaker – a plaintiff is limited to recovering for those paychecks received within the limitations period – other circuits addressing this issue after Morgan have reached the same
conclusion – no reasonable jury could find discriminatory the decision immediately preceding the limitations period and the one decision during the limitations period – plaintiff was ranked too low to warrant a pay increase and this ranking was consistent with prior rankings – complaint ordered dismissed with prejudice.

*Kerr v. McDonald’s Corp.*, 427 F.3d 947, 96 FEP 1086 (11th Cir. 2005) – Two ADEA claimants did not file suit until five months after their 90-day right to sue letters were mailed – claim that they did not receive the right to sue letters in a timely fashion rejected since they had themselves requested the right to sue letters, and if they did not promptly receive them, they had a duty to inquire.

*Reschny v. Elk Grove Plating Co.*, 414 F.3d 821, 96 FEP 113 (7th Cir. 2005) – Constructive receipt of right-to-sue notice which was mailed to former attorney who did not leave forwarding address found – attorney stood in shoes of claimant – claimant was negligent in waiting a year and a half to inquire about status of EEOC charge and failing to update her address – constructive receipt doctrine applies when notice is delayed due to fault of claimant and/or her attorney.

*Maki v. Allelu Inc.*, 383 F.3d 740, 94 FEP 743 (8th Cir. 2004) – Women in distant past were terminated under discriminatory policies prohibiting married or pregnant women from working – they were rehired – their service was not bridged for pension benefits – statute of limitations did not begin to run until they actually retired and suffered a loss of retirement income.

*Williams v. Thomson Corp.*, 383 F.3d 789, 94 FEP 543 (8th Cir. 2004), *cert. denied*, 544 U.S. 951 (2005) – Action dismissed since filed more than 90 days after right to sue letter arrived at address given to EEOC – employee failed to update her address when she moved – she is therefore not entitled to equitable tolling.

*Bost v. Fed. Express Corp.*, 372 F.3d 1233, 93 FEP 1705 (11th Cir.), *cert. denied*, 543 U.S. 1020 (2004) – Verified intake questionnaire was not a charge under the ADEA – lawsuit filed after intake questionnaire but before charge dismissed – later charge and right-to-sue letter did not cure the defect.

*Wastak v. Lehigh Valley Health Network*, 342 F.3d 281, 92 FEP 1079 (3d Cir. 2003) – Age discrimination claim accrued on date of termination, not on date employee learned he had been replaced by a younger employee.

*Smith v. Caterpillar Inc.*, 338 F.3d 730, 92 FEP 595 (7th Cir. 2003) – Individual case dismissed on the ground of laches – it was filed 8-1/2 years after termination of probationary employee – plaintiff could have timely requested right to sue letter from EEOC – employer’s burden to show prejudice is on a sliding scale based on the amount of the delay – here the 8-1/2 years was inexcusable so less prejudice than normal is required –
employer proved significant prejudice from loss of witnesses, loss of memory, and loss of records.

*Jones v. Dillard's, Inc.*, 331 F.3d 1259, 92 FEP 28 (11th Cir. 2003), *cert. denied sub. nom., Dillard's, Inc. v. Byrd*, 543 U.S. 1034 (2004) – Time limits will be equitably tolled until plaintiff learned her employer hired a much younger replacement – until then the employee had a mere suspicion of age discrimination.

*Ramirez v. City of San Antonio*, 312 F.3d 178, 13 A.D. Cas. 1454 (5th Cir. 2002) – No tolling despite allegation that EEOC misled plaintiff into believing that he did not have a claim – alleged advice was that the EEOC told him that he would not have a claim until his salary was cut when in fact he was told at the inception that his salary would be cut – employee has not demonstrated that he told the EEOC the complete facts and thus no tolling.

*Taylor v. Books A Million, Inc.*, 296 F.3d 376, 89 FEP 577 (5th Cir. 2002) – Action dismissed as untimely since not filed within 90 days of right to sue letter – operative date for start of 90-day period is day on which right to sue letter is received – where complaint does not allege specific date, presumption of receipt doctrine presumes receipt within three to seven days from mailing – even using seven-day period action was filed 91 days thereafter.

*Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 87 FEP 1651 (10th Cir. 2002) – Pay discrimination found – district court reversed – district court had ruled for employer because pay increases within 300 days before the charge were the same for black and white employees – district court should have focused on absolute numbers paid during the relevant time frame and should have considered full salary history.

**Timeliness - Continuing Violations (Ch. 31)**

*National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 88 FEP 1601 (2002) – Supreme Court unanimously rejects continuing violation doctrine when applied to a series of discrete acts – “[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act.” *(Id. at 102)* – time-barred charges can be used as background evidence and “this time period for filing a charge is subject to equitable doctrines such as tolling or estoppel!” *(Id. at 113)* - “Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify.” *(Id. at 114)* – Supreme Court 5-4 applies the continuing violation doctrine to hostile environment claims where the unlawful employment practice cannot be said to occur on any particular day but can occur over a series of days or perhaps years – hostile environment claims include both racial and sexual harassment – “Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.” *(Id. at 1608)* – Seventh Circuit test of whether the plaintiff reasonably did not know that the conduct was
discriminatory rejected for hostile environment claims – there is a two-year limit on back pay but “the statute in no way bars a plaintiff from recovering damages for that portion of the hostile environment that falls outside the period for filing a timely charge.” (Id. at 1609) – “Our holding does not leave employers defenseless against employees who bring hostile work environment claims that extend over long periods of time.” (Id. at 1610) – “In addition to other equitable defenses ... an employer may raise a laches defense, which bars a plaintiff from maintaining a suit if he unreasonably delays filing a suit and as a result harms the defendant.” (Id.) – laches requires proof of “lack of diligence” and “prejudice” – citing Lindemann & Grossman, Court declines to address how much prejudice must be shown or what consequences follow if laches is established – “A charge alleging a hostile work environment claim ... will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period.” (Id.) – O’Connor dissent, joined on this issue by Rehnquist, Scalia and Kennedy, argued that “[A] hostile environment is a form of discrimination that occurs every day; some of those daily occurrences may be time barred, while others are not.” (Id. at 1611) – in other words, recovery could be obtained only for the portions of hostile environment that fell within the charge-filing period – four members of the Court would have rejected the continuing violation doctrine in its entirety.

Stepney v. Naperville Sch. Dist. 203, 392 F.3d 236, 94 FEP 1473 (7th Cir. 2004) - Transfer of black school bus driver which caused him to lose seniority occurred outside of statutory charge-filing period – case dismissed – allegation that employer’s failure to remedy an unlawful practice creates a continuing violation rejected – continuing violation doctrine applies to claims like sexual harassment where an individual act cannot be made the subject of a lawsuit because its identity as a violation is unclear until the conduct is repeated – here the transfer and seniority lost were apparent immediately.

Lucas v. Chicago Transit Auth., 367 F.3d 714, 93 FEP 1741 (7th Cir. 2004) – Disciplinary suspensions predating 300-day charge-filing period were discrete acts and not connected to suspensions that occurred during limitations period – there is thus no continuing violation – supervisor’s conduct during limitations period of yelling at black employee and physically grabbing him is not part of same hostile work environment for purposes of continuing violation – prior conduct occurred more than three years before the acts that took place during the limitations period, with no intervening acts – hostile work environment claim is thus time-barred.

Elmenayer v. ABF Freight Sys., Inc., 318 F.3d 130, 90 FEP 1393 (2d Cir. 2003) – Post-Morgan, court finds no continuing violation in employer’s present and continuing refusal to allow a Muslim employee to attend prayer sessions during his lunch hour to meet his Friday prayer obligations – the employer’s rejection of the employee’s proposal was a discrete act – the employer took no further action once it rejected the proposal – its continued insistence on lunch-break rules was no different from retaining an employee in the position from which he had sought a promotion or transfer – no continuing violation even though the effect of the rejection continues to be felt for as long as the employee remains employed.
Hildebrandt v. Ill. Dept of Natural Res., 347 F.3d 1014, 92 FEP 1441 (7th Cir. 2003) – Allegedly discriminatory pay increase was untimely and continuing violation doctrine not applicable – however, each paycheck reflecting bias is a discrete act of discrimination, and therefore suit can be brought with respect to all paychecks received during the 300-day period preceding the charge.

Croy v. COBE Labs., Inc., 345 F.3d 1199, 92 FEP 1218 (10th Cir. 2003) – “Glass ceiling” claim is like hostile environment claim and can be attacked as a continuing violation – however, in this instance, there was no overt act (denial of promotion) within the statutory period.

Lyons v. England, 307 F.3d 1092, 89 FEP 1793 (9th Cir. 2002) – Plaintiffs claimed discrimination in work assignments and promotions beginning in 1991 – under Morgan, which rejected continuing violations for discrete discriminatory acts, pre-limitations period claims are barred – nevertheless, the evidence may be relevant to the timely claims – the Supreme Court in United Air Lines v. Evans held that time-barred discrimination “may constitute relevant background evidence” (Id. at 1109) – the continuing violation doctrine curtailed the need for such “background evidence,” but now that it has been eliminated in most cases background evidence becomes more important – evidence of pre-limitations period discrimination in promotions is relevant to Rule 403’s balancing test – the issue will be relevance versus prejudice – thus, plaintiffs can offer evidence of past discrimination in promotions – this is simply in aid of analyzing whether timely discrimination occurred – it cannot be offered on the theory that past acts of discrimination constitute a current violation because it continues to have a present effect – issue analyzed at 170 LRR 527.

Richards v. CH2M Hill, Inc., 26 Cal. 4th 798, 12 A.D. Cas. 129 (2001) - Continuing violation doctrine might be applicable in disability accommodation case where employee resigned after years of requested and partially granted accommodations – “[A]n employer’s series of unlawful actions in a case of failure to reasonably accommodate an employee’s disability, or disability harassment should be viewed as a single, actionable course of conduct if (1) the actions are sufficiently similar in kind; (2) they occur with sufficient frequency; and (3) they have not acquired a degree of ‘permanence’ so that employees are on notice that further efforts at informal conciliation with the employer to obtain accommodation or end harassment would be futile.” (Id. at 802) - cited Lindemann & Grossman for the proposition that the continuing violation doctrine is “arguably the most muddled area in all of employment discrimination law” (Id. at 812-13) - court reviewed four different approaches of different federal circuits - federal courts have tended toward a broader view of the continuing violation doctrine in cases of “harassment or ongoing failure to accommodate disability” - in series of accommodation-type case, court is concerned about forcing premature litigation – “There is particularly good reason to view the failure over time to reasonably accommodate a disabled employee as a single course of conduct.” (Id. at 821) - but an employee cannot delay indefinitely filing a lawsuit even in a disability or harassment situation – “When ‘the hope that conditions will improve or that informal conciliation may succeed’ . . . is unreasonable, as when an employer makes clear that it will not further
accommodate an employee, justification for delay in taking formal legal action no longer exists.” (Id. at 823) (citation omitted)) - permanence in an accommodation or harassment situation “should properly be understood to mean the following: that an employer’s statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile” (Id.) - in an accommodation or harassment situation “the statute of limitations begins to run not necessarily when the employee first believes that his or her rights may have been violated, but rather, either when the course of conduct is brought to an end, as by the employer’s cessation of such conduct or by the employee’s resignation, or when the employee is on notice that further efforts to end the unlawful conduct will be in vain. Accordingly, an employer . . . may assert control . . . either by accommodating the employee’s request, or by making clear to the employee in a definitive manner that it will not be granting any such requests, thereby commencing the running of the statute of limitations.” (Id. at 823-24) (emphasis in original) - case remanded to trial court.

Election and Exhaustion of Remedies - Arbitration (Ch. 32)

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 85 FEP 266 (2001) – FAA Section 1 exemption which excludes “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” exempts only transportation workers – the FAA coverage provision, Section 2, which compels judicial enforcement of arbitration agreements “in any . . . contract evidencing a contract involving commerce” was intended to utilize Congress’s full power under the Commerce Clause and therefore applies to arbitration agreements between employer and employee when the employer is engaged in interstate commerce – the FAA will “preempt state anti-arbitration laws to the contrary” (Id. at 122) – “For parties to employment contracts . . . there are real benefits to the enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. . . . Arbitration agreements allow the parties to avoid the costs of litigation, a benefit which may be of particular importance in employment litigation. . . .” (Id. at 122-23) – “The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of Congressional enactments giving employees specific protection against discrimination prohibited by federal law; as we noted in Gilmer, ‘by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.’” (Id. at 123) [Note: Appears to repudiate Duffield without naming it.]

Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 91 FEP 1832 (2003) – Arbitrator should decide whether class arbitration is forbidden under contracts between a lender and its customers or whether the contracts are silent on the issue – the question of proceeding on a class basis does not fall into the limited number of circumstances where courts assume that the
parties intended the courts and not arbitrators to decide a particular arbitration-related matter.

*Hardin v. First Cash Financial Services*, 465 F.3d 470, 98 FEP 1797 (10th Cir. 2006) – Arbitration required even though employee expressly rejected the program as a condition of continued employment – in at-will environment, continued employment automatically accepts conditions of employment.

*Berkley v. Dillard’s Inc.*, 450 F.3d 775, 98 FEP 633 (8th Cir. 2006) – Black employee filed administrative complaint – some weeks later employer implemented arbitration program which provided that all employees accepted the program if they accepted or continued their employment – since employee elected to continue her employment, this constituted an acceptance of the arbitration program, and she had to arbitrate her subsequent court complaint.

*Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005), cert. denied, 126 S. Ct. 2020 (2006) – ADEA and FLSA lawsuits – motion to compel arbitration and dismiss granted – while plaintiffs were employees Gulfstream adopted a dispute resolution policy (DRP) which it mailed to all workers with an explanatory cover letter and a question-and-answer form, made its DRP available on the Internet, and posted notices at the facility – the policy stated that its effective date was in two weeks and that it would be a condition of continued employment – the DRP policy after management review provided for mediation and then arbitration and contained strict time limits for each level – it also contained a jury trial waiver – agreement satisfies the FAA since it was in writing - no signature is required – waiver of jury trial is not a waiver of any substantive right – under Georgia law an employee can accept new contract terms by remaining in employment under the new terms – employees had the option of continuing in employment and accepting the DRP policy or terminating employment – although this is Georgia law “our decision falls well within the mainstream of contract law” (Id. at 1375) – fact that the DRP precludes class actions does not render it unconscionable – that is a tradeoff for the simplicity of arbitration.

*Scovill v. WSYX/ABC*, 425 F.3d 1012, 96 FEP 1175 (6th Cir. 2005) – Unlawful provisions in arbitration agreement can be severed – trial court properly severed cost-shifting provision that required non-prevailing party to pay all costs.

*Howell v. Rivergate Toyota Inc.*, 144 Fed. Appx. 475, 16 A.D. Cas. 1714 (6th Cir. 2005) – Arbitration agreement signed six years before termination enforceable – allegation that it was presented as “take-it-or-leave-it” insufficient – no showing that employee could not have found another job if he had refused to sign the agreement – fact that agreement allowed employer to amend arbitration procedures unilaterally does not affect validity of agreement, since employer’s duty to act in good faith prevented amendment for improper purposes.
**Booker v. Robert Half Int’l Inc.,** 413 F.3d 77, 95 FEP 1841 (D.C. Cir. 2005) – Provision in arbitration agreement precluding punitive damages severed and arbitration agreement then enforced – severing illegal provision and enforcing the rest consistent with federal policy that “requires that we rigorously enforce agreements to arbitrate” (Id. at 86) (citation omitted) – opinion by Judge Roberts.

**Marie v. Allied Home Mortgage Corp.,** 402 F.3d 1, 95 FEP 737 (1st Cir. 2005) – Compliance with arbitration time limits is for the arbitrator, not the court – it is procedural – on the other hand, the question of whether the employer’s participation in EEOC proceedings constituted a waiver of its right to compel arbitration of the employee’s claims is for the court, not the arbitrator, to decide – participation in EEOC proceedings is not a waiver of right to compel arbitration.

**Oblix, Inc. v. Winiecki,** 374 F.3d 488, 93 FEP 1833 (7th Cir. 2004) – Discharged employee must arbitrate Title VII claim despite contention that under California law standard-form contract was adhesive and lacked mutuality and thus was unconscionable – unanimous opinion by Easterbrook – the company has its principal place of business in California and the arbitration agreement provided that California law governs – “The district court thought that the arbitration clause, as part of a form contract, might be called ‘unconscionable’ because ‘adhesive’ – this clause, and all the rest of the agreement, was offered on a take-it-or-leave-it basis, and [the employer] did not promise to arbitrate all of its disputes with [the employee] (if she had been accused of departing with trade secrets, then [the employer] could have selected a judicial forum). That [the employer] did not promise to arbitrate all of its potential claims is neither here nor there. [The employee] does not deny that the arbitration clause is supported by consideration – her salary. [The employer] paid her to do a number of things; one of the things it paid her to do was agree to non-judicial dispute resolution. It is hard to see how the arbitration clause is any more suspect, or any less enforceable, than the others – or, for that matter, than her salary. A person who accepts a ‘non-negotiable’ offer of $50,000 salary would be laughed out of court if she filed suit for an extra $10,000, contending that the employer’s refusal to negotiate made the deal ‘unconscionable’ and entitled her to better terms. Well, arbitration was as much a part of this deal as [the employee’s] salary and commissions, the rules about handling trade secrets, and other terms. All stand or fall together.” (Id. at 490-91) – in addition, one who challenges an arbitration agreement which is part of a contract must arbitrate the claim of unconscionability – “But there is little point in telling [the parties] to arbitrate the doomed ‘unconscionability’ argument, which has been rejected in this circuit as often as it has been raised. . . . Employees fare well in arbitration with their employers – better by some standards than employees who litigate, as the lower total expenses of arbitration make it feasible to pursue smaller grievances and leave more available for compensatory awards. [Citation omitted.] Perhaps this is why unions find arbitration so attractive and insist that employers agree to this procedure. How could one call it unconscionable when an employer treats unrepresented workers . . . the same as it treats its organized labor force?” (Id. at 491) – “Standard-form agreements are a fact of life, and given § 2 of the Federal Arbitration Act, 9 U.S.C. § 2, arbitration provisions in these
contracts must be enforced unless states would refuse to enforce all off-the-shelf package deals.” (Id.) – “California routinely enforces limited warranties and other terms found in form contracts. [numerous citations omitted] If a state treats arbitration differently, and imposes on form arbitration clauses more or different requirements from those imposed on other clauses, then its approach is preempted by § 2 of the Federal Arbitration Act. [Citations omitted.] [The employee] reads Armendariz . . . to create such special requirements . . . . At least one [Ninth Circuit] court of appeals reads Armendariz not to establish any special hurdles for arbitration agreements . . . . See EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003) (en banc). It is in the end irrelevant whether the Supreme Court of California wants to treat arbitration less favorably than other promises in form contracts; no state can apply to arbitration (when governed by the Federal Arbitration Act) any novel rule. Under normal rules of contract, the promises [the employee] made in order to be hired and paid are enforceable. Thus she must arbitrate.” (Id. at 492)

Faber v. Menard, Inc., 367 F.3d 1048, 93 FEP 1730 (8th Cir. 2004) – District court’s refusal to order arbitration because of fee-splitting provision reversed – if on remand plaintiff establishes that the fee splitting would prevent him from enforcing his claims district court should sever fee-splitting provision from arbitration agreement and order arbitration.

Gold v. Deutsche Aktiengesellschaft, 365 F.3d 144, 93 FEP 1125 (2d Cir.), cert. denied, 543 U.S. 874 (2004) - National Association of Security Dealers Form U-4, a broad arbitration clause, enforceable with respect to Title VII claim even though employee alleged he did not so understand it, and that he was not given a copy of NASD rules – employee’s responsibility is to understand arbitration clause before agreeing to it.

EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 92 FEP 1057 (9th Cir. 2003) (en banc) – Duffield overruled – “Duffield was wrongly decided” (Id. at 745) – Supreme Court’s Gilmer decision came down six months before Civil Rights Act of 1991 – it validated arbitration agreements covering discrimination claims – “In the post-Gilmer world, our decision in Duffield stands alone. All of the other circuits concluded that Title VII does not bar compulsory arbitration agreements.” (Id. at 748) – it would be ironic to interpret statutory language in the 1991 Civil Rights Act encouraging arbitration as evidencing a Congressional intent to preclude arbitration – 8-3 decision – vigorous dissent by Judge Reinhardt.

Hadnot v. Bay, Ltd., 344 F.3d 474, 92 FEP 1090 (5th Cir. 2003) – Arbitration clause valid and enforceable despite limitation on punitive damages – that limitation can be severed.

Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987 (9th Cir. 2003) (en banc), cert. dismissed, 540 U.S. 1098 (2004) – Parties to arbitration contract lack the power to dictate a broad standard of review by the courts of the decision of the arbitrator – federal courts can review an arbitral decision only under the standards set forth under the Federal Arbitration Act – the parties have no power to alter or expand these grounds, and any contractual
provision purporting to do so is unenforceable – such a provision can, however, be severed from an otherwise valid arbitration clause.

_Circuit City Stores, Inc. v. Mantor_, 335 F.3d 1101, 20 IER Cas. 274 (9th Cir. 2003), _cert. denied_, 540 U.S. 1160 (2004) – Despite revisions to mandatory arbitration agreement made in response to prior court rulings, agreement found procedurally and substantively unconscionable – plaintiff did not have a meaningful “opt-out” opportunity – the filing fee and waiver provisions are still unjust and the clauses cannot be severed – Judge Pregerson opinion holding that a party must have reasonable notice of his opportunity to negotiate or reject the terms of the contract – there must be an actual meaningful choice to exercise.

_Inge v. Circuit City Stores, Inc._, 328 F.3d 1165, 91 FEP 1426 (9th Cir. 2003), _cert. denied_, 540 U.S. 1160 (2004) – Arbitration agreement denied enforcement as unconscionable under California unconscionability law – it is procedurally unconscionable because presented on a take-it-or-leave-it basis to an applicant – the agreement is substantively unconscionable because several provisions are one-sided, as follows: (1) Circuit City does not agree to arbitrate any of its claims; (2) the one-year statute of limitations; (3) the prohibition of class actions; (4) the $75 filing fee paid directly to Circuit City; (5) cost-splitting; (6) limitation to one year of back pay, two years of front pay, and punitive damages only up to $5,000; and (7) Circuit City retains the unilateral right to terminate but no such power is granted to the employee – the court was especially bothered by a provision directing arbitrators not to consolidate claims and barring an arbitrator from hearing the arbitration as a class action – the issue is analyzed at 172 LRR 200.

_Musnick v. King Motor Co._, 325 F.3d 1255, 91 FEP 771 (11th Cir. 2003) – Arbitration ordered – clause in arbitration agreement providing for award of attorney’s fees to prevailing party is not ripe for judicial review until after award is made.


_Morrison v. Circuit City Stores, Inc._ and _Shankle v. Pep Boys, Manny, Moe & Jack Inc._, 317 F.3d 646, 90 FEP 1697 (6th Cir. 2003) (en banc) – The Circuit City arbitration agreement which all applicants were required to sign required each party to pay one-half the costs of arbitration unless the arbitrator decided to require the losing party to pay all fees – the Pep Boys arbitration agreement required the employee to pay half the costs of the arbitrator’s fee 10 days before the first day of the hearing – the Sixth Circuit derived three propositions from the U.S. Supreme Court’s decision in _Green Tree Fin. Corp. v. Randolph_, 531 U.S. 79, 84 FEP 769 (2000): (1) in some cases the potential of large arbitration costs and fees will deter potential litigants; (2) when that occurs at a minimum the cost-splitting provision is unenforceable; and (3) the burden on this issue rests initially with the party opposing arbitration (the plaintiff) – prior to arbitration on the merits the potential litigants must be given an opportunity to demonstrate that the costs are great enough to deter – high-level managers and those with substantial means may well be able to afford the costs of litigation.
while others may not be able to so afford – in both cases the cost-splitting provisions were held unenforceable – the Circuit City plaintiff would have paid over $1,600, or 3% of her salary – this must be evaluated from the point of a recently terminated potential litigant – the Pep Boys case involved a mechanic salesman who would have to pay between $1,100 and $3,000 which would clearly deter a substantial number of similarly situated potential litigants – furthermore, the Circuit City arbitration agreement limited back pay, front pay, and punitive damages which were similarly unenforceable – these provisions can be severed under a severance provision in the arbitration agreement – since the Circuit City arbitration already took place and the plaintiff was not required to pay anything, the order compelling arbitration was affirmed – with respect to Pep Boys, the cost-splitting provisions were invalid and there were other procedural problems but those were also severable and the case was remanded with an order to stay litigation and discovery pending arbitration – issue analyzed at 171 LRR 368.

*Tinder v. Pinkerton Sec.* , 305 F.3d 728, 89 FEP 1537 (7th Cir. 2002) – Employee at time of hire signed acknowledgment form agreeing that she was an at-will employee, and received a handbook indicating that Pinkerton received the right to change its policies and rules with respect to at-will employees – one year later Pinkerton issued to all employees as a payroll stuffers a brochure announcing “Pinkerton’s arbitration program” which indicated that it was mandatory for all disputes – the brochure indicated anyone remaining in Pinkerton’s employ was agreeing to be covered by the program – since plaintiff was an at-will employee, and could have been discharged for rejecting the program, remaining on the job after being put on notice that the program was a condition of employment “evidenced her mutual promise to arbitrate her disputes with Pinkerton” (*Id.* at 734) – in light of undisputed facts no trial necessary on plaintiff’s contention that she did not receive the brochure since the substance of the brochure was repeated on multiple occasions in multiple ways – “Because Tinder continued her at-will employment past the effective date of the arbitration policy, and because Pinkerton agreed to bind itself to the arbitration policy, we conclude that adequate consideration supported Tinder’s agreement to arbitrate . . . .” (*Id.* at 736)

*Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 89 FEP 706 (9th Cir. 2002) – Arbitration agreement imposed on Title VII claimant as non-negotiable condition of employment was substantively unconscionable – it is one-sided in that employer is not obligated to arbitrate most likely claims against employees – it requires employees to pay thousands of dollars in arbitration fees – provisions limiting discovery while not unconscionable standing alone are part of a pattern to give employer undue advantages.

*Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 89 FEP 1149 (9th Cir. 2002) – Arbitration agreement upheld under FEHA – Duffield not applicable since that involved FEHA coupled with Title VII – “We also note that Duffield’s continuing validity is questionable. In *Adams II*, the Supreme Court broadly stated that ‘arbitration agreements can be enforced under the FAA without contravening the policies of Congressional enactments giving employees specific protection against discrimination prohibited by federal law.’” (*Id.* at
alternative contention that arbitration agreement unconscionable rejected despite finding of unconscionability in *Adams III* since here employee had the right to opt out.

*Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 88 FEP 1482 (11th Cir. 2002) – Employer discharged employee who refused to sign new-employee handbook that included a clause requiring arbitration of employment discrimination claims – this is not retaliation – employee did not have an objectively reasonable belief that such a clause was an unlawful employment practice – would not make any difference if arbitration agreement was unenforceable or even illegal.

*Stewart v. Paul, Hastings, Janofsky & Walker LLP*, 201 F. Supp. 2d 291, 7 W&H.2d 1608 (S.D.N.Y. 2002) – Former law firm receptionist must arbitrate employment claims – unconscionability argument rejected – plaintiff argued that agreement had a too-short limitations period, did not allow for adequate discovery, required her to pay half the arbitration cost, and that American Arbitration Association is biased toward employers – with respect to cost, plaintiff failed to make a particularized showing about the estimated cost of the arbitration and her inability to pay.

*Harris v. Parker Coll. of Chiropract*, 286 F.3d 790, 88 FEP 663 (5th Cir. 2002) – Arbitration agreement allowed loser to appeal any “question of law” – this will be interpreted narrowly and does not include mixed questions of law and fact – “[P]arties that wish to provide for more extensive review of an arbitrator’s award may do so by specifying the standard of review in the arbitration agreement. . . . In the present case, the arbitration agreement simply did not specify that the standard of review for anything other than pure questions of law had been altered.” (286 F.3d at 794) – arbitrator’s award affirmed.

*Blair v. Scott Specialty Gases*, 283 F.3d 595, 88 FEP 464 (3d Cir. 2002) – Arbitration agreement provided for splitting of costs – plaintiff should be allowed limited discovery and then be allowed to contend that costs would be so prohibitive plaintiff could not proceed – the issue would be whether resort to arbitration would deny her a forum to vindicate her statutory rights – employer should be given opportunity to prove that arbitration would not be prohibitively expensive or to offer to pay all of the arbitrator’s fees.

*Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 87 FEP 1509 (9th Cir. 2002) – On remand from U.S. Supreme Court, arbitration agreement held unenforceable as unconscionable - “Circuit City has devised an arbitration agreement that functions as a thumb on Circuit City’s side of the scale should an employment dispute ever arise between the company and one of its employees.” (Id. at 892) - amount of damages is restricted - back pay is limited to one year - front pay is limited to two years - punitive damages cannot exceed the amount of front and back pay or $5,000 - employee is required to split the costs of the arbitration, including the cost of the reporter and the expense of renting a room - Circuit City is not required under the agreement to arbitrate any claims it has against the employee - in
addition, the arbitration agreement “is procedurally unconscionable because it is a contract of adhesion: a standard form contract ... which relegates to the other party the option of either adhering to its terms without modification or rejecting the contract entirely” (Id. at 893) - Ninth Circuit panel was composed of Fletcher, Nelson and Brunetti.

*Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 88 FEP 626 (9th Cir. 2002) – Circuit City dispute resolution program sustained in companion case to *Adams* because unlike Adams, Ahmed was given an opportunity to opt out of the arbitration program.

*EEOC v. Waffle House, Inc.*, 534 U.S. 279, 12 A.D. Cas. 1001 (2002) - Arbitration agreement between employer and disabled former employee does not prevent EEOC from seeking victim-specific relief in an enforcement action under Title I of the ADA - 6-3 vote - “It goes without saying that a contract cannot bind a nonparty” (Id. at 294) - EEOC may be seeking to vindicate a public interest when it brings an enforcement action even if it pursues only victim-specific relief - “It is an open question whether a settlement or arbitration judgment would affect the validity of the EEOC’s claim or the character of relief the EEOC may seek.” (Id. at 297) - case analyzed at 169 LRR 87.

*Hightower v. GMRI, Inc.*, 272 F.3d 239, 87 FEP 461 (4th Cir. 2001) - Title VII claimant bound by arbitration provision in employer’s dispute resolution procedure - employee signed meeting attendance sheet acknowledging that he received the dispute resolution procedure materials - he continued to work for the employer after the dispute resolution procedure became effective knowing that his assent to be bound by the dispute resolution procedure was a condition of continued employment.

*Penn v. Ryan’s Family Steak Houses, Inc.*, 269 F.3d 753, 12 A.D. Cas. 615 (7th Cir. 2001) - Arbitration agreement which employer required employee to sign with third party arbitration agency does not bar ADA lawsuit - employer not party to agreement and therefore has not given sufficient consideration - employer's consideration was illusory.

*Safrit v. Cone Mills Corp.*, 248 F.3d 306, 85 FEP 833 (4th Cir. 2001) (per curiam) - Union waived employee's right to litigate Title VII claim by negotiating labor contract that provided that the parties agreed to comply with all the requirements of Title VII and thus making Title VII claims subject to the grievance and arbitration procedure - does not matter that union refused to take employee's grievance to arbitration.

*Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 86 FEP 755 (8th Cir. 2001) - Arbitration agreement limiting punitive damages to $5,000 enforced - limitation on punitive damages can be severed leaving the rest of the agreement intact - 2-1 ruling directing arbitration of sexual harassment and retaliation claims brought under state law and Title VII - issue analyzed at 168 LRR 8 which discusses conflict in the circuits on this issue.

*Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 84 FEP 1358 (4th Cir. 2001) - Arbitration agreement mandating that employer and employee share fees and costs
is not per se unenforceable - case-by-case analysis to determine whether employee is able to pay the fees and whether the fees are disproportionate in terms of what is at issue - arbitration agreement enforced.

Litigation Procedure (Ch. 33)

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 88 FEP 1 (2002) – Plaintiff in disparate treatment case does not need to plead the factual elements of a prima facie case to survive a motion to dismiss – this is an evidentiary standard, not a pleading requirement – simplified notice pleading standard applies to employment discrimination cases like all others – sometimes direct evidence of discrimination is uncovered through discovery and thus no prima facie case need be demonstrated at all.

Cannon-Stokes v. Potter, 453 F.3d 446, 18 A.D. Cas. 201 (7th Cir.), cert. denied, 2006 WL 3244636 (Dec. 11, 2006) – Judicial estoppel forecloses ADEA claims – employee did not disclose pending EEO charge in bankruptcy petition – she obtained a discharge in bankruptcy – “All six appellate courts that have considered this question hold that a debtor in bankruptcy who denies owning an asset, including a . . . legal claim, cannot realize on that concealed asset after the bankruptcy ends.” (Id. at 448)

Price v. Choctaw Glove & Safety Co., Inc., 459 F.3d 595, 98 FEP 1101 (5th Cir. 2006) – Employees who failed to file charge cannot piggyback on existing suit when they attempt to file separate suit – they are limited to intervention in the suit for which a proper charge was filed.


In re Fletcher, 424 F.3d 783, 96 FEP 973 (8th Cir. 2005), cert. denied, 126 S. Ct. 1827 (2006) – Federal district court sitting en bane suspended plaintiff’s attorney for three years for grossly mischaracterizing deponents’ deposition testimony and intimidating and harassing deponents and their counsel – suspension upheld – one witness testified that in affirmative action training the phrase “the white man is an endangered species at Honeywell” was used to show a misperception – however, in multiple lawsuits the lawyer alleged that a management official admitted she told other management officials that “the white man is an endangered species at Honeywell” – an African-American employee repeatedly stated that the “N” word and the “B” word were highly offensive but in multiple court complaints the plaintiff’s counsel stated that this African-American employee thought it was a compliment to be called the “N” word – numerous examples of deposition abuse are set forth in the opinion.
Cambra v. The Restaurant School, 96 FEP 1765 (E.D. Pa. 2005) – Cause determination by EEOC which concluded that discrimination had taken place and that employer witness was not credible excluded from evidence under Rule 403 – evidence is cumulative and substantially more prejudicial than probative – jury may give undue weight to letter written by government agency – letter offers legal conclusions that are at the heart of the case.

Geldon v. S. Milwaukee Sch. Dist., 414 F.3d 817, 96 FEP 109 (7th Cir. 2005) – No exhaustion of administrative remedies with respect to not being chosen for Position Two - charge related only to Position One – even though Position Two claim could be viewed as “like or reasonably related,” EEOC complaint that focused on Position One could lead reasonable observer to conclude there is no issue about Position Two – plaintiff could easily have put EEOC and employer on notice that Position Two was at issue by filing an additional charge.

Parisi v. Boeing Co., 400 F.3d 583, 95 FEP 596 (8th Cir. 2005) – Ninety-four subsequent incidents of failure to rehire not reasonably related to EEOC charge that alleged only discharge and one failure to rehire.

Wilbur v. Corr. Servs. Corp., 393 F.3d 1192, 95 FEP 100 (11th Cir. 2004) – Jury’s answers to special interrogatories required judgment in favor of employer even though jury also awarded damages – substantial evidence supported the answers to the special interrogatories.

Harper v. AutoAlliance Int’l, Inc., 392 F.3d 195, 94 FEP 1748 (6th Cir. 2004) – Pendent jurisdiction exercised over state law claim even though Title VII claim dismissed after 11 months in litigation – Title VII claim not abandoned until after court made several substantive rulings and defendant’s motions for summary judgment were ripe for decision – evidence plaintiff was attempting to engage in forum manipulation – jurisdiction is determined at time of removal and not at later time.

Weyers v. Lear Operations Corp., 359 F.3d 1049, 93 FEP 507 (8th Cir. 2004) – Reversible error to exclude from evidence EEOC questionnaire which was inconsistent with employee’s trial testimony.

Martinez v. Potter, 347 F.3d 1208, 92 FEP 1483 (10th Cir. 2003) – EEOC charge alleging retaliation in 1999 cannot be used to litigate later alleged acts of retaliation – this is mandated by the U.S. Supreme Court rule on the continuing violation doctrine which bars a claimant from suing on claims arising from discrete incidents occurring more than 300 days prior to the filing of the charge – that rationale also applies to discrete claims occurring after the filing of the charge.

Burns v. Bd. of County Comm’rs, 330 F.3d 1275, 91 FEP 1726 (10th Cir. 2003) – Changes to deposition can be disregarded as sham and summary judgment granted in lawsuit alleging discrimination against a Native American – the first question and answer was:
Q. Do you think you were terminated because you’re part
Native American?

A. No.

(Id. at 1281) - that answer was changed to “No, I don’t think that was the only reason.”

(Id.) – the second question was:

Q. Do you think [you were terminated] because you called [a county commissioner] a lying motherfucker?

A. Yeah, I’d say so.

(Id.) – that answer was changed to “Yeah, I’d say that was part of it.” (Id.) – significant
authority supports the fact that an affidavit which contradicts the deposition can be
disregarded as sham – “[Plaintiff] argues that [these authorities] dealing with ‘sham
affidavits’ are not relevant to the instant case, because he modified his statements not in a
subsequent affidavit, but in an errata sheet submitted pursuant to Federal Rule of Civil
Procedure 30(e). We reject this distinction.” (Id. at 1282) – the court then quoted from
Garcia v. Pueblo Country Club, 299 F.3d 1233, 1242 n.5 (10th Cir. 2002) as follows (internal
quotations omitted):

[Rule 30(e)] cannot be interpreted to allow one to alter what was
said under oath. If that were the case, one could merely answer the
questions with no thought at all and then return home and plan
artful responses. Depositions differ from interrogatories in that
regard. A deposition is not a take-home examination.

We do not condone counsel’s allowing for material changes to
deposition testimony and certainly do not approve of the use of
such altered testimony that is controverted by the original
testimony.

We see no reason to treat Rule 30(e) corrections differently than
affidavits. . . .

The district court correctly disregarded the changes.

[Note: Additional authorities to the same effect are: Hambleton Bros. Lumber Co. v. Balkin
Enters., 397 F.3d 1217 (9th Cir. 2005) (citing and following Burns and similar Seventh
Circuit case); Garcia v. Pueblo Country Club, 299 F.3d 1233, 1242 n.5 (10th Cir. 2002) (“A
deposition is not a take-home examination.”); and Thorn v. Sundstrand Aerospace Corp., 207
F.3d 383, 389 (7th Cir. 2000) (“A change of substance which actually contradicts the
transcript is impermissible unless it can plausibly be represented as the correction of an
error in transcription, such as dropping a ‘not.’”).]
Sheehan v. City of Gloucester, 321 F.3d 21, 14 A.D. Cas. 1 (1st Cir. 2003) – No denial of due process resulted from judicial delay – appeals court remanded the case in March 2000 directing the federal district court to consider an ADA claim under what was then favorable to the plaintiff precedent – while the claim was pending the Supreme Court decided Toyota Motor Mfg. v. Williams, which foreclosed the claim and compelled dismissal – the delay did not violate the constitutional prohibition on ex post facto laws, which apply only to criminal or punitive statutes – the application of later decided unfavorable precedent did not constitute retroactive punishment.

In re Horseshoe Entm’t, 337 F.3d 429 (5th Cir. 2003) – In relevant part Section 706(f)(3) authorizes a Title VII action “in any judicial district in the State in which the unlawful employment practice is alleged to have been committed. . . .” – plaintiff filed in a judicial district that had no connection to the case but in the state in which she had been employed – by 2-1 vote the court of appeals rejected the idea that Congress intended to permit plaintiffs to sue their employer in judicial districts which had no connection whatsoever – case transferred to judicial district where plaintiff worked – the dissent indicated that the plain language of the statute allowed the suit in any judicial district in the relevant state.

Freeman v. Oakland Unified Sch. Dist., 291 F.3d 632, 88 FEP 1646 (9th Cir. 2002) – African-American teacher filed EEOC charge alleging discrimination in election to faculty advisory council – this was not like or reasonably related to complaint allegations concerning teaching assignments, class size, and handling of dispute.

Amantea Cabrera v. Potter, 279 F.3d 746, 87 FEP 1777 (9th Cir. 2002) - Trial court did not err in excluding evidence of an EEOC cause finding - admission was within the discretion of the trial judge - trial was limited to damages.

Thompson v. Altheimer & Gray, 248 F.3d 621, 85 FEP 897 (7th Cir. 2001) - Magistrate judge failed to ask prospective juror who expressed belief that some people sue their employer just because they have not gotten a promotion or other job benefit whether she could suspend belief for duration of trial - this entitles Title VII claimant whose claim rejected by jury to a new trial.

Union Underwear Co. v. Barnhart, 50 S.W.3d 188, 85 FEP 835 (Ky. 2001) - Company headquartered in Kentucky - employee performed services in South Carolina and Alabama - in 4-3 decision, held that employee cannot sue under Kentucky age discrimination statute even though employer made the discharge decision at Kentucky headquarters - issue analyzed at 167 LRR 40.

Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 84 FEP 1395 (9th Cir. 2001) - Summary judgment affirmed despite fact that declaration in record would warrant denial of summary judgment - plaintiff’s declaration contained assertion that vice president of school board told her that as long as she maintained legal proceedings against the District she
would not be employed - this was never brought to the attention of the court in opposing summary judgment - judge who decided summary judgment unaware of this statement - declaration in question was filed two years before the summary judgment motion at issue - other circuits are not unanimous - our view is that district court may limit its review to the documents submitted for purposes of summary judgment - Fifth, Sixth, Seventh and Tenth Circuits agree - First Circuit has gone the other way - there is no requirement that the district court search the entire record to find material not pointed out to the court by counsel for the party opposing a summary judgment motion - summary judgment affirmed.

EEOC Litigation (Ch. 34)

EEOC v. Sidley Austin LLP, 437 F.3d 695, 97 FEP 743 (7th Cir.), cert. denied, 127 S. Ct. 76 (2006) – Based on Waffle House, EEOC may obtain monetary relief on behalf of individuals who are barred from bringing their own ADEA actions because of their failure to file timely administrative charges – Seventh Circuit holds that its North Gibson decision to the contrary was effectively overruled by Waffle House – EEOC is not in privity with individuals for whom it seeks relief.

EEOC v. Caterpillar, Inc., 409 F.3d 831, 95 FEP 1371 (7th Cir. 2005) – When the EEOC suits, the courts will not review the scope of its investigation or its determination that probable cause exists to believe that the statute was violated – the scope of the charge becomes irrelevant since the purpose of a charge review in an individual case is to be sure that administrative remedies were exhausted – it is to prevent individuals from bypassing the EEOC’s procedures by adding claims that were not presented in the EEOC charge – this does not apply when the EEOC is the plaintiff.

EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256, 92 FEP 661 (11th Cir. 2003) – Sanction of dismissal and award of attorney’s fees against the EEOC affirmed – EEOC failed to engage in adequate conciliation – three years after charge was filed EEOC issued letter of determination and sent conciliation agreement demanding response within 12 business days – employer’s counsel got in touch with the EEOC and indicated an interest in discussing the matter – the EEOC nevertheless ignored the communication, ruled that conciliation had failed, and filed suit – “In its haste to file the instant lawsuit, with lurid, perhaps newsworthy [the racial harassment allegations involved a noose], allegations, the EEOC failed to fulfill its statutory duty to act in good faith to achieve conciliation, effect voluntary compliance, and to reserve judicial action as a last resort. Under these circumstances, the sanction of dismissal, awarding attorneys’ fees, is not an unreasonable remedy or an abuse of the district court’s discretion.” (340 F.3d at 1261)
Class Actions (Ch. 37)

*Dukes v. Wal-Mart Stores, Inc.*, ___ F.3d ___, ___ FEP ___ (9th Cir. 2007) – Ninth Circuit panel 2-1 affirms district court’s national class certification in all respects – with respect to manageability:

“In analyzing the manageability of the class at all stages of the case, the district court reasoned that if, at the merits stage, Wal-Mart was found liable of discrimination, the Court could employ a formula to determine the amount of back pay and punitive damages owed to class members.”

Slip Op. at 1368. – no discussion by majority of Section 706(g)(2)(A) (“No order of the court shall require . . . payment to [any individual] of any back pay, if such individual . . . was [adversely treated] for any reason other than discrimination. . . .”) – formula relief not prohibited by *Teamsters* since *Teamsters* only said that after a finding of liability the district court “must usually conduct additional proceedings . . . to determine the scope of individual relief” – “usually” means that there is flexibility – without formula relief there would be a “quagmire of hypothetical judgments” – “The district court found that statistical formulas can incorporate detailed information from employee databases about each individual to calculate whether, and what amount, a specific individual has been underpaid or has been denied a promotion.” – [Note: No specification of information in databases.] – mixed-motive amendments to Civil Rights Act of 1991, which allow defendant in mixed-motive case to avoid back pay if it can prove it would have taken the same action in the absence of a discriminatory motive, is not applicable since “plaintiffs have the choice” whether to proceed on a mixed-motive theory or not – “Plaintiffs have elected to prove the single-motive theory. This means that Wal-Mart is not entitled to present a same decision defense because such a defense at the remedy stage applies only when the conduct was a result of mixed motives.” – “Class actions involving punitive damages do not necessarily require individualized hearings.” – “The aggregate computation of class monetary relief is lawful and proper.” – “The district court speculated that a Special Master might assist the Court by developing and employing a formula to compute damages at the remedy stage.” – better to handle the case as a class action “instead of clogging the federal courts with innumerable individual suits” – with respect to 23(a)(2) commonality, the district court’s decision is subject to “very limited review” – the plaintiffs have a “permissive and minimal burden” – there is no need for a Daubert hearing with respect to plaintiffs’ sociologist who testified that Wal-Mart’s culture and subjective decision-making were susceptible to bias – aggregated statistics across regions or nationally show statistical significance – “Wal-Mart’s centralized company culture and policies” provide a nexus between “the subjective decision-making” of the store managers and “the considerable statistical evidence” – “Evidence of Wal-Mart’s subjective decision-making policy raises an inference of discrimination and [supports commonality]” – “[T]he discrimination they allegedly suffered occurred through an alleged common practice – e.g., excessively subjective decision-making in a corporate culture of uniformity and gender
stereotyping . . .” – does not matter that “female in-store managers . . . are both plaintiff class members and decision-making agents” – proper to certify under (b)(2) rather than (b)(3) because plaintiffs and their counsel have said their primary motive in bringing the lawsuit is injunctive relief and that monetary relief is incidental – large amount of monetary relief sought through back pay and punitive damages insufficient to negate assertions of plaintiffs and their counsel – Dissent: “This case poses a considerable risk of enriching undeserving class members . . . but depriving thousands of women actually injured by sex discrimination of their just due” – Falcon requires “rigorous analysis,” not deference and minimal requirements with respect to 23(a)(2) requirements, as does Second Circuit in recent In Re Initial Public Offering Securities Litigation, 471 F.3d 24 (2d Cir. 2006), which the majority ignored – “The only common question plaintiffs identify with any precision is whether Wal-Mart's promotion criteria are ‘excessively subjective.’” – with respect to (b)(2) certification, “it is hard to say that injunctive and declaratory relief ‘predominate’ . . . when they seek billions of dollars in punitive damages” – “The punitive damages claim poses a constitutional barrier to class certification. The district court devised a scheme under which an “expert or special master” using an unspecified formula will allocate back and front pay to class members – “There will never be an adjudication, by the jury or the special master, of whether any individual woman was injured by sex discrimination.” – “The Civil Rights Act expressly prohibits orders requiring the reinstatement, promotion, or payment of back pay to anyone injured ‘for any reason other than discrimination.’” – “The district court’s class certification scheme requires what the Civil Rights Act prohibits . . .” – “The district court calls this class certification ‘historic,’ a euphemism for ‘unprecedented.’ In the law, the absence of precedent is no recommendation.” – “The district court’s formula approach to dividing up punitive damages and back pay means that women injured by sex discrimination will have to share any recovery with women who are not. Women who were fired or not promoted for good reasons will take money from Wal-Mart they do not deserve . . . . This is ‘rough justice’ indeed. ‘Rough,’ anyway.”

In Re: Initial Public Offering Securities Litigation, 471 F.3d 24 (2d Cir. 2006) – “(1) that a district judge may not certify a class without making a ruling that each Rule 23 requirement is met and that a lesser standard such as ‘some showing’ for satisfying each requirement will not suffice, (2) that all of the evidence must be assessed as with any other threshold issue, (3) that the fact that a Rule 23 requirement might overlap with an issue on the merits does not avoid the court’s obligation to make a ruling as to whether the requirement is met, although such a circumstance might appropriately limit the scope of the court’s inquiry at the class certification stage. . . .” (Id. at 27) – securities litigation – class certification vacated and remanded – court below rejected the preponderance of the evidence standard where elements of class certification were enmeshed with the merits, holding that “some showing” would suffice – Supreme Court in Falcon required a “rigorous analysis” and noted that this analysis is generally “enmeshed” with the merits – Eisen was earlier, and has been misunderstood – careful analysis of Eisen makes clear that “there is no basis for thinking that a specific Rule 23 requirement need not be fully established just because it concerns . . . the merits” (Id. at 33) – the oft-quoted statement from Eisen was made in a case where the district judge’s merits inquiry had nothing to do with the requirements for class
certification – it is unfortunate that the Eisen statement that a court should not consider the merits has been taken out of context “and applied it to consideration of the Rule 23 threshold requirements” – in Caridad it was implied that “some showing” would be sufficient for class certification, and Caridad was influenced by Eisen – “Thus, under the influence of Eisen, Caridad condemned ‘statistical dueling’ between experts and ruled that the report of the plaintiffs’ expert plus anecdotal evidence ‘satisfies the Class Plaintiffs’ burden of demonstrating commonality for purposes of class certification,’ without requiring the district court to have made a clear determination of commonality in light of all the evidence . . . .” (Id. at 35) (citations omitted) – “Caridad, by the imprecision of its language, left unclear whether the merits dispute between the experts was not to be resolved at the class certification . . . .” (Id.) – author of current opinion was author of Caridad – Visa Check case followed Caridad and held that in examining expert opinions in support of class certification the issue was whether it was “‘not so flawed that it would be inadmissible as a matter of law.’” (Id. at 36) – the case law outside the Second Circuit generally supports an obligation of the district court to determine all the requirements of Rule 23 and not accept a weak “some showing” standard – “It would seem to be beyond dispute that a district court may not grant class certification without making a determination that all of the Rule 23 requirements are met.” (Id. at 40) – factual disputes must be resolved when they affect Rule 23 requirements – properly understood Eisen precludes “consideration of the merits only when a merits issue is unrelated to a Rule 23 requirement” (Id. at 41) – “[T]here is no reason to lessen a district court’s obligation to make a determination that every Rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue.” (Id.) – “To avoid the risk that a Rule 23 hearing will extend into a protracted mini-trial” (Id.) district judge must be granted considerable discretion “to limit both discovery and the extent of the hearing on Rule 23 requirements” (Id. at) – we hold that a determination that a Rule 23 requirement has been met “can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met” (Id.) – this may require resolution of merits issues that are identical with Rule 23 requirements – however, a district judge should not assess any aspect of the merits unrelated to a Rule 23 issue – we “disavow . . . that an expert’s testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed. A district judge is to assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit.” (Id. at 42) – courts cannot at class certification refuse to weigh conflicting evidence – applying these standards to the case at bar, class certification must be denied for numerous reasons, including the necessity for individualized liability determinations.
Garcia v. Johanns, 444 F.3d 625 (D.C. Cir. 2006) – National origin lending discrimination case – allegation was that multiple-facility decisionmaking was subjective and led to discrimination – class certification was denied by the district court (1) for lack of commonality; (2) because (b)(2) certification “was inappropriate because the $20 billion in damages [plaintiffs] sought predominated over their request for equitable relief,” (Id. at 630) and (3) because (b)(3) “certification [was] inappropriate because they had not shown that common questions predominated” (Id.) – denial of class certification affirmed – “[T]o show commonality . . . the plaintiff must make a significant showing to permit the Court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the [defendant’s] challenged . . . decisions” (Id. at 632) (citations and internal quotation marks omitted; second alterations in original) – “Establishing commonality for a disparate treatment class is particularly difficult where, as here, multiple decisionmakers with significant autonomy exist” (Id.) – “[T]heir claims arise from multiple individual decisions made by multiple individual committees. [Plaintiffs] did not cite a single reversal of a district court’s denial of class certification based on no commonality resulting from the geographic spread of decisionmakers [numerous citations omitted]” (Id. at 633) – plaintiffs contended that case was disparate impact for two reasons: (1) The “one employment practice” language of Title VII allows them to claim disparate impact based on aggregated statistics without identifying the neutral policy; and (2) The “subjective decisionmaking process constitutes the common facially neutral practice.” (Id. at 634) – “We reject both theories and instead affirm the district court’s denial of class certification because the appellants failed to show a common facially neutral . . . policy . . . .” (Id.) – even under Title VII the “one employment practice” language does not get around the commonality requirement – “Assuming . . . the ‘one employment practice’ [rule of Title VII] applies . . . it does not alter the required commonality showing under . . . 23(a)(2). The appellants erroneously confuse the commonality showing with the prima facie case of disparate impact discrimination. . . . Under . . . 23(a)(2), the appellants must show that the putative class members have something in common – they all suffered an adverse effect from the same facially neutral policy . . . .” (Id. at 633 n.10) – “It does not suffice under Rule 23(a)(2) to show an ethnic imbalance . . . ; rather, the appellants must show that a common facially neutral policy caused the imbalance.” (Id. at 635) – statistical evidence inadequate because of omitted variables – cited Title VII case of Cooper v. Southern Co., 390 F.3d 695 (11th Cir. 2004), in which class certification was denied because “the statistical evidence . . . did not account for variables such as an employee’s type or level of acquired skills and field of study, the quality, type and relevance of an employee’s experience, an employee’s job performance, etc., to ensure that black and white employees were similarly situated.” (Id. at 635 n.11)

Love v. Johanns, 439 F.3d 723 (D.C. Cir. 2006) – Lending sex discrimination case – allegation was that “subjective loan-making criteria . . . enabled decentralized decision-makers to discriminate amongst loan applicants on the basis of gender” (Id. at 725) – district court refusal to certify class because of lack of commonality under 23(a)(2) affirmed – varying reasons utilized at different locations for rejection of loan applicants – citation of Reeb v. Ohio Dep’t of Rehabilitation and Correction, 435 F.3d 638 (6th Cir. 2006), with approval (district
court finding of commonality in excess subjectivity case reversed) – here if the class were certified “the outcome . . . would nevertheless turn on a series of individualized inquiries into application-distribution practices in more than 2,700 . . . offices across the country over the last quarter century” (Id. at 730) – “The District Court concluded that the geographic dispersal and decentralized organization of the USDA's loan offices ‘cut against any inference for class action commonality.’” (Id.) – the court relied on Hartman v. Duffey, 19 F.3d 1459, 1472 (D.C. Cir. 1994), for the proposition that “plaintiffs’ challenge to the defendant’s ‘subjective’ decisionmaking did not warrant a finding of commonality: ‘While plaintiffs’ statistics may have demonstrated that discrimination . . . was afoot, nothing in the record so far permits the additional inference that class members suffered common injury.’” [emphasis in original] (Love, 439 F.3d at 730)

Reeb v. Ohio Department of Rehabilitation & Correction, 435 F.3d 639, 97 FEP 353 (6th Cir. 2006) – “Title VII cases in which plaintiffs seek individual compensatory damages are not appropriately brought as class actions under Rule 23(b)(2) because such individual claims for money damages will always predominate over requested injunctive or declaratory relief . . . .” (Id. at 641) – district court did not conduct appropriate “rigorous” analysis of commonality and typicality – district court relied on the common and typical issue of whether the defendant violated Title VII – “If this were the test, every plaintiff seeking to certify a class in the Title VII action would be entitled to that certification.” (Id. at 644) – allegations of “a general policy of discrimination is not sufficient to allow a court to find commonality or typicality” (Id. at 645) – there must be an analysis of the claims raised by the named plaintiffs and the claims likely to be raised by other members of the class – the district court is “required to examine the incidents, people involved, motivations, and consequences regarding each of the named plaintiffs’ claims to determine the typicality element of Rule 23(a)” (Id.) - with respect to class certification under 23(b)(2), district court should have followed Allison decision of Fifth Circuit rather than Robinson decision of Second Circuit – 2-1 decision – class certification vacated and remanded.

In Re: Allstate Ins. Co., 400 F.3d 505, 34 EB Cas. 2005 (7th Cir. 2005) – Rule 23(f) petition granted and class certification vacated under 23(b)(2) – a class of over 1,000 Allstate agents alleged that they were constructively discharged in order to avoid paying them severance pay under a subsequently announced severance pay plan – damages are not “incidental” as required under 23(b)(2) – “The operational meaning of ‘incidental’ damages in this setting is that the computation of damages is mechanical, ‘without the need for individual calculation’ so that a separate damages suit by individual class members would be a waste of resources.” (Id. at 507) (citation omitted) – thus an incidental award of damages by a judge does not run afoul of the Seventh Amendment’s right to a jury trial because when damages are mechanical there would be no jury trial because summary judgment would be granted – the circumstances of individual class members varied – “This variance in circumstances doubtless pervades the entire class. Given the size of the class, more than a thousand individual hearings will be necessary in order to determine which members were really forced to quit and which quit voluntarily . . . .” (Id. at 508) – suggestions in our prior cases that adequate notice and an opportunity to opt out could be provided within the
context of Rule 23(b)(2) are dicta and the cases left open whether the procedure would ever be proper – “[S]uch an effort to restructure Rule 23(b)(2) would be complicated and confusing – unnecessarily so, given the ready availability of the 23(b)(3) procedure.” (Id.) – class action should have been certified if at all under 23(b)(3).

Monreal v. Potter, 367 F.3d 1224, 93 FEP 1562 (10th Cir. 2004) – Class certification denied – class certification resolved without discovery – complaint very broadly alleged nationwide discrimination against Hispanics by the post office in promotion, compensation, evaluations, discipline, and in the creation of a hostile and retaliatory working environment – the complaint was so broad that it would be impossible to narrowly tailor an injunction and thus certification is not possible under (b)(2) – with respect to (b)(3), common issues must predominate, and with such broad allegations they clearly do not – the only common issue is whether the law was violated.

Grosz v. Boeing Co., 92 FEP 1690 (C.D. Cal. 2003), aff’d, 136 Fed. Appx. 960 (9th Cir. 2005) – Class certification denied in multi-facility “excessive subjectivity” case – “The class proposed by plaintiffs does not meet the Rule 23(a) nexus requirements, nor is it manageable or appropriate under Rule 23(b).” (92 FEP at 1694) – nexus requirements not met for numerous reasons including multiplicity of pay practices and extreme diversity of class in terms of jobs covered – “‘Excessive subjectivity,’ . . . is a criticism, not an actual company-wide policy or practice. Without some evidence of the class-wide use of common decisional criteria or practices, Plaintiffs have failed to show the requisite commonality and typicality.” (Id. at 1695) – treatment of women varies by location – “[I]n some years and at some sites, women were treated more favorably than men; in other years and sites they were treated less favorably. This disparity of outcomes belies the existence of commonality or typicality.” (Id.) – “Plaintiffs’ claims for back pay and punitive damages create insurmountable problems for certification under Rule 23(b)(2).” (Ibid.) – normally can certify under (b)(2) only if monetary relief is incidental – Ninth Circuit in Molski refused to adopt a bright line standard and refused to hold that (b)(2) certification was never possible when there were non-incidental damages, but in this case plaintiffs have not shown “that special circumstances exist in this case warranting application of any standards other than the ‘generally’ applicable ones described in Kanter [265 F.3d 853 (9th Cir. 2001)] and Molski [318 F.3d 937 (9th Cir. 2003)]” (Id. at 1694 n.3 – “Here, without an identifiable policy or practice common to the purported class, there is no practice for this Court to enjoin for the protection of the class as a whole. Since the Court has no policy or practice to enjoin in this case, back pay and punitive damages are not incidental to injunctive relief.” (Id. at 1696) – “Plaintiffs minimize the significance of their prayer for individualized relief by suggesting that back pay and punitive damages can be awarded on a formulaic basis, without individualized inquiry into the circumstances of each class member. That sort of scheme is not possible here: 1. Even after a pattern or practice liability finding, there must be a finding of individual harm to each individual before punitive damages can be awarded. Beck v. Boeing Company, . . . 2003 U.S. App. LEXIS 3619, at *6 (9th Cir. 2003). 2. ‘No order of the Court shall require back pay [or] award damages [to any] individual . . . [if] the [employer] demonstrates that [it] would have taken the same action in the absence of the
impermissible motivating factor . . . .’ 42 U.S.C. § 2000e-5(g)(2)(A) and (B). 3. Even in class cases, relief can only be provided to individuals who are actually injured, and those injuries must be proven individually [citations omitted]. 4. The cases cited by plaintiffs do not support the use of formulaic recovery here: (a) none involve money damages, like the punitive damage claim here, or the right to a trial by jury; (b) each predates the Civil Rights Act of 1991, and thus none considered the statutory requirements cited in 2. above; and (c) although some cases suggest that an aggregate sum of back pay can be determined on a group basis (in limited, extraordinary circumstances not present here), they generally require a personalized liability inquiry for each class member before those damages can be distributed to individuals [citations omitted].” (Id. at 1696) (emphasis in original) – (b)(3)
certification would not have been proper because the formulaic recovery model is not possible and “determining back pay and punitive damages for the class would require an endless litany of fact-specific inquiries . . . .” (Id.)

Colindres v. QuietFlex Mfg., 235 F.R.D. 347 (S.D. Tex. 2006) – Class certification motion denied – waiving compensatory damages in order to achieve class certification makes counsel inadequate representatives under 23(a)(4) – punitive damages cannot be determined on a group basis – therefore, certification cannot be ordered under (b)(2) or (b)(3).

Palmer v. Combined Ins. Co., 217 F.R.D. 430, 92 FEP 943 (N.D. Ill. 2003) – Broad class certification including punitive damages – “[I]n most cases, an award of punitive damages requires a fact-specific inquiry into an individual plaintiff’s circumstances” (Id. at 438) – but when class relief is sought “I find that such individualized proof is not necessarily required.” (Id.) – “[G]iven the unique nature of this suit, and the possibility of distributing a punitive damages award without looking at the specifics of each class member, I find that this could be one of the rare exceptions to existing case law.” (Id. at 439) – punitive damages possibly could be awarded pro rata or given to a charity – need not decide now. [Note: No discussion of Supreme Court State Farm decision – seems clearly erroneous in light of State Farm.]

Radmanovic v. Combined Ins. Co., 216 F.R.D. 424, 92 FEP 371 (N.D. Ill. 2003) – Female sales agent brought class action on behalf of 6,500 female employees of nationwide insurance company with employees spread all over the United States – commonality requirement met despite individual issues, different work locations, and different supervisors since although there are individual issues there are common issues including whether a pattern or practice of sexual discrimination exists and whether statistical evidence establishes such a pattern or practice – typicality requirement met since critical inquiry is whether class claims share same essential legal determinations with class representative – however, predominance requirement of Rule 23(b)(3) not met – all potential class members did not suffer the same employment action, liability could not be determined with regard to each class member without individual determination of employment action suffered by each class member, determination would have to be made whether each injury constituted adverse employment action, and all this would require
individualized evidence and individual issues – the key reason why predominance is not met is that each employee would need to come forth with proof of how a pattern or practice of discrimination impacted her – failure to promote claims do not meet predominance requirement – individualized review as to whether employee was qualified for position sought would be necessary – qualifications of male employee who received each promotion are unique to each determination – claim of hostile work environment further does not meet predominance requirement of (b)(3) since each class member would have to show that she found the work environment to be subjectively hostile, and a determination would have to be made as to whether supervisor or co-worker created the hostile environment which would require a separate legal analysis – need to make individual determinations would render the action unmanageable as a class action – each class member has a significant interest in controlling her own claim – there is no particular advantage to concentrating litigation of claims in any one place because of their individualized nature – plaintiff had moved for certification only under (b)(3) because her suit sought only damages and not injunctive relief.

*Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003) – Class action settlement under 23(b)(2) under which disability plaintiffs waived right to damages but did not have right to opt out disapproved because of no right to opt out – Supreme Court’s decision in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), arguably requires a right to opt out if money is involved – we do not agree there is a per se rule but there was a clear need for a right to opt out in this case – it is possible to certify a (b)(2) class even when monetary damages are involved – although we agree that the class should not have been certified as it was, we refuse to adopt the approach set forth in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413-15 (5th Cir. 1998), which appeared to require that all non-incidental damages would be considered predominant for purposes of Rule 23(b)(2) – as the Second Circuit held in *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 163-64 (2d Cir. 2001), a bright line rule for distinguishing between incidental and non-incidental damages for purposes of determining predominance would nullify the discretion vested in district courts through Rule 23 and would have troubling implications for the viability of future civil rights actions – thus, the district court did not abuse its discretion in certifying a Rule 23(b)(2) class but it did by not allowing opt outs – overall settlement agreement was also unfair.

*Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001) - Principal issue was whether plaintiffs were “similarly situated” so that an opt-in class action under ADEA was appropriate - plaintiffs alleged that employer adopted a “blocker” policy (older workers who are blocking the progression of younger workers), identified plaintiff and many of the 22 individual opt-ins as “blockers,” and took adverse action against them - trial court conditionally certified class but ultimately granted motion to decertify and summary judgment against individual plaintiff - courts have used three approaches in determining whether opt-ins are “similarly situated” - the first is an ad hoc, case-by-case basis evaluating the individual claims - the second approach is to apply the current Rule 23 standards, including 23(b)(3)’s requirement that common questions of fact predominate - the third approach is to use the pre-1966 version of Rule 23 and its standards for “spurious” class
actions which require common questions and common relief and which grant a trial court inherent authority to refuse to proceed collectively - district court here adopted ad hoc approach - if plaintiffs were simply attempting to collectively assert individual claims the decision to decertify would be entirely proper - but this is a pattern or practice claim modeled on Teamsters v. U.S. - the focus is on a pattern of discriminatory decisionmaking - pattern or practice cases are tried in two or more stages - in the first stage the plaintiffs must demonstrate a regular procedure or policy of discrimination - therefore it was error for the district court to rely upon the question of whether a sufficient link existed between the blocker policy and the challenged employment decisions in denying class treatment - this factor encompasses factual issues relevant to both the first and second stages of a pattern or practice case - it was improper for the trial court to make findings regarding these questions outside the context of a summary judgment motion - this deprived plaintiffs of their right to have that issue determined by a jury - this further ignored the presumption of discrimination plaintiffs would have at a Stage II proceeding - district court also erred in concluding what individual issues would predominate - the highly individual defenses of defendant would not become the focal point until Stage II - district court’s reliance on trial management concerns was also adversely affected by its failure to recognize the pattern or practice nature of plaintiff’s claim - in particular the district court was wrong in rejecting plaintiff’s proposal that the case be tried in two phases - district court therefore abused its discretion in decertifying the class – “We do not hold that whenever there is evidence of a pattern-or-practice, a class must be certified. Whether certification or decertification is appropriate depends upon application of the factors we have identified . . . .” (267 F.3d at 1108) - summary judgment reversed - summary judgment not analyzed under McDonnell Douglas in pattern or practice case - summary judgment analysis must proceed under assumption that a pattern or practice of discrimination was in place - district court also erred in excluding eight opt-ins who were terminated more than 300 days prior to plaintiff’s EEOC charge - since charge raises continuing violation issue, this was error - no abuse of discretion in rejecting plaintiff’s attempt to depose corporate counsel on the theory that corporate counsel directed the company to destroy documents pertaining to the “blocker” policy.

Robinson v. Metro-N. Commuter R.R. Co., 267 F.3d 147, 86 FEP 1580 (2d Cir. 2001) - Discrimination plaintiffs who seek compensatory damages as well as injunctive relief under Title VII are entitled to bring disparate impact claim as a class action and were entitled to have a federal district court reconsider its refusal to permit class treatment of a pattern or practice disparate treatment claim - conflict with Fifth Circuit on whether individual damages can be sought in 23(b)(2) class action, whether there can be partial class certification under the Seventh Amendment, and whether the Seventh Amendment precludes the use of multiple juries - basic allegation was excessive subjectivity with respect to discipline and promotion in a race class action - district court denial of class certification reversed - statistical evidence in conjunction with anecdotal evidence sufficient to show commonality and typicality and delegation of discretionary authority to supervisors constituted a policy or practice also sufficient to satisfy commonality - bright line test for class actions based on back pay issue is inappropriate - Second Circuit refuses to follow
Allison v. Citgo Petroleum Corp., 151 F.3d 402, 81 FEP 501 (5th Cir. 1998) - the court acknowledges that compensatory and punitive damages raise issues but a flat-out rule is inappropriate - in pattern or practice of disparate treatment cases district courts are to balance the types of relief requested and decide whether class action would be an efficient way of proceeding and thus whether common questions predominate - there will have to be a case-by-case inquiry - the court can protect absent class members through opt-out notices for the damage phase in a 23(b)(2) action - the Second Circuit suggests the court can bifurcate the case pursuant to 23(c)(4) and allow it to proceed as a class action with respect to particular issues - a 23(b)(2) class should not be certified unless the district court is satisfied that a reasonable claimant would bring an action to obtain injunctive or declaratory relief even in the absence of possible monetary recovery - it is possible to litigate a pattern or practice case at least in the liability stages under 23(b)(2) - partial certification of the class action would not violate the Seventh Amendment’s requirement of jury trials even if a separate jury has to hear damages claims so long as a specific factual issue is not tried by different juries - issue analyzed at 168 LRR 200 - in conclusion on remand the district court should certify the disparate impact claim under 23(b)(2) and, if not, to grant at least partial certification of the liability aspects under 23(b)(2) - [Note: Second Circuit, without addressing the issue, seems to accept the “across-the-board” doctrine which had been severely limited by the Supreme Court.]

Culver v. City of Milwaukee, 277 F.3d 908, 87 FEP 1464 (7th Cir. 2002) - Class action decertified because of incompetent representation by class attorney - often class representative has merely a nominal stake and the real plaintiff at interest is the class lawyer - attorney refused to subdivide class between actual applicants and allegedly deterred applicants - “If . . . the lawyer, through breach of his fiduciary obligations to the class [citations omitted], or otherwise, demonstrates that he is not an adequate representative of the interests of the class as a whole, realism requires that certification be denied.” (Id. at 913) - notice must be given under Rule 23(e) because the filing of a class action tolls the statute of limitations for all members of the class and the statute will start running again - this notice must be given even though the district judge thought that class members were probably unaware of the lawsuit.

Donaldson v. Microsoft Corp., 205 F.R.D. 558, 88 FEP 356 (W.D. Wash. 2001) – Employee whose initial EEOC charge did not raise theory of class-based liability is not precluded by the scope of the charge from pursuing class-based allegations of disparate treatment where series of affidavits, letters and conversations put EEOC on notice she was concerned about class-wide pattern and practice discrimination and thus a reasonable EEOC investigation could have investigated class-wide disparate treatment – however, “There is no explicit statement, and no inference, that [the employee] is challenging the impact of Microsoft’s rating system based on race.” (88 FEP at 364) – thus, the post-charge communications between charging party and EEOC “were sufficient to introduce theories of class liability, but insufficient to raise [or] add a theory of disparate impact liability to her underlying charge.” (Id. at 365) - however, class certification denied – no commonality
since statistics failed to show measurable impact of employer’s evaluation system on women and blacks and credibility of plaintiff’s expert is suspect – nationwide class is unworkable since there is a broad range of types of jobs and class runs from low level to non-executive managers.

Reid v. Lockheed Martin Aeronautics Co., 205 F.R.D. 655, 86 FEP 631 (N.D. Ga. 2001) - Class certification denied on pattern and practice of disparate treatment, disparate impact, and racially hostile environment claims - the class action device envisions liability being determined in a single trial and similar relief for class members - where the alleged discrimination results from the actions of individual supervisors, class actions may not be appropriate - in the “across-the-board” era class certification was nearly automatic - that is no longer the case - the right to compensatory and punitive damages with jury trials have materially changed the class certification analysis - commonality and typicality have not been established - these two requirements tend to merge - commonality requires issues susceptible to class-wide proof - plaintiffs cannot seek to represent individuals at facilities other than their own - no showing of centralized and uniform employment practices which is necessary to satisfy commonality and typicality requirements for multi-facility classes - this is particularly true since core contention is excessive subjectivity given to first-level managers and supervisors - this is in conflict with plaintiffs’ assertion that there are common employment practices at the various facilities - plaintiffs seem to be contending that Lockheed “had a centralized policy of decentralization, which is insufficient . . . to satisfy commonality or typicality” (86 FEP at 645) with respect to a multi-facility class - but commonality and typicality fails also at the one facility - no statistical evidence offered on promotion or training discrimination theories - anecdotal evidence does not establish commonality and typicality - plaintiffs have not demonstrated their ability to prove that promotions and training practices discriminated against black employees as a class or that their claims are typical - plaintiffs did offer statistical evidence on compensation - looking at hourly employees across 43 different pay grades statistical significance was found in only 4-7% - analyzing by job group 32% of the comparisons showed statistically significant disparities but there is much variation within job groups - with respect to salaried, there was statistical significance in 18% of the comparisons but 8 of the comparisons showed statistical significance favoring blacks - again vast differences exist between the job groups – “Plaintiffs’ statistical evidence relating to compensation shows neither commonality nor typicality.” (Id. at 649) - statistics on performance evaluations show wide variations also even though 13% showed statistically significant disparities against blacks - again no commonality or typicality - hostile environment claims require both subjective and objective abusiveness and are not well suited for class actions - reviewing the anecdotal evidence, there are wide variations from racial graffiti in the restroom to allegedly being watched more closely than white co-workers to Confederate flags at work stations to racial jokes and slurs - the conduct alleged demonstrates that the alleged hostile environment occurred with varying frequency and varying degrees of severity and focuses on individual actions - the Supreme Court in Falcon required significant proof to justify certification of a broad class based on excess subjectivity - plaintiffs have not shown an identifiable employment pattern that affects all members of the class in comparable ways - assuming,
arguendo, all 23(a) requirements were met, certification would not be appropriate under 23(b)(2) or (b)(3) - (b)(2) is not appropriate because the monetary relief is not incidental - the distinction between back pay and monetary damages is not inconsequential - compensatory damages would not be automatically available even if class-wide liability was established - the same is true for punitive damages - Kolstad requires a showing of malice or reckless indifference and the statute requires a fact-specific inquiry into the circumstances of each individual plaintiff - claims for compensatory and punitive damages could be recovered only after examining the particular circumstances of each class member - (b)(3) is not applicable because individual issues predominate - this is especially true with respect to compensatory and punitive damages - extensive review of recent circuit authority on appropriateness of (b)(3) classes - focus would be on individual circumstances of each class member with respect to both liability and damages - promotions and hostile work environment are by their nature extremely individualized - now that compensatory and punitive damages are available, 23(b)(2) certification is not appropriate and the entire issue depends on (b)(3) which requires common issues to predominate over individual ones - that is not the case here – plaintiffs’ argument that the Teamsters presumption overcomes individual issues ignores the fact that the Teamsters presumption applies only to equitable relief but does not trigger liability for individual damages - the Teamsters presumption applies chiefly to 23(b)(2) cases - plaintiffs urge a hybrid certification under both (b)(2) and (b)(3) - severing plaintiffs’ claims for injunctive relief does not remedy the problem of individual issues predominating - with respect to certifying only equitable claims under (b)(2), the Seventh Amendment prohibits such a course of action - there is a right to a jury trial where legal rights are intertwined with equitable rights - many of the factual issues relevant to damage claims are also relevant to equitable claims and must be tried by a single jury - class certification denied.

Miller v. Hygrade Food Prods. Corp., 198 F.R.D. 638, 84 FEP 1755 (E.D. Pa. 2001) – Title VII action seeking compensatory and punitive damages in race case cannot be certified as class action – monetary relief predominates – there would have to be separate proceedings to determine the damages due each employee.

Discovery (Ch. 38)

Leon v. IDX Systems Corp., 464 F.3d 951, 18 A.D. Cas. 784 (9th Cir. 2006) – Dismissal and $65,000 sanction because of spoliation of evidence affirmed – employee erased 2,200 files from his employer-issued laptop computer during pendency of litigation – employee knew he was under duty to preserve data, including pornographic files.

Greviskes v. Univs. Research Ass’n., 417 F.3d 752, 96 FEP 392 (7th Cir. 2005) – Sanction of dismissal and award of over $50,000 in attorneys’ fees upheld for discovery abuse – plaintiff engaged in fraudulent misconduct during discovery and then tried to cover up the wrongdoing, refused to stipulate to basic facts, and filed multiple frivolous motions – dismissal is the most severe sanction possible but is warranted in this case.
Sallis v. Univ. of Minn., 408 F.3d 470, 95 FEP 1281 (8th Cir. 2005) – Plaintiff sought discovery of all allegations of discrimination made against University by all complainants in all departments without any temporal limits – trial court properly limited discovery to complaints made by other employees in his department no more than one year before the actions at issue – irrelevant that all of University’s discrimination complaints were contained in easily accessible central database.

Maynard v. Nygren, 372 F.3d 890, 15 A.D. Cas. 1121 (7th Cir. 2004), cert. denied, 543 U.S. 1049 (2005) – Dismissal of action as a sanction for willfully withholding from discovery a physician’s letter affirmed – existence of factual disputes about willful nature of withholding does not prevent a finding by clear and convincing evidence that the discovery violation was willful.

Rivera v. NIBCO Inc., 364 F.3d 1057, 93 FEP 929 (9th Cir. 2004), cert. denied, 543 U.S. 1049 (2005) – Defendant in discrimination suit cannot seek discovery into terminated worker’s immigration status – protective order affirmed in lawsuit by 23 former employees who were terminated for not being proficient in English – goals of Title VII and California’s FEHA would be undercut if such discovery were permitted because it would chill the willingness of discriminated-against workers to assert their legal rights – opinion by Judge Reinhardt.


Jimenez v. Madison Area Tech. College, 321 F.3d 652, 91 FEP 193 (7th Cir. 2003) – No abuse of discretion in dismissing case under Rule 11 as sanction for submission of falsified documents – dismissal is a harsh sanction but the claim was very unmeritorious and the behavior extremely deceptive – this amounted to an exploitation of the judicial process which subjected former college colleagues and employer to unnecessary embarrassment and mental anguish.

Martin v. DaimlerChrysler Corp., 251 F.3d 691, 86 FEP 123 (8th Cir. 2001) - Dismissal of action appropriate as sanction where former employee misrepresented during deposition whether she had been party to employment discrimination suit against previous employer and failed to reveal in interrogatory and deposition answers her prior treatment by mental health counselors – “When a litigant’s conduct abuses the judicial process, dismissal of a lawsuit is a remedy within the inherent power of the court.” (Id. at 694) – plaintiff’s argument that the withheld evidence did not “go to the heart of the lawsuit” rejected.

Oleszko v. State Comp. Ins. Fund, 243 F.3d 1154, 85 FEP 483 (9th Cir. 2001) – Plaintiff is barred by psychotherapist-patient privilege from seeking information from unlicensed
counselors at an employer’s employee assistance program – EAP’s refusal to provide discovery upheld – plaintiff wanted information to see if there was a pattern of race or sex discrimination and retaliation – even though EAP counselors do not engage in psychotherapy, they have access to much the same sort of highly sensitive information.

**Statistical Proof** (Ch. 39)

*Carpenter v. Boeing Co.*, 456 F.3d 1183, 98 FEP 1763 (10th Cir. 2006) – Summary judgment for Boeing in class action alleging sex discrimination in the assignment of overtime – claim was that supervisors were favoring males in discretionary choices – collective bargaining agreement contains rules governing assignment of overtime – plaintiffs relied on study by their expert, Dr. Bernard Siskin – regression analysis showed statistically significant adverse impact against women – no dispute that “something” causes men to work proportionately more overtime than women – but disparate impact plaintiffs should control for the constraints placed on decisionmaker’s discretion – statistical analysis cannot establish prima facie case unless it is based on data restricted to qualified employees – the Siskin study did not incorporate the collective bargaining agreement’s eligibility requirements – Boeing did not maintain electronic data on any of the omitted variables, but plaintiffs could have obtained the data through depositions or interrogatories – plaintiffs contend that the disparity in overtime is so great that even if the omitted variables had been present it could not have made that much of a difference – even though there was large statistical significance, this “does not necessarily mean that the departure from equality was large” *(Id.* at 1201) – percentage disparities were 10% to 19% - this is not massive – “when, as here, there is a great deal of data, even a relatively small difference may be highly statistically significant” *(Id.* at 1202) – Boeing’s expert, Dr. Ward, conducted a study that controlled for the collective bargaining agreement criteria – Dr. Ward’s study illustrates how disparities found in plaintiffs’ study could result from collective bargaining agreement criteria which were omitted variables – “[T]he very large number of standard deviations does not mean that the gross difference . . . is itself large; it just means that the difference is very unlikely to be random. But since the CBA requirements [are] not included in the Siskin Study model . . ., and may well impact men and women differently . . ., the results of the Siskin Study are consistent with the CBA requirements being the cause of the disparity . . . . [T]he Siskin Study does not satisfy Plaintiffs’ burden to establish a prima facie case.” *(Id.* at 1203)

*Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 95 FEP 1121 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1432 (2006) – Summary judgment on disparate impact hiring and promotion claim – expert’s statistical comparison of the percentage of black employees who succeeded with the percentage of black employees who might be expected to succeed based on their percentage in the workplace did not prove causation – the statistical analysis did not account for critical variables such as education, experience, the applicant’s presentation at the interview, demeanor, and the like.
Isabel v. City of Memphis, 404 F.3d 404, 95 FEP 801 (6th Cir. 2005) – Disparate impact found despite the fact that the City was in compliance with the EEOC’s four-fifths rule – 2-1 decision – the difference was statistically significant, and plaintiffs are not limited to any particular form of statistical proof.

Malave v. Potter, 320 F.3d 321, 91 FEP 101 (2d Cir. 2003) – In promotion case preferred statistics are applicant flow statistics: “In the context of promotions, we have held that the appropriate comparison is customarily between the composition of candidates seeking to be promoted and the composition of those actually promoted.” (Id. at 326) – but here the defendant conceded those statistics are not available so summary judgment should not have been granted – case remanded – decision “should not be construed as anything other than a rejection . . . of a rule that the lack of statistical information as to an applicant pool always renders it impossible to establish a prima facie disparate impact case.” (Id. at 327)

Rudebusch v. Hughes, 313 F.3d 506, 90 FEP 865 (9th Cir. 2002) – Extensive discussion of multiple regression pay analyses – University did multiple regression analysis and concluded that there were pay inequities against female and minority faculty – the report based on regression analysis recommended pay adjustments for minorities and females – salary adjustments were awarded to female/minority faculty members whose actual salaries fell below the salary predicted by the regression analysis for a similarly situated non-minority male – no non-minority men received adjustments even if their earnings were below the salary predicted by the regression analysis – after University President left his post, the University hired two outside consultants to do new regression analysis – new regression analysis indicated minorities and females were disadvantaged, but not to a statistically significant level – white males sued the University President individually for equal protection violations and the University under Title VII – the President and the University prevailed below – President entitled to qualified immunity – government can act on racial classifications only if actual discrimination has occurred – gross statistical disparities can be sufficient – the second regression analysis indicated that the statistical disparities were not “gross” – “[W]e express concern about inferring discrimination from a study in which the highest single pay disparity for ethnic minorities fell 2.0 standard deviations away from [the] predicted salary . . . .” (Id. at 515) – in the Title VII context Ninth Circuit has rejected standard deviations of 1.3 and 2.46 as creating an inference of discrimination – need not decide whether discrimination may ever be inferred from a probability this low but it certainly does not “show a conspicuous imbalance in salaries such as to justify the salary adjustments here” (Id. at 516) – moreover, “[W]hile over half the minority faculty were making less than predicted salary, a significant percentage of white male faculty were also making less than predicted.” (Id.) – since both majority and minority faculty members were in substantial numbers underpaid, “the existence of across-the-board disparities would seem to undercut the study’s ability to demonstrate that minorities were discriminated against simply because their salaries fell below predicted” (Id.) – court also bothered that the regression analysis relied upon for the salary increases did not account for factors such as academic credentials, performance, merit, teaching, research, or service – court should not dictate what factors must be included in regression analysis.
studies – the Supreme Court has made it clear in Bazemore that factors in a regression go to weight rather than admissibility – citation to cases holding that discrimination not established because highly relevant factors not included in regression analysis – plaintiff established an equal protection violation – but this is only the first step in suing the President since question is whether a reasonable official in the President’s position would understand that he was violating constitutional rights – at the time of the pay increases, the early ’90s, the specific contours of the law pertaining to pay equity were not well developed – “One need only look at the complexity of the models at issue in reported cases, and the discussion on statistics and multiple regression in the Federal Judicial Center’s Reference Manual on Scientific Evidence [David H. Kaye and David A. Freedman, Reference Guide on Statistics in Reference Manual on Scientific Evidence 83, 145-50 (2d ed. 2000); Daniel L. Rubinfeld, Reference Guide on Multiple Regression, at 179-221] to realize how tricky it is to measure whether sex and ethnicity are a significant determinant of salary.” (Footnote deleted.) (Id. at 518) – therefore, since the issue is not whether in hindsight the President acted unreasonably, but whether it was reasonable in light of the information he possessed – President is entitled to qualified immunity – turning to Title VII, plaintiff and 40 white male professors claim they should have received pay adjustments since their pay was below the predicted amount also – under Title VII affirmative action can be justified by a manifest imbalance – the Constitution requires actual discrimination for preferential treatment – affirmative action cases under Title VII do not require actual discrimination – the jury concluded there was a manifest imbalance justifying the remedial efforts – the issue then became whether the remedy unnecessarily trammeled the rights of white males – when you are talking about jobs or promotions, there are a limited number of opportunities, and awarding the jobs to one group deprives the other group – here there would have been no funds available for anyone’s pay adjustments but for the University’s decision to allocate extra money to make up for a disparity – in the absence of the special pay increases, the white males would have received nothing – the pay increase was a one-time adjustment – it thus presented no absolute bar to the advancement of the white males – whatever the reason some white faculty were earning less than predicted the reason was not race or sex – “[T]he real question is . . . whether using the predicted salary of similarly situated white male faculty for the minority and female adjustments somehow overcompensated these minority and women faculty members. . . .” (Id. at 523) – this issue, the “unnecessarily trammel” issue, was resolved on summary judgment – it should not have been since this issue involves disputed facts – decision on qualified immunity 2-1.

Bennett v. Roberts, 295 F.3d 687, 89 FEP 439 (7th Cir. 2002) – Statistical evidence introduced by unsuccessful black applicant for teaching position in school district in far western suburb of Chicago comparing racial composition of teachers hired by that school district with composition of teachers employed in the entire Chicago metropolitan statistical area is inherently flawed – statistics did not consider geographic relationship between outlying school district and the overall Chicago metropolitan statistical area and did not consider commuting patterns.
Kadas v. MCI Systemhouse Corp., 255 F.3d 359, 85 FEP 1720 (7th Cir. 2001) - Judge Posner, although rejecting an age discrimination claim based on statistics, argues that under the Daubert rule federal judges should be allowed to consider statistics that do not have statistical significance - much non-statistical evidence that is not reliable 19 times out of 20 is admitted – “Litigation generally is not fussy about evidence; much eyewitness and other nonquantitative evidence is subject to significant possibility of error, yet no effort is made to exclude it if it doesn’t satisfy some counterpart to the 5 percent significance test.” (Id. at 362)

Injunctive and Affirmative Relief (Ch. 40)

Cardenas v. Massey, 269 F.3d 251, 87 FEP 19 (3d Cir. 2001) - Dismissal of pay and hostile environment claims reversed and remanded - with respect to relief on remand, employee who has resigned cannot seek injunctive relief requiring alteration of allegedly discriminatory evaluations or a requirement that the employer implement specific anti-discrimination policies - the novel theory that a court can reform actual documents has no support - implementing specific anti-discrimination policies could have no effect on plaintiff, who does not seek reinstatement.

Monetary Relief (Ch. 41)

Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 85 FEP 1217 (2001) - Front pay award not subject to 1991 Civil Rights Act’s caps on compensatory damages - front pay is in lieu of reinstatement - treating them differently would lead to strange result that most egregious offenders would be subject to the least sanctions because front pay would be limited.

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) - Appellate court reviewing trial court punitive damage award should apply a de novo standard of review and not an abuse of discretion standard - $4.5 million punitive damage award overturned because Ninth Circuit applied wrong standard - punitive damage award is a private fine - the Fourteenth Amendment’s Due Process Clause imposes substantive limits on the state’s discretion - the relevant constitutional line is inherently imprecise - three criteria: (1) reprehensibility; (2) relationship between the punitive damages and the harm caused; and (3) sanctions imposed in other cases for comparable misconduct - court seemed to suggest review of awards in other cases be considered.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) – Punitive damages award of $145 million where full compensatory damages for pain and suffering were $1 million is excessive and violates the Due Process Clause – punitive damages pose an acute danger of arbitrary deprivation of property – with respect to the first Gore factor, reprehensibility, it should be presumed that plaintiff has been made whole by compensatories so punitives
should be awarded only if the culpability is so reprehensible as to warrant additional sanctions – conduct that bears no relationship to the individual plaintiff cannot be considered – with respect to the second Gore guidepost, few awards exceeding a single-digit ratio will satisfy due process – when compensatory damages are substantial an even lesser ratio can reach the outermost limit – here, since the $1 million pain and suffering award was substantial, a punitive damages award at or near that amount is the maximum that could be justified – “When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” (Id. at 425) – “The harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries; . . . so the Campbells suffered only minor economic injuries . . . .” (Id. at 426) – “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (Id. at 427)

Comm'r of Internal Revenue v. Banks, 543 U.S. 426, 94 FEP 1793 (2005) – Portion of an employee’s recovery in discrimination lawsuit that is paid to an attorney under contingent-fee agreement is included in the employee’s gross income – this has been changed statutorily but that act does not apply retroactively.

Murphy v. IRS, 460 F.3d 79 (D.C. Cir. 2006) – Taxation of emotional distress and reputation damages in an employment case is unconstitutional – the Sixteenth Amendment authorizes only the taxation of “income” – no physical illness or injury involved. [Note: This decision is being reconsidered.]

Carter v. Kansas City S. Ry. Co., 456 F.3d 841, 98 FEP 929 (8th Cir. 2006) - $900,000 punitive damage award under Title VII set aside – racial harassment including endemic racial slurs, offensive notes on a company bulletin board, and the like, were sufficient to submit the claim to the jury, but there was insufficient proof of malice or indifference – the railroad investigated the complaints and fired the offensive co-worker – the isolated racial slurs allegedly heard after the employee complained were insufficient and were not reported by the employee – a claim that he was not given the same tools provided to white co-workers is insufficient to support punitive damages.

Pena-Crespo v. Commonwealth of Puerto Rico, 408 F.3d 10, 95 FEP 1287 (1st Cir. 2005) – Emotional distress damages in harassment case properly limited to $12,000 since there was no expert testimony – although expert testimony is not necessarily required, the lack of such testimony is relevant to the amount of the award.

Lust v. Sealy, Inc., 383 F.3d 580, 94 FEP 645 (7th Cir. 2004) - $300,000 cap for compensatory and punitive damages should be awarded only in more serious cases – in this case, where the discriminatory denial of promotion was corrected by a promotion two months later, the maximum that would be reasonable would be $150,000 – ratios have little meaning when the legislature has set a cap.
Biondo v. City of Chicago, 382 F.3d 680, 94 FEP 513 (7th Cir. 2004), cert. denied, 543 U.S. 1152 (2005) – Nineteen white candidates who lost promotional opportunity to lieutenant because 29% of slots were reserved for minority group candidates were awarded 12 years of front pay and assumption they would have been promoted to captain – reversed – only 33% of those promoted to lieutenant during the relevant time frame made captain, so the candidates in question should get only 33% of the benefits of such a promotion – 12 years of front pay is unduly speculative and exceeds equitable discretion – the jury’s conclusion that every one of the candidates would have been promoted to captain is not real world – “Even in a world of grade inflation, where teachers living far from Lake Woebegon think nothing of rating all students as ‘above average’ it is hard to swallow a conclusion that all candidates held back from promotion to lieutenant in 1986 were sure to become captains.” (Id. at 688-89) – “Front pay cannot extend past the time a reasonable person needs to achieve the same or an equivalent position in the absence of discrimination.” (Id. at 692) – here opportunities will come far sooner than 12 years.

Williams v. ConAgra Poultry Co., 378 F.3d 790, 94 FEP 266 (8th Cir. 2004) – Punitive damage award slightly in excess of $6 million overturned as unconstitutional – remitted to $600,000 – award unconstitutional for three interrelated reasons: (1) although evidence of misconduct by the employer unrelated to the plaintiff was properly introduced at the liability phase, the district court relied on that in upholding the punitive damages, which cannot be done; (2) the punitive damages awarded under § 1981 is 20 times in excess of what Title VII would allow; and (3) the ratio of punitive damages to compensatory damages (10-1) far exceeds the levels that the Supreme Court has suggested are consistent with due process – with respect to the third factor, “The Supreme Court has stated that ‘[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.’ State Farm, 538 U.S. at 425. Mr. Williams received $600,000 to compensate him for his harassment. Six Hundred Thousand Dollars is a lot of money. Accordingly, we find that due process requires that the punitive damages award . . . be remitted to $600,000.” (378 F.3d at 799)

Sellers v. Mineta, 358 F.3d 1058, 93 FEP 417 (8th Cir. 2004) – A discharged employee’s post-termination misconduct at a subsequent job is relevant in determining whether and how much front pay she could receive – employee had been air traffic controller and allegation was that nature of misconduct made her ineligible to work as air traffic controller – since front pay is a disfavored remedy, it should not be awarded when reinstatement would be precluded for any reason other than the original employer’s hostility.

Barger v. City of Cartersville, 348 F.3d 1289, 92 FEP 1377 (11th Cir. 2003) – Plaintiff is estopped to seek monetary damages in discrimination action since she did not list the discrimination action as an asset when she filed for bankruptcy – facts indicate that omission was not “inadvertent.”
**Zhang v. Am. Gem Seafoods, Inc.**, 339 F.3d 1020, 92 FEP 641 (9th Cir. 2003), *cert. denied*, 541 U.S. 902 (2004) – Over $360,000 in compensatory damages including over $200,000 in emotional distress damages and $2.6 million in punitive damages upheld in favor of executive terminated because of his Chinese national origin after two years with employer – objective evidence of emotional distress not required in the Ninth Circuit – plaintiff’s testimony that he lost his dream job and that this badly hurt his dignity and reputation “more than sufficient to support a substantial compensatory damage award for emotional distress” (339 F.3d at 1041) – the punitive damage award is within a single-digit multiplier of the compensatory damages award and thus is not constitutionally suspect – employer alleged relative lack of reprehensibility and “purely economic” harm which supreme court has held are less likely to warrant substantial punitive damages awards – but discrimination is intolerable and thus the reprehensibility factor is met – does not matter that punitive damages are limited to $300,000 under Title VII since this award was under § 1981.

**Bryant v. Aiken Reg’l Med. Ctrs., Inc.**, 333 F.3d 536, 92 FEP 233 (4th Cir. 2003), *cert. denied*, 540 U.S. 1106 (2004) – Black employee denied a promotion and retaliated against was improperly awarded punitive damages – company had implemented extensively in organization-wide equal employment opportunity policy with grievance procedure and had a carefully developed diversity training program that included formal training classes – *Kolstad* provides protection from punitive damages to employers who make such good-faith efforts.

**Lansdale v. Hi-Health Supermart Corp.**, 314 F.3d 355, 90 FEP 826 (9th Cir. 2002) – Congress did not violate the U.S. Constitution when it capped damages available under Title VII but did not limit damages recoverable for racial discrimination under § 1981 – this was a compromise in the Civil Rights Act of 1991 and bears a rational relationship to a legitimate governmental purpose – legitimate purpose was to protect employers from financially crippling awards – this case illustrates the need for such protection since there were no out-of-pocket damages, $100,000 for pain and suffering, and a “whopping $1,000,000 in punitive damages.” (Id. at 359)

**Shick v. Ill. Dep’t of Human Servs.**, 307 F.3d 605, 90 FEP 78 (7th Cir. 2002) – Plaintiff claimed that the reason he used a sawed-off shotgun to rob a convenience store was the trauma caused by discrimination based on disability and sex – district court’s reversal of disability verdict meant that a new trial was necessary on sex discrimination claim because of the prejudicial effect of the disability evidence – district court awarded over $300,000 in front pay, accepting the theory that the robbery was caused by the discrimination – reversed – plaintiff will be in jail for the robbery until after age 65 – whether or not he was discriminated against, his own act of robbing the store constituted a superseding intervening cause of his conviction and incarceration and the incarceration precludes him from recovering front pay or emotional distress damages caused by his conviction and incarceration.
Davey v. Lockheed Martin Corp., 301 F.3d 1204, 89 FEP 1164 (10th Cir. 2002) – New trial ordered on $200,000 punitive damage award to allow company to present evidence that it met the Kolstad test for barring punitive damages – Kolstad defense requires that the employer has adopted a discrimination policy and made good-faith efforts to educate its employees about the policy and Title VII’s requirement, and further requires the employer to properly enforce its discrimination policy – thus, the defense would not be available if the plaintiff demonstrates that the employer failed to adequately address Title VII violations of which it was aware – since the trial court did not allow the defendant to put on Kolstad evidence, a new trial was required.

Thomas v. Tex. Dep’t of Criminal Justice, 297 F.3d 361, 89 FEP 452 (5th Cir. 2002) – Jury award of $30,000 for past emotional distress for discrimination on the basis of sex and race affirmed since this amount “fits within the range of damages that we have established” (Id. at 367) – award of $100,000 for future emotional distress damages reversed “because our precedent does not support a $100,000 award based on such insubstantial injuries” (Id.) – on remand plaintiff may chose between accepting a remittitur to $75,000 or a new trial.

Ross v. Kansas City Power & Light Co., 293 F.3d 1041, 88 FEP 1796 (8th Cir. 2002) – Federal district court reduced punitive damages award on constitutional grounds from $750,000 to $120,000 – this is not a remittitur – employee did not have option of new trial on damages – employee’s consent to a constitutional reduction of a punitive damages award is irrelevant – court decided as a matter of law that punitive damages could not constitutionally exceed that amount.

Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 88 FEP 1281 (11th Cir. 2002) – Employee filed for bankruptcy relief under Chapter 13, later sued for employment discrimination, and thereafter sought to convert his Chapter 13 bankruptcy into a Chapter 7 case, which allows a trustee to collect and liquidate a debtor’s assets – employee did not report his pending lawsuit – he then received a “no asset” complete discharge of debts – his creditors never knew about the lawsuit – employee is judicially estopped to seek damages – lawsuit can continue for injunctive relief alone – issue analyzed at 170 LRR 8.

Peyton v. DiMaria, 287 F.3d 1121, 88 FEP 1041 (D.C. Cir. 2002) – Award of 26 years’ front pay to a 34-year-old non-incapacitated former government printing apprentice was unduly speculative – subjective intent to remain at the job until retirement did not justify an award for remainder of work life – district court clearly erred in simply calculating the differences between her pay at the private employer and former pay with the government, with the assumption that employee would have stayed at the private employer for the rest of her career.

Hemmings v. Tidyman’s Inc., 285 F.3d 1174, 88 FEP 945 (9th Cir. 2002) – Congress did not violate separation of powers or right to jury trial in setting caps on compensatory damages under Title VII.
Kucia v. Southeast Ark. Cnty. Action Corp., 284 F.3d 944, 88 FEP 861 (8th Cir. 2002) – Case in which two years of front pay awarded without reasons for not ordering reinstatement remanded to determine whether reinstatement was impracticable or impossible.

Salinas v. O'Neill, 286 F.3d 827, 89 FEP 491 (5th Cir. 2002) – Remittitur ordered on emotional distress damages in retaliation case – jury awarded $1 million – since statutory cap is $300,000, issue is whether $300,000 is excessive – “Any award for emotional injury greater than nominal damages must be supported by evidence of the character and severity of the injury to the plaintiff's emotional well-being. That a plaintiff may be entitled to something beyond nominal damages, however, is not to concede the reasonableness of just any award a jury may assign.” (Id. at 830) (citation omitted) (footnote omitted) - in deciding whether there is an abuse of discretion, “[a] mainstay of the excessiveness determination is comparison to awards for similar damages. This use of comparison is a recognition that the evaluation of emotional damages is not readily susceptible to ‘rational analysis.’” (Id.) (citation omitted) – “We remit damage awards that we find excessive to the maximum amount the jury could have awarded.” (Id.) “In practice, our evaluation of what a jury could have awarded is tied to awards in cases with similar injuries . . . decided by this court.” (Id. at 831) - $300,000 is too high – three of our decisions “inform our evaluation” (Id.) – in this case there’s at least as much evidence of emotional distress as in those three cases - even though plaintiff offered more evidence of emotional distress plaintiff did not offer enough to support an award of $300,000 – “[A] comparison with other emotional damage awards in this circuit stemming from discrimination points to $100,000 as the proper award. In keeping with our duty to avoid substituting our opinion for that of the jury, we multiply this amount by 150%. Anything more would be ‘clearly excessive.’” (Id. at 833) (citation omitted) – new trial on damages unless remittitur to $150,000 accepted.

Anderson v. G.D.C., Inc., 281 F.3d 452, 88 FEP 309 (4th Cir. 2002) – Female employee harassed by general manager/dispatcher can seek punitive damages under Kolstad – harasser was managerial employee and possessed the authority to hire and fire drivers and impose some discipline – key fact is that employer did not engage in good faith efforts to comply with Title VII – never adopted an antidiscrimination policy or provided any training.

Hertzberg v. SRAM Corp., 261 F.3d 651, 88 FEP 165 (7th Cir. 2001) – Victim of discrimination who leaves employment cannot get back or front pay absent a constructive discharge – punitive damage award affirmed in co-worker harassment case – Kolstad governs – at least one person who was a managerial agent was aware of the conduct – the evidence established a lack of a good faith effort to insulate the plaintiff from her co-worker’s harassment – the gender-related comments came constantly and the manager was ineffective in stopping them.

Evans v. Port Auth. of N.Y. & N.J., 273 F.3d 346, 87 FEP 510 (3d Cir. 2001) - Jury in promotion case awarded $1.15 million in pain and suffering damages which was remitted to $375,000 - plaintiff appealed - trial court has great discretion on remitting damages -
plaintiff “does not cite any other discrimination case from any other jurisdiction where an award approaching the jury’s verdict of over $1 million was sustained” (Id. at 354) - even though race discrimination is invidious “[t]he verdict was so large as to appear contrary to reason . . . .” (Id. (internal quotations omitted)) - even though the employer does not challenge the $375,000 award, an appellate court has an independent duty to review an award to make sure it is rationally based - the amount of $375,000 is “well above most emotional distress awards” (Id. at 355) - however, it is not based solely on the plaintiff’s testimony because the employer’s witnesses testified as to the physical and emotional toll of working under discriminatory conditions - we thus affirm the award since “this was not a typical case.” (Id. at 356)

*Bishop v. Gainer*, 272 F.3d 1009, 87 FEP 920 (7th Cir. 2001) - Three white state police troopers were discriminated against with respect to one promotion - lower court used “lost chance” theory and decided that the three plaintiffs, respectively, had a 45%, a 30%, and a 15% chance of receiving the promotion in a nondiscriminatory environment, and therefore awarded that proportion of back pay - the circuit court approved, indicating that while the approach was “more art than science” it was “the likeliest way to arrive at a just result.”

*Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 87 FEP 456 (2d Cir. 2001) - Punitive damages can be awarded even though there was no actual or nominal award of compensatory damages - Second Circuit adopts approach of Seventh Circuit and rejects approach of First Circuit to the contrary.

*Swinton v. Potomac Corp.*, 270 F.3d 794, 87 FEP 65 (9th Cir. 2001) - One-million-dollar award of punitive damages based primarily upon immediate supervisor’s failure to stop and to some degree participating in racially offensive jokes and use of the “N” word affirmed - employee manual stated employee should notify his supervisor or, if not appropriate, the employer’s president - employee did not go to president because he did not know the identity of the president and because he feared the joke-telling supervisor who carried a gun - employee raised harassment issues after quitting - joke-telling supervisor had left the employer by this time - HR manager interviewed co-workers who confirmed the racial jokes but contended that everyone, including plaintiff, laughed at them - the employer had all its supervisors and managers undergo harassment training - no one was disciplined - jury awarded $5,000 in back pay, $30,000 for emotional distress, and $1 million in punitive damages, all affirmed - supervisor was not at too low a level for his action or inaction to be imputed to the employer - employer never trained supervisors during relevant time frame - employer’s remedial efforts were excluded at trial - Ninth Circuit concluded there is no hard and fast rule on the admissibility of remedial efforts - a trial court in its discretion may allow evidence of remedial steps as a means to mitigate punitive damages - evidence of post-event corrective measures would not bar punitive damages but would be for the jury to consider - in the present case the trial court’s barring of such evidence was not error - the training occurred approximately seven months after the employee quit and five months after he filed his racial harassment charges and two months after he filed suit - introduction of such evidence would have done little if anything to undermine the uncontested
evidence that even after everyone became fully cognizant of the allegations no one was ever discharged, demoted or disciplined - case analyzed at 168 LRR 256 – Faragher/Ellerth affirmative defense is not available when the harasser is not the plaintiff’s supervisor and the plaintiff is alleging negligence.

Sinyard v. Comm’r of Internal Revenue, 268 F.3d 756, 86 FEP 1417 (9th Cir. 2001) - ADEA claimant who received settlement must pay taxes on portion of settlement proceeds that went to his attorneys - attorneys’ fees not fully deductible - the fees, reduced by 2% of adjusted gross income, should be treated as a miscellaneous deduction - argument that fees went directly to counsel rejected - under ADEA fees are available to the prevailing party rather than to counsel - therefore irrelevant that employer’s payment of the fees went directly to the law firm.

EEOC v. Ind. Bell Tel. Co., 256 F.3d 516, 86 FEP 1 (7th Cir. 2001) (en banc) - Collective bargaining agreement required employer to impose discipline within 30 days of misconduct and limited its power to discharge by imposing a just cause standard - it further authorized an arbitrator to reinstate a discharged employee - this evidence was not admissible in a sexual harassment case to show the reasonableness of an employer’s response, but was admissible at the punitive damages phase - case analyzed at 167 LRR 304.

Cooke v. Stefani Mgmt. Servs., Inc., 250 F.3d 564, 85 FEP 1295 (7th Cir. 2001) - Punitive damage award to harassee overturned - employee complained only to manager who was harasser - employer had written harassment policies and was unaware of the manager’s conduct - the manager’s “rogue acts” were motivated by a desire to amuse himself and not to benefit the employer - cannot impute to employer knowledge of the harasser - employer could use good faith defense even though its harassment policy directed a complaint to the manager, where common sense should have led the employee to report the harassment to someone higher up.

Giles v. Gen. Elec. Co., 245 F.3d 474, 11 A.D. Cas. 1242 (5th Cir. 2001) - Award of $300,000 in compensatory damages reduced to $150,000 - court looked to $100,000 award for similar emotional distress symptoms in another case but augmented it by 50% to avoid substituting court’s judgment for that of jury.

Attorney’s Fees (Ch. 42)

Buckbannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res., 531 U.S. 1004, 11 A.D. Cas. 1300 (2001) - Supreme Court rejects “catalyst” theory for awarding attorney’s fees where the party seeking attorney’s fees has not secured a judgment on the merits or a court-ordered consent decree - 5-4 decision - numerous courts had previously accepted the catalyst theory - issue analyzed at 167 LRR 169.
Thompson v. Wal-Mart Stores, Inc., 472 F.3d 517, 99 FEP 763 (8th Cir. 2006) – In granting summary judgment court stated that no reasonable fact finder could believe that black employee’s conflict with supervisor was due to race – this conflicts with district court’s order denying attorney’s fees to Wal-Mart, which stated that fact finder could have concluded that black employee was subjected to racial discrimination and therefore the case was not frivolous – case remanded for reconsideration of the attorney’s fees issue.

Pacheco v. Mineta, 450 F.3d 780, 98 FEP 10 (5th Cir. 2006) – It was error to deny costs to prevailing government agency against employee on the ground that the employee brought the case in good faith – remanded to consider other relevant factors such as whether the losing party has limited financial resources, whether close legal issues were presented, and whether the prevailing party has enormous financial resources.

Barnes v. City of Cincinnati, 401 F.3d 729, 95 FEP 994 (6th Cir.), cert. denied, 126 S. Ct. 624 (2005) – Attorney’s fee multiplier of 1.75 approved in an unusual preoperative male to female transsexual case because of the uniqueness of the case, the difficulty of the case, the skill utilized, and the extraordinary result – another factor supporting it was the highly controversial nature of the case – court cautions that this multiplier is near the upper end of what would be considered reasonable.

Gobert v. Williams, 323 F.3d 1099, 91 FEP 513 (5th Cir. 2003) – Attorney who was awarded fees may also enforce contingent-fee agreement entitling attorney to 35% of employee’s recovery in addition to amount awarded under Title VII.

Mathur v. Bd. of Trs. of S. Ill. Univ., 317 F.3d 738, 90 FEP 1537 (7th Cir. 2003) – Attorneys from Chicago entitled to Chicago hourly rates when retained to bring an action in area where local rates for attorneys were lower – litigant was unable to find anyone with needed skills who could provide the services in the local area.

Thomas v. NFL Players Ass’n, 273 F.3d 1124, 87 FEP 894 (D.C. Cir. 2001) – One of three plaintiffs prevailed on two of 10 claims – district court correct in not allowing fees for time spent on unsuccessful claims that were not directly related to successful claims - Rule 68 offer of judgment made to all three claimants which was unallocated did not trigger cost-shifting provisions because record does not reflect what was offered to each claimant.

Barber v. T.D. Williamson, Inc., 254 F.3d 1223, 86 FEP 187 (10th Cir. 2001) - Plaintiff prevailed but obtained only nominal damages - Tenth Circuit remands award of attorney's fees for reconsideration - three factors must be considered: difference between amount recovered and damages sought; significance of the legal issue on which the plaintiff prevailed; and the accomplishment of some public goal.

Chris v. Tenet, 221 F.3d 648, 83 FEP 724 (4th Cir. 2000) - Cannot sue under Title VII to recover attorneys’ fees for attorney work performed during administrative process which led to settlement where no substantive lawsuit ever filed - case analyzed at 164 LRR 489.
Ricciardi v. Weber, 795 A.2d 914, 88 FEP 1123 (N.J. Super. Ct. App. Div. 2002) – Plaintiff’s attorney’s defamatory statements made to the press that went beyond the allegations contained in the complaint were not protected by a qualified privilege – the attorney stated that his client had left employment because sexual harassment was so pervasive he could not take it any more, but that was clearly not the case.

Flannery v. Prentice, 26 Cal. 4th 572, 86 FEP 838 (2001) - Although discrimination statute provides that attorneys’ fees are awarded to “the prevailing party,” the fees belong to counsel for the prevailing party to the extent that they exceed the fees already paid in the absence of an enforceable agreement to the contrary - otherwise it would be a windfall and a form of punitive damages - after an award to plaintiff of $250,000 in damages and an award of attorneys’ fees and costs of just under $1 million, plaintiff sued her counsel alleging that she was entitled to the entire statutory fee, claiming that she had entered into an oral agreement with her counsel that counsel would get only 40% of the “net award of the jury” - counsel contended that their agreement was that they would receive 40% of the award or the entirety of statutory fees - case remanded to determine factual issue of whether parties entered into an agreement which would negate counsel’s right to the statutory fees.

Settlement (Ch. 43)

Staton v. Boeing Co., 327 F.3d 938 (9th Cir. 2003) – Proposed class action consent decree overturned 2-1 – class of 15,000 black employees – $3.77 million to go to named plaintiffs and other class members identified by class counsel as active participants in the litigation (those who signed retainer agreements with class counsel, paid an initial fee of $300, and made monthly payments of $200 each) – this led to awards in the $5,000-50,000 range, most about $16,000 – the remaining $3.5 million was to go to unnamed class members whose average payment was $1,000 - 3.8 million was to go to attorneys’ fees - $3.7 million was to be spent on diversity training and the like – in approving the decree the district court relied upon Boeing’s success in defending against prior claims of racial bias and the effectiveness of the injunctive relief – the first question was the broad class certification which included both supervisory and nonsupervisory employees which was attacked by the objectors – the court upheld the broad certification as not being an abuse of discretion – the court held that if the case were to be litigated, the trial court would on remand have to address the issue of manageability – the court of appeals was bothered by the vague nature of some of the injunctive relief but indicated it would not overturn the settlement based on that – but the method of paying attorneys’ fees was unacceptable – counsel were awarded 28% of a hypothetical common fund that was constructed by adding together the amount of money that the employer would pay in damages, the amount of fees provided to various counsel, the cost of class action notices, and the gross amount of money which is ascribed to injunctive relief – the actual percentage award was much higher than 28% since the estimated value of the injunctive relief should not have been included – recovery of attorneys’ fees from a common fund is not forbidden in an action under a fee-
shifting statute – here, the parties followed an improper procedure by negotiating the fee award on a common fund basis and conditioning the merits settlement on judicial approval of the agreed-upon fees – there is an obvious risk that the claimants’ lawyers will be induced to forgo a fair settlement to gain a higher fee award – this agreement is unusual in that the employer is paying the fees as in a statutory fee-shifting situation but the parties justify it as coming from a putative common fund – conditioning settlement on a set amount of attorneys’ fees based on an actual or putative common fund can inhibit a district court from engaging in an independent determination of reasonable fees – “The parties to a class action may not include in a settlement agreement an amount of attorneys’ fees measured as a percentage of an actual or putative common fund created for the benefit of the class. Instead, in order to obtain fees justified on a common fund basis, the class’s lawyers must ordinarily petition the court for an award of fees, separate from and subsequent to settlement.” (Id. at 945) – can’t count injunctive relief in creating a “putative” fund but injunctive relief obtained may be considered in determining what percentage of the fund should be reasonable as attorney’s fees – the decree also has to be overturned because the higher payments to 237 individually identified recipients which were 16 times greater than what went to unnamed class members were not sufficiently justified – issue analyzed at 171 LRR 152.

Reiter v. MTA New York City Transit Authority, 457 F.3d 224, 98FEP 1032 (2d Cir. 2006) – Rule 68 ineffective even though monetary amount exceeded recovery – Rule 68 offer did not provide for reinstatement to prior position which, disregarding monetary issues, was prestigious and carried significant personal satisfaction.

Richardson v. Sugg, 448 F.3d 1046, 98 FEP 401 (8th Cir. 2006) – Richardson, longtime head basketball coach at the University of Arkansas, was fired after repeatedly publicly stating “If they go ahead and pay me my money, they can take the job tomorrow.” (Id. at 1051) – his contract, which was honored, contained a buyout of $500,000 a year for several years, and in exchange he waived all potential claims – prospective waiver of Title VII claims void - [Note: Arguably contract could have been written to provide that post-termination the University would offer a settlement in the same amount, conditioned upon a release to be signed post-termination.] – district court dismissal following bench trial affirmed – even if University Athletic Director was biased, concededly unbiased University President made an independent investigation and was the decisionmaker.

EEOC v. Lockheed Martin Corp., 444 F. Supp. 2d 414 (D. Md. 2006) – Unlawful retaliation to offer severance package conditioned upon dismissing pending EEOC charge – unlawful retaliation to insist on broad release in exchange for severance pay which required employee not to pursue any “charges” for “monetary relief or other remedies.” [Note: Consistent EEOC position has been that employees may release individual entitlements, but cannot be compelled to withdraw charges – to the extent that case holds that employee cannot release right to individual monetary relief under Title VII for severance pay, it seems erroneous.]
Bandera v. City of Quincy, 344 F.3d 47, 92 FEP 1014 (1st Cir. 2003) – District court should not have set aside settlement agreement without holding hearing – fact that memorandum of agreement setting forth terms of settlement agreement contemplated a more complete written agreement would not automatically preclude enforcement – hearing necessary on contention that plaintiff’s attorney coerced her into signing agreement and that there was a side agreement that the contract would be renegotiated in her favor after the City’s mayoral election.

Le v. Univ. of Pa., 321 F.3d 403, 91 FEP 310 (3d Cir. 2003) – Rule 68 offer was valid and thus requires prevailing plaintiff who recovered less than offer to pay employer’s post-offer costs and to suffer a restriction on his attorney’s fee recovery – plaintiff had argued that the offer was not apportioned between the employer and its co-defendant, his former supervisor, but this was irrelevant because there was an indemnity contract requiring the employer to bear the supervisor’s costs – fact that offer was not apportioned between discrimination and retaliation claim irrelevant since only the plaintiff received the offer pertaining to both claims, and it mattered not that the jury ruled for him on retaliation but not on discrimination.

Jefferson v. Cal. Dep’t of Youth Auth., 28 Cal. 4th 299, 89 FEP 401 (2002) – Compromise and release executed in workers’ compensation proceeding that released “all claims and causes of action” that were related to an injury arising from sexual harassment bars sexual harassment action under Fair Employment and Housing Act – workers’ compensation judge had sufficient information to assess the fairness of releasing the employee’s FEHA claim.

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