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**Trends in Employment**  
**Discrimination Law**

by

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**I. The Statistics**

<b><u>Twelve-Month Period</u></b>	<b><u>Number of Employment Discrimination Cases Filed in These 12 Months</u></b>
1997 (12 mos. to 12/31/97)	24,174
1998 (12 mos. to 12/31/98)	23,299
1999 (12 mos. to 12/31/99)	22,412
2000 (12 mos. to 12/31/00)	21,111
2001 (12 mos. to 12/31/01)	21,062
2002 (12 mos. to 12/33/02)	20,972
2003 (12 mos. to 12/31/03)	20,040
2004 (12 mos. to 9/30/04)	19,746
2005 (12 mos. to 9/30/05)	16,930
2006 (12 mos. to 9/30/06)	14,353
2007 (12 mos. to 12/31/07)	13,107

There are no comparable figures available for filings in State courts.

There has been a 45.8% decline since 1997 in the number of new fair-employment cases filed in Federal district courts.

**II. EEOC Charge Statistics**

“In FY 2008, we received 95,402 private sector charges of discrimination, a 15.2% increase from FY 2007. We also received 2,666 charges through net transfers from state and local Fair Employment Practices Agencies (FEPAs).”

The above information was downloaded on March 9, 2009, from the EEOC web site, [http://www.eeoc.gov/abouteeoc/plan/par/2008/managements\\_discussion.html#enforcement](http://www.eeoc.gov/abouteeoc/plan/par/2008/managements_discussion.html#enforcement).

The following information was cited to the EEOC, and downloaded on March 9, 2009, from <http://www.msnbc.msn.com/id/29554931/>:

<b>Category</b>	<b>FY 2007</b>	<b>FY 2008</b>	<b>Percent Change</b>
Total charges	82,792	95,402	15.2%
Race	30,510	33,937	11.2%
Retaliation	26,663	32,690	22.6%
Sex	24,826	28,372	14.3%
Age	19,103	24,582	28.7%

<b>Category</b>	<b>FY 2007</b>	<b>FY 2008</b>	<b>Percent Change</b>
Disability	17,734	19,453	9.7%
National Origin	9,396	10,601	12.8%
Religion	2,880	3,273	13.6%
Equal Pay Act	818	954	16.6%

### **III. Summary Judgment Statistics**

#### **A. A Decade's Worth of Statistics**

The following chart is based on running the following algorithms on WestLaw® for all appellate decisions reflected on WestLaw®, whether published or unpublished, for each calendar year and for 2009 to mid-September:

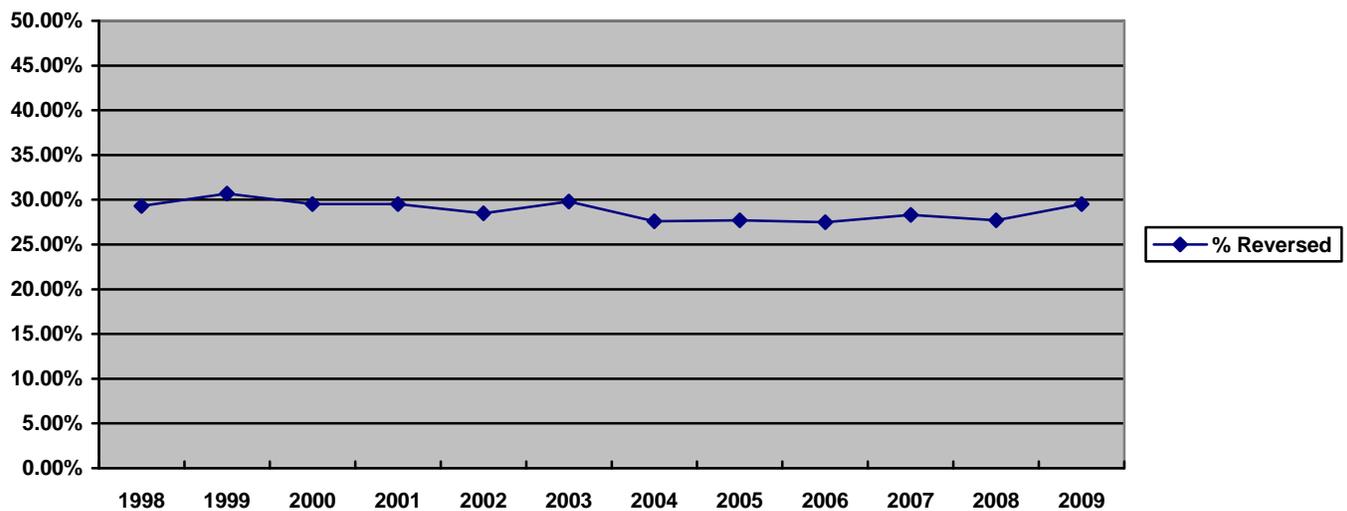
(discriminat! retaliat! harass! "hostile environment") & ("rule 56" "summary judgment") & (reversed vacated) & da(aft 01/01/2009) & da(bef 01/01/2010)

(discriminat! retaliat! harass! "hostile environment") & ("rule 56" "summary judgment") & affirmed & da(aft 01/01/2009) & da(bef 01/01/2010)

It is imperfect, because many cases fit into both categories.

<b>Calendar Year</b>	<b>Summary Judgments Reversed or Vacated</b>	<b>Summary Judgments Affirmed</b>	<b>Percent of Total Reversed or Vacated</b>
1998	609	1466	29.3%
1999	714	1610	30.7%
2000	656	1569	29.5%
2001	672	1603	29.5%
2002	635	1592	28.5%
2003	673	1585	29.8%
2004	548	1435	27.6%
2005	609	1587	27.7%
2006	608	1599	27.5%

Calendar Year	Summary Judgments Reversed or Vacated	Summary Judgments Affirmed	Percent of Total Reversed or Vacated
2007	599	1515	28.3%
2008	577	1505	27.7%
2009	409	979	29.5%



The numbers are strikingly uniform, suggesting either that plaintiffs' counsel:

- are not learning to improve their selection of cases, or
- are not learning to improve their defences against summary judgment, or
- that we are all improving but new entrants into the field are cancelling out the improvements that would otherwise show up, or
- that nothing we do makes a difference.

This seminar is the answer to the first two possibilities, getting more members into NELA is the solution to the third, and improved communication with the bench may answer the fourth.

### **B. Who Has a Right to Paranoia?**

Many plaintiffs' attorneys believe that reversals of summary judgment are tucked away in unreported decisions where they will be difficult to find. To test this, I ran the above algorithms on two WestLaw® databases for the period from January 1, 2008, through September 21, 2009: the CTA database of reported and unreported decisions combined, and the CTAR database of reported opinions. By subtracting the CTAR decisions from the CTA decisions, I obtained the

unreported decisions. Not all unreported decisions appear on WestLaw®, but this is the best that can be done.

The results were surprising:

Database	Summary Judgments Reversed or Vacated	Summary Judgments Affirmed	Percent of Total Reversed or Vacated
All cases	986	2,515	28.2%
Reported cases	573	812	41.4%
Unreported Cases	413	1,703	19.5%

If anything, it is defense counsel who should be paranoid. In actuality, these results may reflect the likely result of numerous *pro se* filings, and poor case selections and filings by attorneys who have not yet learned how to identify and handle an employment case properly.

#### IV. Legislation and Rules Changes

##### A. Americans with Disabilities Amendments Act, H.R. 3195 and S. 3406

Signed by the President on September 25, 2008, and is now Public Law No. 110-325. The text of the Act is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

#### SECTION 1. SHORT TITLE.

This Act may be cited as the `ADA Amendments Act of 2008'.

#### SEC. 2. FINDINGS AND PURPOSES.

(a) Findings- Congress finds that--

(1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act `provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' and provide broad coverage;

(2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

(3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;

(4) the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

(5) the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;

(6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;

(7) in particular, the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress; and

(8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term 'substantially limits' as 'significantly restricted' are inconsistent with congressional intent, by expressing too high a standard.

(b) Purposes- The purposes of this Act are--

(1) to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection to be available under the ADA;

(2) to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms 'substantially' and 'major' in the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard for qualifying as disabled,' and that to be substantially limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives';

(5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for 'substantially limits', and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and

(6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term 'substantially limits' as 'significantly restricted' to be consistent with this Act, including the amendments made by this Act.

### SEC. 3. CODIFIED FINDINGS.

Section 2(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101) is amended--

(1) by amending paragraph (1) to read as follows:

'(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;';

(2) by striking paragraph (7); and

(3) by redesignating paragraphs (8) and (9) as paragraphs (7) and (8), respectively.

### SEC. 4. DISABILITY DEFINED AND RULES OF CONSTRUCTION.

(a) Definition of Disability- Section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102) is amended to read as follows:

#### 'SEC. 3. DEFINITION OF DISABILITY.

`As used in this Act:

`(1) DISABILITY- The term `disability' means, with respect to an individual--

`(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

`(B) a record of such an impairment; or

`(C) being regarded as having such an impairment (as described in paragraph (3)).

`(2) MAJOR LIFE ACTIVITIES-

`(A) IN GENERAL- For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

`(B) MAJOR BODILY FUNCTIONS- For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

`(3) REGARDED AS HAVING SUCH AN IMPAIRMENT- For purposes of paragraph (1)(C):

`(A) An individual meets the requirement of `being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

`(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

`(4) RULES OF CONSTRUCTION REGARDING THE DEFINITION OF DISABILITY- The definition of `disability' in paragraph (1) shall be construed in accordance with the following:

`(A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.

`(B) The term `substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

`(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

`(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

`(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as--

`(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

`(II) use of assistive technology;

`(III) reasonable accommodations or auxiliary aids or services; or

`(IV) learned behavioral or adaptive neurological modifications.

`(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

`(iii) As used in this subparagraph--

`(I) the term `ordinary eyeglasses or contact lenses' means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

`(II) the term `low-vision devices' means devices that magnify, enhance, or otherwise augment a visual image.'

(b) Conforming Amendment- The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) is further amended by adding after section 3 the following:

#### `SEC. 4. ADDITIONAL DEFINITIONS.

`As used in this Act:

`(1) AUXILIARY AIDS AND SERVICES- The term `auxiliary aids and services' includes--

`(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

`(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

`(C) acquisition or modification of equipment or devices; and

`(D) other similar services and actions.

`(2) STATE- The term `State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands of the United States, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.'

(c) Amendment to the Table of Contents- The table of contents contained in section 1(b) of the Americans with Disabilities Act of 1990 is amended by striking the item relating to section 3 and inserting the following items:

`Sec. 3. Definition of disability.

`Sec. 4. Additional definitions.'

#### SEC. 5. DISCRIMINATION ON THE BASIS OF DISABILITY.

(a) On the Basis of Disability- Section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) is amended--

(1) in subsection (a), by striking `with a disability because of the disability of such individual' and inserting `on the basis of disability'; and

(2) in subsection (b) in the matter preceding paragraph (1), by striking `discriminate' and inserting `discriminate against a qualified individual on the basis of disability'.

(b) Qualification Standards and Tests Related to Uncorrected Vision- Section 103 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12113) is amended by redesignating subsections (c) and (d) as subsections (d) and (e), respectively, and inserting after subsection (b) the following new subsection:

`(c) Qualification Standards and Tests Related to Uncorrected Vision- Notwithstanding section 3(4)(E)(ii), a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.'

(c) Conforming Amendments-

(1) Section 101(8) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(8)) is amended--

(A) in the paragraph heading, by striking 'WITH A DISABILITY'; and

(B) by striking 'with a disability' after 'individual' both places it appears.

(2) Section 104(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12114(a)) is amended by striking 'the term "qualified individual with a disability" shall' and inserting 'a qualified individual with a disability shall'.

#### SEC. 6. RULES OF CONSTRUCTION.

(a) Title V of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 et seq.) is amended--

(1) by adding at the end of section 501 the following:

(e) Benefits Under State Worker's Compensation Laws- Nothing in this Act alters the standards for determining eligibility for benefits under State worker's compensation laws or under State and Federal disability benefit programs.

(f) Fundamental Alteration- Nothing in this Act alters the provision of section 302(b)(2)(A)(ii), specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.

(g) Claims of No Disability- Nothing in this Act shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability.

(h) Reasonable Accommodations and Modifications- A covered entity under title I, a public entity under title II, and any person who owns, leases (or leases to), or operates a place of public accommodation under title III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C) of such section.';

(2) by redesignating section 506 through 514 as sections 507 through 515, respectively, and adding after section 505 the following:

#### SEC. 506. RULE OF CONSTRUCTION REGARDING REGULATORY AUTHORITY.

The authority to issue regulations granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation under this Act includes the authority to issue regulations implementing the definitions of disability in

section 3 (including rules of construction) and the definitions in section 4, consistent with the ADA Amendments Act of 2008.'; and

(3) in section 511 (as redesignated by paragraph (2)) (42 U.S.C. 12211), in subsection (c), by striking `511(b)(3)' and inserting `512(b)(3)'.

(b) The table of contents contained in section 1(b) of the Americans with Disabilities Act of 1990 is amended by redesignating the items relating to sections 506 through 514 as the items relating to sections 507 through 515, respectively, and by inserting after the item relating to section 505 the following new item:

`Sec. 506. Rule of construction regarding regulatory authority.'

#### SEC. 7. CONFORMING AMENDMENTS.

Section 7 of the Rehabilitation Act of 1973 (29 U.S.C. 705) is amended--

(1) in paragraph (9)(B), by striking `a physical' and all that follows through `major life activities', and inserting `the meaning given it in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102)'; and

(2) in paragraph (20)(B), by striking `any person who' and all that follows through the period at the end, and inserting `any person who has a disability as defined in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102)'.

#### SEC. 8. EFFECTIVE DATE.

This Act and the amendments made by this Act shall become effective on January 1, 2009.

#### **B. Consumer Product Safety Commission Reform Act**

Sec. 219 contains the whistleblower protections. Enforcement is through the Department of Labor, but individuals can file suit and obtain trial *de novo* in the district courts if the Department of Labor has not issued a final decision in 210 days. The remedies are reinstatement with back seniority, back pay with interest, and litigation expenses, including attorneys' fees. Sec. 219 provides:

#### **SEC. 219. WHISTLEBLOWER PROTECTIONS.**

(a) In General- The Act (15 U.S.C. 2051 et seq.), as amended by section 206 of this Act, is further amended by adding at the end the following:

#### `WHISTLEBLOWER PROTECTION

`Sec. 40. (a) No manufacturer, private labeler, distributor, or retailer, may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee, whether at the

employee's initiative or in the ordinary course of the employee's duties (or any person acting pursuant to a request of the employee)--

`(1) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of this Act or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts;

`(2) testified or is about to testify in a proceeding concerning such violation;

`(3) assisted or participated or is about to assist or participate in such a proceeding; or

`(4) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this Act or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts.

`(b)(1) A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 180 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination and identifying the person responsible for such act. Upon receipt of such a complaint, the Secretary shall notify, in writing, the person named in the complaint of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

`(2)(A) Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the complainant and the person named in the complaint an opportunity to submit to the Secretary a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary shall initiate an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary concludes that there is reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Any such hearing shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

`(B)(i) The Secretary shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

`(ii) Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

`(iii) The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

`(iv) Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

`(3)(A) Not later than 120 days after the date of conclusion of any hearing under paragraph (2), the Secretary shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary, the complainant, and the person alleged to have committed the violation.

`(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) has occurred, the Secretary shall order the person who committed such violation--

`(i) to take affirmative action to abate the violation;

`(ii) to reinstate the complainant to his or her former position together with compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

`(iii) to provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

`(C) If the Secretary finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary may award to the prevailing employer a reasonable attorneys' fee, not exceeding \$1,000, to be paid by the complainant.

`(4) If the Secretary has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after receiving a written determination, the complainant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States with jurisdiction, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury. The proceedings shall be governed by the same legal burdens of proof specified in paragraph (2)(B). The court shall have jurisdiction to grant all relief necessary to make the employee whole, including injunctive relief and compensatory damages, including--

`(A) reinstatement with the same seniority status that the employee would have had, but for the discharge or discrimination;

`(B) the amount of back pay, with interest; and

`(C) compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.

`(5)(A) Unless the complainant brings an action under paragraph (4), any person adversely affected or aggrieved by a final order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

`(B) An order of the Secretary with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

`(6) Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur, or in the United States district court for the District of Columbia, to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

`(7)(A) A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have

jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

`(B) The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorneys' and expert witness fees) to any party whenever the court determines such award is appropriate.

`(c) Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28, United States Code.

`(d) Subsection (a) shall not apply with respect to an employee of a manufacturer, private labeler, distributor, or retailer who, acting without direction from such manufacturer, private labeler, distributor, or retailer (or such person's agent), deliberately causes a violation of any requirement relating to any violation or alleged violation of any order, regulation, or consumer product safety standard under this Act or any other law enforced by the Commission.'

(b) Conforming Amendment- The table of contents, as amended by section 206 of this Act, is further amended by inserting after the item relating to section 39 the following:

`Sec. 40. Whistleblower protection.'

### **C. Genetic Information Nondiscrimination Act of 2008**

GINA was signed by the President on May 21, 2008, and is now Public Law 110-233, 122 Stat. 881 (2008). The Act draws heavily on Title VII, and in the context of employment gives the same enforcement powers and remedies to the EEOC and persons affected by violations. Title II of the bill covers employment. It prohibits both disparate treatment and disparate impact discrimination. It takes effect November 21, 2009.

The definition of “genetic information” includes the results of “genetic tests” of the individual (except for sex and age) or family members, “the manifestation of a disease or disorder in family members of such individual.” This means that comprehensive physical examinations after the job offer, not prohibited by the ADA, will be unlawful as of November 21, 2009. There are several narrow exceptions as to the gathering of information, but none allow an employer to base employment decisions, or to classify employees, based on the information.

The term “genetic tests” means “an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes,” but “does not mean an analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes.” This means that drug tests are lawful only if they do not detect “genotypes, mutations, or chromosomal changes.”

### **D. Civil Rights Tax Relief Act**

This bill was introduced in the House on June 25, 2009, by Rep. John Lewis. It is H.R.3035. On the same day, it was introduced in the Senate by Sen. Bingaman as S. 1360. These bills would exempt emotional-distress damages in employment cases and civil rights cases

from gross income, and would allow income averaging for back pay and front pay awards received on account of such claims.

**E. Civil Rights Act of 2009**

An omnibus civil rights bill is expected to be introduced.

**F. Lilly Ledbetter Fair Pay Act of 2009**

The Act is Public Law 111-2, and became law on January 29, 2009. It provides:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the ``Lilly Ledbetter Fair Pay Act of 2009''.

**SEC. 2. FINDINGS.**

Congress finds the following:

(1) The Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The *Ledbetter* decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.

(2) The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.

(3) With regard to any charge of discrimination under any law, nothing in this Act is intended to preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment practice that has occurred outside the time for filing a charge of discrimination.

(4) Nothing in this Act is intended to change current law treatment of when pension distributions are considered paid.

**SEC. 3. DISCRIMINATION IN COMPENSATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN.**

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended by adding at the end the following:

``(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual

becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

“(B) In addition to any relief authorized by section 1977A of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.”.

#### SEC. 4. DISCRIMINATION IN COMPENSATION BECAUSE OF AGE.

Section 7(d) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(d)) is amended--

(1) in the first sentence--

(A) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively; and

(B) by striking “(d)” and inserting “(d)(1)”;

(2) in the third sentence, by striking “Upon” and inserting the following:

“(2) Upon”; and

(3) by adding at the end the following:

“(3) For purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of this Act, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.”.

#### SEC. 5. APPLICATION TO OTHER LAWS.

(a) Americans With Disabilities Act of 1990.--The amendments made by section 3 shall apply to claims of discrimination in compensation brought under title I and section 503 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq., 12203), pursuant to section 107(a) of such Act (42 U.S.C. 12117(a)), which adopts the powers, remedies, and procedures set forth in section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5).

(b) Rehabilitation Act of 1973.—The amendments made by section 3 shall apply to claims of discrimination in compensation brought under sections 501 and 504 of the Rehabilitation Act of 1973 (29 U.S.C. 791, 794), pursuant to--

(1) sections 501(g) and 504(d) of such Act (29 U.S.C. 791(g), 794(d)), respectively, which adopt the standards applied under title I of the Americans with Disabilities Act of 1990 for determining whether a violation has occurred in a complaint alleging employment discrimination; and

(2) paragraphs (1) and (2) of section 505(a) of such Act (29 U.S.C. 794a(a)) (as amended by subsection (c)).

(c) Conforming Amendments.--

(1) Rehabilitation act of 1973.--Section 505(a) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)) is amended--

(A) in paragraph (1), by inserting after "(42 U.S.C. 2000e-5 (f) through (k))" the following: "(and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation)"; and

(B) in paragraph (2), by inserting after "1964" the following: "(42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation)".

(2) Civil rights act of 1964.--Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) is amended by adding at the end the following:

"(f) Section 706(e)(3) shall apply to complaints of discrimination in compensation under this section."

(3) Age discrimination in employment act of 1967.—Section 15(f) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(f)) is amended by striking "of section" and inserting "of sections 7(d)(3) and".

## SEC. 6. EFFECTIVE DATE.

This Act, and the amendments made by this Act, take effect as if enacted on May 28, 2007 and apply to all claims of discrimination in compensation under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), title I and section 503 of the Americans with Disabilities Act of 1990, and sections 501 and 504 of the Rehabilitation Act of 1973, that are pending on or after that date.

## **G. Paycheck Fairness Act of 2009, H.R. 12**

This bill has 198 co-sponsors. It would add compensatory damages as a remedy as all defendants, punitive damages as a remedy for defendants other than the United States, and

provide for Rule 23 class treatment rather than opt-in collective-action treatment. The bill would replace the defense for “any other factor other than sex” with a defense for “a bona fide factor other than sex, such as education, training, or experience” that is job-related and consistent with business necessity. It was attached to the Ledbetter bill when that passed the House, but was deleted from it after the Senate passed the Ledbetter bill as a stand-alone bill.

**H. Arbitration Fairness Act of 2009, H.R. 1020**

H.R. 1020 would amend the FAA by barring the enforcement of any predispute arbitration agreement “if it requires arbitration of” “ (1) an employment, consumer, or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights.” It has 39 co-sponsors in the House.

**I. American Recovery and Re-Investment Act of 2009**

Sec. 1553 of Pub. L. 111-5 contains the whistleblower protections. Subparagraph (a) contains the broad prohibition:

(a) Prohibition of Reprisals- An employee of any non-Federal employer receiving covered funds may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of an employee's duties, to the Board, an inspector general, the Comptroller General, a member of Congress, a State or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct), a court or grand jury, the head of a Federal agency, or their representatives, information that the employee reasonably believes is evidence of--

(1) gross mismanagement of an agency contract or grant relating to covered funds;

(2) a gross waste of covered funds;

(3) a substantial and specific danger to public health or safety related to the implementation or use of covered funds;

(4) an abuse of authority related to the implementation or use of covered funds; or

(5) a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued relating to covered funds.

Complaints are to be investigated by the Inspector General of the agency, and both the agency and the complainant may sue. Complainants who are retaliated against may sue, and need only show that their reports were a contributing factor in the adverse employment action. They may sue for compensatory damages and other remedies, and jury trial is available.

## V. The Constitution and Statutes

### A. The First Amendment

*Andrew v. Clark*, 561 F.3d 261, 28 IER Cases 1537 (4th Cir. 2009), reversed the district court's holding that the plaintiff police officer's speech was not protected under *Garcetti*. The plaintiff was a Major in the Police Department, and sent an internal memorandum questioning the use of deadly force in an incident in which a murder suspect was barricaded. When it was ignored, he sent it to the *Baltimore Sun* and was subjected to a bizarre range of retaliatory actions including reassignment, being ordered to work without pay, and discharge. The district court held on a Rule 12(b)(6) motion that *Garcetti* barred his claim. Reversing, the court of appeals stated at 264:

Andrew was not under a duty to write the memorandum as part of his official responsibilities. He had not previously written similar memoranda after other officer-involved shootings. Andrew would not have been derelict in his duties as a BPD commander, nor would he have suffered any employment consequences, had he not written the memorandum. The memorandum was characterized by Clark as "unauthorized." The task of investigating officer-involved shootings falls upon the BPD's Homicide Unit and the Internal Affairs Division. Andrew did not work within either of these units nor did he have any control over their investigations. Clark ignored the Andrew Memorandum.

The district court also dismissed plaintiff's second-level retaliation claim, that he was fired because he had disclosed he was about to sue the Baltimore Police Department for retaliation in violation of the First Amendment, because it found that this speech did not involve a matter of public concern. Reversing, the court of appeals stated:

Andrew has asserted viable petition claims because he alleges that the first-level retaliation was an Internal Affairs investigation due to his distribution of his memorandum to the press, and that the second level of retaliation was his termination for threatening to file suit for the first level of retaliation.

*Id.* at 269.

*Charles v. Grief*, 522 F.3d 508, 103 FEP Cases 276 (5th Cir. 2008), affirmed the lower court's denial of qualified immunity to the defendant official of the Texas Lottery Commission, as to plaintiff's § 1983 claim that he was fired in retaliation for complaining of racial discrimination and mismanagement by the Commission. The court held that plaintiff complained as a private citizen, not as a Commission employee. It stated at 513-14:

Grief insists that *Garcetti* and its progeny control, emphasizing that (1) Charles's speech concerned "special knowledge" that he had obtained through his employment at the Commission, and (2) Charles identified himself in his e-mails as a Commission employee. Even when accepted as true, neither of these assertions is dispositive. To hold that any employee's speech is not protected merely because it concerns facts that he happened to learn while at work would severely undercut First Amendment rights. Also, it is apparent that Charles identified himself as a Commission employee solely to

demonstrate the veracity of the factual allegations he was making in his e-mails to the legislators. After introducing himself as a Commission employee, Charles further emphasized the foundation for his allegations by stating that he was available to speak to the legislative officials about activities that he had “witnessed” while employed. Moreover, Charles submitted the e-mails from his private e-mail address and listed his home address and phone number for his contact information, all of which further undermines the emphasis Grief tries to place on Charles's identification of himself as a Commission employee.

Most significantly, though, Charles's speech—unlike that of the plaintiffs in *Garcetti* and *Williams*—was not made in the course of performing or fulfilling his job responsibilities, was not even indirectly related to his job, and was not made to higher-ups in his organization (as were Ceballos's and Williams's) but was communicated directly to elected representatives of the people. As a systems analyst, Charles worked in the area of Information Resources as a senior technical lead coordinating and supporting the Commission's computer network operations. He was not in a professional position of trust and confidence like those of an assistant district attorney or a sheriff's deputy. Even though his job description is not contained in the record on appeal and is therefore unavailable to us, we are convinced that his e-mails concerned topics far removed from the realm of—and unrelated to—any conceivable job duties. As the district court indicated, there can be no *Garcetti*-like nexus between Charles's systems analyst's work and the malfeasance that he sought to expose to the cognizant public authorities.

Moreover, the persons to whom Charles directed his e-mails further distinguishes his speech from that of the plaintiffs in *Garcetti* and *Williams*: Charles voiced his complaints *externally*, to Texas legislators who had oversight authority over the Commission, not *internally*, to supervisors. His decision to ignore the normal chain of command in identifying problems with Commission operations is a significant distinction. We conclude that Charles's speech is not left unprotected by *Garcetti*'s genre of “non-protected” speech and turn next to examine whether his speech involved matters of public concern.

(Emphases in original; footnote omitted.) The court went on to hold that plaintiff's complaints involved matters of public concern, and rejected defendant's argument that they were too vague to be of public concern. *Id.* at 514-15.

## **B. The Fourteenth Amendment**

### **1. “Class of One” Equal-Protection Claims**

*Engquist v. Oregon Dept. of Agriculture*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2146, 2148-49, 170 L. Ed. 2d 975 (2008) (Roberts, J.), stated the holding of the Court succinctly: The question in this case is whether a public employee can state a claim under the Equal Protection Clause by alleging that she was arbitrarily treated differently from other similarly situated employees, with no assertion that the different treatment was based on the employee's membership in any particular class. We hold that such a “class-of-one” theory of equal protection has no place in the public employment context.” The Court distinguished public actions affecting the general

public, in which everyone is expected to be treated the same, from actions affecting single employees, in which there is an expectation of individual treatment. *Id.* at 2151-54. It explained at 2155: “State employers cannot, of course, take personnel actions that would independently violate the Constitution. . . . But recognition of a class-of-one theory of equal protection in the public employment context—that is, a claim that the State treated an employee differently from others for a bad reason, or for no reason at all—is simply contrary to the concept of at-will employment. The Constitution does not require repudiating that familiar doctrine.” (Citation omitted.) The Court continued:

In concluding that the class-of-one theory of equal protection has no application in the public employment context—and that is all we decide—we are guided, as in the past, by the “common-sense realization that government offices could not function if every employment decision became a constitutional matter.” . . . If, as Engquist suggests, plaintiffs need not claim discrimination on the basis of membership in some class or group, but rather may argue only that they were treated by their employers worse than other employees similarly situated, any personnel action in which a wronged employee can conjure up a claim of differential treatment will suddenly become the basis for a federal constitutional claim. Indeed, an allegation of arbitrary differential treatment could be made in nearly every instance of an assertedly wrongful employment action—not only hiring and firing decisions, but any personnel action, such as promotion, salary, or work assignments—on the theory that other employees were not treated wrongfully. . . . On Engquist’s view, every one of these employment decisions by a government employer would become the basis for an equal protection complaint.

*Id.* at 2156 (citations omitted). The Court recognized that it would be difficult for employees to prevail, but emphasized the practical difficulties of requiring public employers to justify each of their decisions, and held that acceptance of the class-of-one theory in an employment context would constitutionalize employee grievances over every aspect of the employment relationship. *Id.* at 2157. Justice Stevens dissented, joined by Justices Ginsburg and Souter. *Id.* at 2157-61.

## **2. Due Process Claim to Demotion Rather than Termination**

*Andrew v. Clark*, 561 F.3d 261, 28 IER Cases 1537 (4th Cir. 2009), reversed the district court’s dismissal of plaintiff’s claim of a violation of procedural due process. The plaintiff was a Major in the Police Department, and sent an internal memorandum questioning the use of deadly force in an incident in which a murder suspect was barricaded. When it was ignored, he sent it to the *Baltimore Sun* and was subjected to a bizarre range of retaliatory actions including reassignment, being ordered to work without pay, and discharge. The district court held on a Rule 12(b)(6) motion that plaintiff, who served at the pleasure of the Police Chief, did not have a procedural due process claim to a demotion and then a hearing prior to termination. The court of appeals held that plaintiff had adequately pleaded under *Twombly* the existence of a custom in which the City of Baltimore demoted command staff to civil service positions, from which they could be removed only through notice and hearing.

### 3. Ministerial Exception

*Rweyemamu v. Cote*, 520 F.3d 198, 102 FEP Cases 1678 (2d Cir. 2008), affirmed the dismissal for lack of jurisdiction of the plaintiff priest’s promotional and termination claims against the Bishop of his diocese. The court stated at 207 that “our limited precedent to date supports the following propositions: (1) Title VII and the ADEA are not inapplicable to religious organizations as a general matter; (2) we will permit lay employees—but perhaps not religious employees—to bring discrimination suits against their religious employers; and (3) even when we permit suits by lay employees, we will not subject to examination the genuineness of a proffered religious reason for an employment action.” The court held at 209 that plaintiff’s claim fell within the exception. It stated: “Father Justinian is an ordained priest of the Roman Catholic Church; his duties are determined by Catholic doctrine and they are drawn into question in this case. Furthermore, in order to prevail on his Title VII claim, he must argue that the decision of the Congregatio Pro Clericis was not only erroneous, but also pretextual. Such an argument cannot be heard by us without impermissible entanglement with religious doctrine. Because Title VII is unconstitutional as applied in this case, Father Justinian's federal claim fails at its inception.”

#### C. 42 U.S.C. § 1981

##### 1. Application to Municipalities

*McGovern v. City of Philadelphia*, 554 F.3d 114, 105 FEP Cases 481 (3d Cir. 2009), affirmed the dismissal of plaintiff’s § 1981 claim alleging racial discrimination in his discharge. The period of limitations had expired on a Title VII or § 1983 claim. After surveying the decisions of six other Circuits, the court held that § 1981, as amended by the Civil Rights Act of 1991, created a right that could be enforced directly only against private defendants, but did not create a cause of action independent of § 1983. The court stated at 118: “In other words, § 1981(c) can establish equal *rights* for parties against private and state defendants without establishing equal *remedies*; the fact that § 1981(c) establishes a private right of action against private defendants does not lead to the conclusion that a parallel right must exist for suits against state defendants if such actions are provided for elsewhere in the statutory scheme. . . . Indeed, federal courts often view the availability of other enforcement mechanisms in a statutory scheme as preclusive of an implied cause of action.” (Citations omitted; emphases in original.) The court concluded at 120-21: “In sum, because Congress neither explicitly created a remedy against state actors under § 1981(c), nor expressed its intent to overrule *Jett*, we hold that “the express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units.” *Jett*, 491 U.S. at 733. Accordingly, McGovern's § 1981 claim must fail.” The court added that plaintiff’s claim independently failed because he did not allege an official policy of discrimination. *Id.* at 121.

*Arendale v. City of Memphis*, 519 F.3d 587, 103 FEP Cases (6th Cir. 2008), affirmed the grant of summary judgment to defendant on plaintiff’s § 1981 claim, holding that § 1981 does not allow a private cause of action against municipalities.

## 2. Interracial Association

*Floyd v. Amite County School Dist.*, \_\_\_ F.3d \_\_\_, 2009 WL 2620290 (5th Cir. Aug. 27, 2009) (08-60799), affirmed the grant of summary judgment to the racial discrimination defendant. Plaintiff, who was African-American and had been the Principal of a predominantly African-American high school, asserted that he was fired because he had arranged a Summer Track Program in which white students from other schools participated along with African-American students from his school. In affirming, the court held that plaintiff's evidence merely showed white officials' unhappiness that white students were participating in the program at plaintiff's school, and did not show animus at plaintiff for associating with the white students. As a result, the associational claim failed. The court explained at p. \*6:

The association cases are predicated on animus against the employee because of his association with persons of another race. Although Coach Floyd alleged that he was terminated because of a relationship with persons of another race, the white track athletes, the evidence Floyd submitted does not indicate that any animus by his employer was directed at him because of his relationship with these athletes. Rather, the evidence reflects that the racial animus was directed solely towards the white students. Floyd's evidence of racial animus is based primarily on alleged statements by School Board President Davis. Floyd claimed in a deposition that Davis told him that "he did not-that they did not want them white kids over there at [ACHS]. Coach, you know better." Similarly, community members Hirschel and Celia Pearson testified by affidavit that, on or about March 30, 2003, Davis made statements to them to the effect that "Caucasian students had no business using [ACHS's] track facilities" and that "Floyd had no business trying to bring the African American and Caucasian students together with the summer track program." School Board President Davis' alleged statements indicate that he was angry with Floyd for allowing white students to intermingle with the black students at ACHS and/or use ACHS facilities, not because Floyd, a black coach, interacted with the white students. Floyd's attorney at oral argument confirmed that Floyd's mistake was allowing white and black students "to drink from the same water fountain," and stated that "regardless of whether he was white or black, that the racial animus about mixing races would have cost Coach Floyd his job." Although Davis' statements reflect clear racial animus, nothing in these statements supports a conclusion that the animus was directed at Floyd on the basis of *his* race.

Since Floyd's proof fails to raise a genuine issue of fact that he was terminated on the basis of his race, the district court did not err in dismissing his claims under Title VII and § 1981.

*Barrett v. Whirlpool Corp.*, 556 F.3d 502, 512, 105 FEP Cases 1097 (6th Cir. 2009), affirmed in part and reversed in part the grants of summary judgment to the Title VII and § 1981 defendant. The court stated: "Section 1981 also prohibits discrimination based on association with or advocacy for non-whites, and we review § 1981 claims under the same standard as Title VII claims." (Citations omitted.)

### 3. What is “Race”?

*Abdullahi v. Prada USA Corp.*, 520 F.3d 710, 711-12, 102 FEP Cases 1537 (7th Cir. 2008)), reversed the grant of summary judgment to defendant on plaintiff’s § 1981 claim, holding that plaintiff’s *pro se* form Amended Complaint was adequate to state a § 1981 claim notwithstanding her failure to check the “Race” box on the form, because the form did not explain the difference between “race” and “national origin” and it was clear that plaintiff was complaining of discrimination because of her Iranian ancestry, which could involve race but did not necessarily involve race.

### 4. Retaliation

*CBOCS West, Inc. v. Humphries*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1951, 170 L. Ed. 2d 864, 103 FEP Cases 481 (2008), held that § 1981 applies to retaliation claims in employment discrimination cases. The court expressly rejected defendant’s argument based on the Civil Rights Act of 1991:

Second, CBOCS argues that Congress, in 1991 when it reenacted § 1981 with amendments, intended the reenacted statute not to cover retaliation. CBOCS rests this conclusion primarily upon the fact that Congress did not include an explicit antiretaliation provision or the word “retaliation” in the new statutory language—although Congress has included explicit antiretaliation language in other civil rights statutes. See, e.g., National Labor Relations Act, 29 U.S.C. § 158(a)(4); Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12203(a)-(b); Family and Medical Leave Act of 1993, 29 U.S.C. § 2615.

We believe, however, that the circumstances to which CBOCS points find a far more plausible explanation in the fact that, given *Sullivan* and the new statutory language nullifying *Patterson*, there was no need for Congress to include explicit language about retaliation. After all, the 1991 amendments themselves make clear that Congress intended to supersede the result in *Patterson* and embrace pre- *Patterson* law. And pre- *Patterson* law included *Sullivan*. See Part II, *supra*. Nothing in the statute’s text or in the surrounding circumstances suggests any congressional effort to supersede *Sullivan* or the interpretation that courts have subsequently given that case. To the contrary, the amendments’ history indicates that Congress intended to restore that interpretation. See, e.g., H.R.Rep. No. 102-40, at 92 (noting that § 1981(b) in the “context of employment discrimination . . . would include . . . claims of . . . retaliation”).

*Id.* at 1959-60. The Court also rejected defendant’s argument as to the scope of the right to be free from retaliation:

We agree with CBOCS that the statute’s language does not expressly refer to the claim of an individual (black or white) who suffers retaliation because he has tried to help a different individual, suffering direct racial discrimination, secure his § 1981 rights. But that fact alone is not sufficient to carry the day. After all, this Court has long held that the

statutory text of § 1981's sister statute, § 1982, provides protection from retaliation for reasons related to the *enforcement* of the express statutory right.

*Id.* at 1958 (emphasis in original). Justice Thomas, joined by Justice Scalia, dissented. *Id.* at 1961-70.

## **5. Application of *National R.R. Passenger Corp. v. Morgan***

*Tademy v. Union Pacific Corp.*, 520 F.3d 1149, 1170-72, 102 FEP Cases 1798 (10th Cir. 2008), reversed the grant of summary judgment to the Title VII and § 1981 racial harassment defendant. The court held that the holdings of *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 88 FEP Cases 1601 (2002), with respect to the timeliness of hostile-environment claims, applies to § 1981 cases.

## **D. 42 U.S.C. § 1983**

### **1. No § 1983 Suit Against Official for ADEA Violation**

*Ahlmeier v. Nevada System of Higher Education*, 555 F.3d 1051, 105 FEP Cases 865 (9th Cir. 2009), affirmed the lower court's denial of plaintiff's motion for leave to amend her ADEA Complaint to withdraw her ADEA claim, which was barred by the Eleventh Amendment, and replace it with a § 1983 claim against her former supervisor alleging that age discrimination against her violated the equal protection of the laws. The court held that the ADEA was a comprehensive Federal statute and that, under the doctrine of *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 19-20 (1981), it was the exclusive remedy for age discrimination. The court surveyed the decisions of other Circuits, and stated at 1056: "While this court has not ruled whether the ADEA is the exclusive remedy for age discrimination in employment claims, every other circuit to consider the question has so held."

### **2. Title IX Does Not Preempt a § 1983 Suit**

*Fitzgerald v. Barnstable School Committee*, \_\_ U.S. \_\_, 129 S.Ct. 788, 2009 WL 128173, 105 FEP Cases 358 (2009), held that § 1983 could be used to address intentional sexual discrimination in State and municipal school employment, and that Title IX did not preclude such suits.

### **3. Official "Inaction"**

*Arendale v. City of Memphis*, 519 F.3d 587, 599-600, 103 FEP Cases (6th Cir. 2008), affirmed the grant of summary judgment to defendant on plaintiff's § 1983 claim. Plaintiff, a white police officer, claimed that the City was liable for its inaction in responding to a particular African-American Lieutenant's acts of discrimination. The court stated: "To state a municipal liability claim under an "inaction" theory, Plaintiff must establish: (1) the existence of a clear and persistent pattern of discrimination by municipal employees; (2) notice or constructive notice on the part of the City; (3) the City's tacit approval of the unconstitutional conduct, such that its deliberate indifference in its failure to act can be said to amount to an official policy of inaction; and (4) that the City's custom was the 'moving force' or direct causal link in the constitutional deprivation." (Citations omitted.)

## **E. Title VII of the Civil Rights Act of 1964**

### **1. Interracial Association**

*Holcomb v. Iona College*, 521 F.3d 130, 102 FEP Cases 1844 (**2d Cir.** 2008), vacated the grant of summary judgment to the Title VII defendant, and stated at 131: “We hold, for the first time, that an employer may violate Title VII if it takes action against an employee because of the employee’s association with a person of another race.” The court discussed lower-court decisions to the contrary, and stated:

We reject this restrictive reading of Title VII. The reason is simple: where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee’s *own* race.

*Id.* at 139 (emphasis in original; citations omitted).

See the discussion of *Floyd v. Amite County School Dist.*, \_\_\_ F.3d \_\_\_, 2009 WL 2620290 (**5th Cir.** Aug. 27, 2009) (08-60799), in the section on § 1981 above.

*Barrett v. Whirlpool Corp.*, 556 F.3d 502, 105 FEP Cases 1097 (**6th Cir.** 2009), affirmed in part and reversed in part the grants of summary judgment to the Title VII and § 1981 defendant. The court stated at 511: “Title VII forbids discrimination on the basis of association with or advocacy for a protected party.” (Citations omitted.) The court rejected the lower court’s decision that plaintiffs had failed to show a close enough relationship with African-Americans, because their interaction was at work, stating at 513:

We adopt the sound reasoning of *Drake*: If a plaintiff shows that 1) she was discriminated against at work 2) because she associated with members of a protected class, then the degree of the association is irrelevant. *Drake*, 134 F.3d at 884. The absence of a relationship outside of work should not immunize the conduct of harassers who target an employee because she associates with African-American co-workers. While one might expect the degree of an association to correlate with the likelihood of severe or pervasive discrimination on the basis of that association—for example, a non-protected employee who is married to a protected individual may be more likely to experience associational harassment than one who is merely friends with a protected individual—that goes to the question of whether the plaintiff has established a hostile work environment, not whether he is eligible for the protections of Title VII in the first place. Therefore, we conclude that the district court erred in requiring a certain degree of association before a non-protected employee may assert a viable claim under Title VII.

### **2. Sexual Orientation vs. Gender Stereotyping**

*Prowel v. Wise Business Forms, Inc.*, \_\_\_ F.3d \_\_\_, 2009 WL 2634646, 107 Fair Empl.Prac.Cas. (BNA) 1 (3d Cir. Aug. 28, 2009) (No. 07-3997), reversed the grant of summary judgment to the Title VII sex discrimination defendant, and held that there was a triable issue of fact as to whether plaintiff was harassed because of his homosexuality (in which case Title VII did not protect him) or effeminacy (in which case he would have been harassed because of his sex and protected by Title VII). The court explained at pp. \*6-\*7:

The record demonstrates that Prowel has adduced evidence of harassment based on gender stereotypes. He acknowledged that he has a high voice and walks in an effeminate manner. In contrast with the typical male at Wise, Prowel testified that he: did not curse and was very well-groomed; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot “the way a woman would sit.” Prowel also discussed things like art, music, interior design, and decor, and pushed the buttons on his nala encoder with “pizzazz.” Prowel's effeminate traits did not go unnoticed by his co-workers, who commented: “Did you see what Rosebud was wearing?”; “Did you see Rosebud sitting there with his legs crossed, filing his nails?”; and “Look at the way he walks.” Finally, a co-worker deposited a feathered, pink tiara at Prowel's workstation. When the aforementioned facts are considered in the light most favorable to Prowel, they constitute sufficient evidence of gender stereotyping harassment—namely, Prowel was harassed because he did not conform to Wise's vision of how a man should look, speak, and act—rather than harassment based solely on his sexual orientation.

To be sure, the District Court correctly noted that the record is replete with evidence of harassment motivated by Prowel's sexual orientation. Thus, it is possible that the harassment Prowel alleges was because of his sexual orientation, not his effeminacy. Nevertheless, this does not vitiate the possibility that Prowel was also harassed for his failure to conform to gender stereotypes. See 42 U.S.C. § 2000e-2(m) (“[A]n unlawful employment practice is established when the complaining party demonstrates that ... sex ... was a motivating factor for any employment practice, even though other factors also motivated the practice.”). Because both scenarios are plausible, the case presents a question of fact for the jury and is not appropriate for summary judgment.

In support of the District Court's summary judgment, Wise argues persuasively that every case of sexual orientation discrimination cannot translate into a triable case of gender stereotyping discrimination, which would contradict Congress's decision not to make sexual orientation discrimination cognizable under Title VII. Nevertheless, Wise cannot persuasively argue that because Prowel is homosexual, he is precluded from bringing a gender stereotyping claim. There is no basis in the statutory or case law to support the notion that an effeminate heterosexual man can bring a gender stereotyping claim while an effeminate homosexual man may not. As long as the employee—regardless of his or her sexual orientation—marshals sufficient evidence such that a reasonable jury could conclude that harassment or discrimination occurred “because of sex,” the case is not appropriate for summary judgment. For the reasons we have articulated, Prowel has adduced sufficient evidence to submit this claim to a jury.

(Footnote omitted.) The court held that plaintiff's retaliation claim was derivative of the underlying claim, and was saved to the extent that the underlying claim was saved. See footnote 4. The lesson for pleading and showing a genuine dispute about a gender stereotyping claim is clear: the plaintiff needs to focus on the sexual aspect rather than the sexual orientation aspect, and present the same type of case as a straight person with characteristics associated with the other sex.

### **3. Abortions**

*Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 103 FEP Cases 577 (3d Cir. 2008), reversed the grant of summary judgment to the Title VII Pregnancy Discrimination Act defendant, and held that the PDA prohibits discrimination because of having had an abortion.

### **4. Pay Discrimination: Acts that Unbar Time-Barred Claims**

*Mikula v. Allegheny County*, \_\_\_ F.3d \_\_\_, 2009 WL 2889742, 107 Fair Empl.Prac.Cas. (BNA) 238 (3rd Cir. Sept. 10, 2009) (No. 07-4023) (*per curiam* on rehearing), reversed in part the grant of summary judgment against plaintiff's Title VII pay discrimination claim. The court held on rehearing that even the employer's failure to respond to a request for a pay raise was a pay decision that started the period of limitations running again. The court stated at p. \*4:

Despite our earlier decision, we now hold that the failure to answer a request for a raise qualifies as a compensation decision because the result is the same as if the request had been explicitly denied. *See Reese v. Ice Cream Specialties, Inc.*, 347 F.3d 1007, 1013 (7th Cir.2003) (allowing a claim to proceed where the employer gave raises only to similarly situated white employees). We reaffirm, however, our earlier conclusion that the August 2006 investigation report does not constitute a compensation decision or other practice. While, in the abstract, the result of the investigation affected Mikula's compensation, finding that an employer can be liable under Title VII for investigating an internal discrimination complaint and communicating its findings to the employee would have the unfortunate effect of encouraging employers to ignore such complaints.

## **F. The Age Discrimination in Employment Act**

### **1. "Because of . . . Age"**

*Kentucky Retirement Systems v. EEOC*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2361, 2364, 103 FEP Cases 897, 43 EB Cases 2933 (2008), succinctly summarized the holding of the Court:

The Commonwealth of Kentucky permits policemen, firemen, and other "hazardous position" workers to retire and to receive "normal retirement" benefits after either (1) working for 20 years; or (2) working for 5 years and attaining the age of 55. See Ky.Rev.Stat. Ann. §§ 16.576, 16.577(2) (Lexis 2003), 61.592(4) (Lexis Supp.2003). It permits those who become seriously disabled but have not otherwise become eligible for retirement to retire immediately and receive "disability retirement" benefits. See § 16.582(2)(b) (Lexis 2003). And it treats some of those disabled individuals more generously than it treats some of those who became disabled only after becoming eligible for retirement on the basis of age. The question before us is whether Kentucky's system consequently discriminates against the latter workers "because of . . . age." Age Discrimination in Employment Act of 1967 (ADEA or Act), § 4(a)(1), 81 Stat. 603, 29 U.S.C. § 623(a)(1). We conclude that it does not.

The Kentucky plan classified some positions as hazardous, and imputed a limited number of additional years of service to hazardous-duty employees who become disabled in the line of duty but are not yet eligible for retirement. "Thus, if an employee with 17 years of service becomes

disabled at age 48, the Plan adds 3 years and calculates the benefits as if the employee had completed 20 years of service. If an employee with 17 years of service becomes disabled at age 54, the Plan adds 1 year and calculates the benefits as if the employee had retired at age 55 with 18 years of service.” *Id.* at 2365. The number of imputed years cannot be greater than the number of years of actual service. *Id.* The charging party became disabled after he reached the age of 55 and was eligible for normal retirement, and did not receive the benefit of any imputed years in determining the amount of his benefits. The Court rejected the EEOC’s argument that the distinction was motivated by age:

Kentucky’s Plan turns normal pension eligibility *either* upon the employee’s having attained 20 years of service alone *or* upon the employees having attained 5 years of service and reached the age of 55. The ADEA permits an employer to condition pension eligibility upon age. See 29 U.S.C.A. § 623(1)(1)(A)(i) (Supp.2007). Thus we must decide whether a plan that (1) lawfully makes age in part a condition of pension eligibility, and (2) treats workers differently in light of their pension status, (3) *automatically* discriminates *because of* age. The Government argues “yes.” But, following *Hazen Paper’s* approach, we come to a different conclusion. In particular, the following circumstances, taken together, convince us that, in this particular instance, differences in treatment were not “actually motivated” by age.

*Id.* at 2367. The Court relied on several factors in reaching its conclusion. It noted that age and pension status “remain ‘analytically distinct’ concepts.” *Id.* It relied on the “background circumstances” showing that the Kentucky system was not a “proxy for age”: “We consider not an individual employment decision, but a set of complex systemwide rules. These systemic rules involve, not wages, but pensions—a benefit that the ADEA treats somewhat more flexibly and leniently in respect to age. . . . And the specific benefit at issue here is offered to all hazardous position workers on the same nondiscriminatory terms *ex ante*. That is to say, every such employee, when hired, is promised disability retirement benefits should he become disabled prior to the time that he is eligible for normal retirement benefits. *Id.* at 2367-68. It relied on the Congressional use of age-conscious disability provisions. *Id.* at 2368. The Court relied on “a clear non-age-related rationale for the disparity here at issue,” and the fact that the “disability rules clearly track Kentucky’s normal retirement rules.” *Id.* The Court noted that the same result could have been achieved by an age-neutral plan, and that the existing plan can in some instances produce greater benefits for an older employee. *Id.* at 2368-69. The Court relied on the fact that “Kentucky’s system does not rely on any of the sorts of stereotypical assumptions that the ADEA sought to eradicate.” *Id.* at 2369. The final factor on which the Court relied is that it would be difficult to construct a remedy:

*Sixth*, the nature of the Plan’s eligibility requirements means that, unless Kentucky were severely to cut the benefits given to disabled workers who are not yet pension eligible (which Kentucky claims it will do if its present Plan is unlawful), Kentucky would have to increase the benefits available to disabled, pension-eligible workers, while lacking any clear criteria for determining how many extra years to impute for those pension-eligible workers who already are 55 or older. The difficulty of finding a remedy that can both correct the disparity and achieve the Plan’s legitimate objective—providing each disabled worker with a sufficient retirement benefit, namely, the normal retirement benefit that the worker would receive if he

were pension eligible at the time of disability—further suggests that this objective and not age “actually motivated” the Plan.

*Id.* Justice Kennedy, joined by Justices Scalia, Ginsburg, and Alito, dissented. *Id.* at 2371.

## **2. Retaliation in the Federal Sector**

*Gomez-Perez v. Potter*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1931, 170 L. Ed. 2d 887, 103 FEP Cases 494 (2008) (Alito, J.), stated its holding succinctly: “The question before us is whether a federal employee who is a victim of retaliation due to the filing of a complaint of age discrimination may assert a claim under the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA), as added, 88 Stat. 74, and amended, 29 U.S.C. § 633a(a) (2000 ed., Supp. V). We hold that such a claim is authorized.” The Chief Justice dissented, and as joined by Justices Scalia and Thomas except as to Part I of the dissent. *Id.* at 1943-1951. Justice Thomas, joined by Justice Scalia, dissented. *Id.* at 1951.

## **3. Attempted Insulation by Using Intermediaries**

*Halpert v. Manhattan Apartments, Inc.*, \_\_\_ F.3d \_\_\_, 2009 WL 2881388 (2d Cir. Sept. 10, 2009) (No. 07-4074-CV) (*per curiam*), was a *pro se* case in which the court vacated the grant of summary judgment to the ADEA defendant. Plaintiff applied for a job with defendant and was explicitly rejected because of his age. The lower court granted summary judgment to defendant because an employee of an independent contractor had done the interviewing. The court stated at pp. \*1-\*2:

By its terms, employer liability under the ADEA is direct: an employer may not “fail or refuse to hire ... any individual ... because of such individual's age.” 29 U.S.C. § 623(a)(1). That prohibition applies regardless of whether an employer uses its employees to interview applicants for open positions, or whether it uses intermediaries, such as independent contractors, to fill that role. As the Seventh Circuit has explained in the context of Title VII, when liability for discrimination is direct rather than derivative, “it makes no difference whether the person whose acts are complained of is an employee, an independent contractor, or for that matter a customer.” *Dunn v. Wash. County Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005). If a company gives an individual authority to interview job applicants and make hiring decisions on the company's behalf, then the company may be held liable if that individual improperly discriminates against applicants on the basis of age.

A company is not, of course, liable for the hiring decisions made by independent contractors who are hiring on their own behalf. Nor is a company liable simply because a job applicant unreasonably (and incorrectly) believes that he is interviewing for a job with the company and that the independent contractor has the authority to make hiring decisions on behalf of the company. General principles of agency law determine whether the independent contractor or other third party has been given actual authority to hire on behalf of the company, or whether the company, through its own words or conduct, has created apparent authority in that individual in the eyes of the job applicant. *See Minskoff v. Am. Express Travel Related Servs. Co.*, 98 F.3d 703, 708 (2d Cir.1996). Significantly,

however, the company's potential liability does not depend on whether the individual hiring for the company as its agent is an employee or an independent contractor under the broadest meaning of those words as they are determined by the common law agency test. FN1 An independent contractor can act as an agent, or an apparent agent, of the company for the limited purpose of interviewing and potentially hiring job applicants while still retaining his independence for any number of other purposes.

(Footnote omitted.)

**G. The Americans with Disabilities Act and Rehabilitation Act**

**1. Disparate Impact**

*Rohr v. Salt River Project Agricultural Imp. and Power District*, 555 F.3d 850, 862-63, 21 AD Cases 964 (9th Cir. 2009), reversed the grant of summary judgment to the ADA defendant and held that defendant's respirator test was not job-related and was not a business necessity. It stated: "Salt River asserts that its respirator certification test, including the breathilator test, was a business necessity because it is mandated by OSHA. However, OSHA's requirements are not so specific. . . . OSHA's regulations do not specify the content of such medical evaluations, how often the evaluations should be conducted, the appropriate tests for determining whether an employee should be certified, or any blood-pressure requirements." The court held that OSHA's flexibility meant that there was a genuine issue of fact whether it could have provided an accommodation to plaintiff. The court held that plaintiff's evidence that respirators were often unavailable on the job, and that in twenty-three years he had never had to use a respirator, also created a genuine issue as to whether the respirator test was job-related. *Id.* at 863.

*Allmond v. Akal Sec. Inc.*, 558 F.3d 1312, 21 AD Cases 961 (11th Cir. 2009), affirmed the grant of summary judgment to the ADA and Rehabilitation Act defendants. The court held that the U.S. Marshals Service requirement that court security officers pass a hearing test without hearing aids was job-related and a business necessity.

**2. Disability**

*Maclin v. SBC Ameritech*, 520 F.3d 781, 787, 102 FEP Cases 1839, 20 AD Cases 712 (7th Cir. 2008), affirmed the grant of summary judgment to defendant on plaintiff's ADA claims. The court held that the inability to sit or more than two hours without severe pain was not a disability.

*Rohr v. Salt River Project Agricultural Imp. and Power District*, 555 F.3d 850, 862-63, 21 AD Cases 964 (9th Cir. 2009), reversed the grant of summary judgment to the ADA defendant and held that a Type II insulin-dependent diabetic was disabled under the law prior to enactment of the ADAAA, and that there was no need to determine whether the ADAAA was retroactive. The court stated at p. 859-60:

We conclude that Rohr has raised a genuine issue of material fact as to whether his diabetes substantially limits his life activity of eating. The record is replete with statements, both by Rohr and his doctors, that to manage his disease Rohr is required to

strictly monitor what, and when, he eats. Rohr stated that these restrictions constrain him every day, “whether it's a workday, a weekend or a holiday.” He cannot eat large meals or skip meals, and must eat a snack every few hours. He must schedule each day's blood tests, medications and food intake. He “sometimes become[s] weak and dizzy without warning,” and only when he eats something do these sensations quickly subside. If he fails to follow his diet regimen for more than a meal or two, his blood sugar rises to a level that aggravates his disease. While Rohr and his wife “used to schedule frequent trips during vacation time to go to Rocky Point or to visit family in Utah,” they no longer do so because it is increasingly difficult for him to follow his diet during travel. Rohr stated that overall, “[c]ontrolling diabetes is like being on a chemical roller coaster.”

The district court oversimplified Rohr's condition when it opined that “if he stays on his medicines and watches what and when he eats the only limitation on his activities are the work-related restrictions recommended by his physicians.” While it may seem easy to take a pill or shot of insulin, the reality of diabetes, a chronic and incurable disease, is not so simple. For people like Rohr, who must treat their diabetes with insulin, the failure to take insulin will result in severe problems and eventually death. See American Diabetes Association Position Statement: Insulin Administration, Diabetes Care 27:S106-107 (2004). Insulin injections themselves can be dangerous. Rohr stated in his deposition that it is difficult to determine how much insulin to take, as the necessary amount varies depending on the food and activity level. Generally, food raises blood glucose levels while exercise and insulin reduce them. But other factors play a role, too (e.g., mental stress, illness and injury). To obtain the appropriate balance, Rohr must test his blood glucose levels through a finger stick test numerous times a day, and adjust insulin, food and activity level according to the results.

If daily insulin injections alone more or less stabilized Rohr's blood sugar levels, such that any limitation imposed on his diet would be minor, then Rohr's major life activity of eating might not be substantially limited. . . . However, Rohr has alleged substantial limitations on his eating in spite of his medicine and insulin. He must snack regularly, plan his daily schedule around his diet, avoid skipping meals and eat immediately when he feels dizzy or light-headed. The general population does not have to “snack on something every few hours” to regulate sugar intake; moreover, the general population is not medically required to plan daily schedules around a dietary regimen. Straying from a diet for more than one or two meals is not a cause for medical concern for most people, and skipping a meal, or eating a large one, does not expose them to the risk of fainting. It is simply no answer to say that “if he strictly controls his diet” he is not substantially limited; for Rohr, the effort required to control his diet is itself substantially limiting.

(Citations to record omitted; footnotes omitted). The court stated: “While we decide this case under the ADA, and not the ADAAA, the original congressional intent as expressed in the amendment bolsters our conclusions.” *Id.* at 862.

### **3. “Qualified” Individuals**

*Garg v. Potter*, 521 F.3d 731, 20 AD Cases 705 (**7th Cir.** 2008), affirmed the grant of summary judgment to the Rehabilitation Act defendant U.S. Postal Service because plaintiff did not perform the essential functions of her job even with reasonable accommodation. The court stated that plaintiff did not challenge the reasonableness of the accommodations the Postal Service had made for her, but even with those accommodations her allergies prevented her from performing her job.

*Brannon v. Luco Mop Co.*, 521 F.3d 843, 848-49, 20 AD Cases 709 (**8th Cir.** 2008), affirmed the grant of summary judgment to the ADA defendant and held that plaintiff had not shown she was a qualified person with a disability because regular attendance was an essential function of her job, her attendance was poor, and “Brannon failed to demonstrate that her requested accommodation of additional time off to recuperate would have enabled her to have consistent attendance at work.”

#### 4. Regarded As Disabled

*Ruiz Rivera v. Pfizer Pharmaceuticals, LLC*, 521 F.3d 76, 83, 20 AD Cases 718 (1st Cir. 2008), *petition for certiorari filed* (U.S., June 19, 2008, No. 07-1598), affirmed the grant of summary judgment to the ADA defendant. The court stated: “Regarded as claims primarily fall into one of two categories: “(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.” (Citations omitted.) The court stated that the plaintiff must show that the employer regarded the employee as disabled within the meaning of the ADA and, where the major life activity in question is working, that the employer regarded the employee as disabled from a class of jobs or broad range of jobs.

*Eshelman v. Agere Systems, Inc.*, 554 F.3d 426, 21 AD Cases 865 (3d Cir. 2009), upheld the jury verdict for the “regarded as” ADA plaintiff. The court stated at 434: “Eshelman asserted both at trial and on appeal that the jury could reasonably have concluded that although she had excelled at her job and was a highly valued employee, Agere nonetheless erroneously viewed her memory impairment caused by her chemotherapy treatment as substantially limiting two major life activities; namely, Eshelman's ability to think and her ability to work. It is undisputed that working and thinking qualify as ‘major life activit[ies].’” As to thinking, the court stated at 435: “The analysis is somewhat less clear with respect to thinking, as the regulations do not specify what degree of thinking impairment renders a person disabled. Nonetheless, it is logical to assume that a person may qualify as substantially limited when their inability to think (i) arises from a qualifying ‘physical or mental impairment’; that (ii) compromises their ability to work, or causes their employer to believe that their ability to work is compromised.” (Footnote and citation omitted.) The court rejected the defendant’s argument that it was only concerned about plaintiff’s driving ability, because one of her supervisor’s reasons for changing her score from top-rated to bottom-rated was that he was concerned over her ability to perform any job at the alternative locations. “Other than its own *ipse dixit*, Agere offers no reason why the jury would have necessarily been unreasonable to reach such a conclusion.” *Id.* The court also rejected defendant’s argument that all of the praise and accolades it had bestowed on plaintiff after her cancer-related memory loss showed that it did not regard her as disabled, because they did not explain the “avulsive” change in her score. *Id.* at 435-36. The court held, based on similarly strong and varied evidence, that plaintiff’s six months off work for surgery and chemo treatment, the accommodations of allowing her to use a notebook to write things down, her occasional need to pull over to the side of the road when she went blank, her need to regain focus from time to time, and concerns over whether she could perform any job at the other locations leading to the change in her score, all allowed the jury to determine that plaintiff had a record of impairment. *Id.* at 436-39. The court also held that the issue of reasonable accommodation was as relevant to a “regarded as” or “record of” claim as to a claim based on actual disability, and that the lower court properly instructed the jury on reasonable accommodation despite plaintiff’s failure to allege a denial of reasonable accommodation, where this was done to set her actual claims in context. *Id.* at 439-40.

*Wilson v. Phoenix Specialty Mfg. Co., Inc.*, 513 F.3d 378, 20 AD Cases 193 (4th Cir. 2008), affirmed the judgment for the ADA plaintiff on his claim that defendant discriminated against him because it regarded him as disabled. Plaintiff had Parkinson’s Disease but his

symptoms were controlled by medication. The court held that defendant thought his symptoms were considerably worse than they were, and that they interfered with the major life activity of performing manual tasks such as using a computer, writing, interfered with the major life activity of counting, and interfered with the major life activity of seeing. Judge Niemeyer dissented. *Id.* at 388–95.

## 5. Reasonable Accommodation

*Tobin v. Liberty Mutual Insurance Co.*, 553 F.3d 121, 137, 21 AD Cases 769 (1st Cir. 2009), affirmed the judgment on a jury verdict for the ADA and Massachusetts-law plaintiff. The jury determined that plaintiff's poor sales performance, caused by his disability, would have been remedied by assigning him to a Mass Marketing account. Defendant denied his requests for this accommodation because "MM" accounts were assigned as "perks" to high-selling employees. The court held that the accommodation would have been reasonable and effective:

We have little difficulty in dismissing the first rationale. Ample evidence supports the conclusion that Tobin's illness significantly impaired his ability to meet his sales goals. Indeed, he requested an MM assignment in the belief that the logistical convenience of such accounts would offset the deficits in his performance that were attributable to his disability. A request for an accommodation cannot be deemed unreasonable solely because the disabled employee has failed to satisfy standard eligibility requirements for the benefit. Such a conclusion would turn the ADA's accommodation requirement on its head.

## 6. The Seventh Circuit Plays "Gotcha"

*EEOC v. Lee's Log Cabin, Inc.*, 554 F.3d 1102, 21 AD Cases 957 (7th Cir. 2009) (*en banc*), denied rehearing from the panel decision, which had held that the EEOC impermissibly tried to change its theory of the case from its pleading that the charging party was HIV-positive to its position at summary judgment that the charging party had AIDS or "HIV/AIDS." Judge Williams dissented, joined by Judges Rovner, Wood, and Evans. The dissent stated at 1104:

The majority opinion affirmed the district court on two grounds that are problematic to me and merit *en banc* consideration. First, by holding that the EEOC failed to give adequate notice to Log Cabin when its complaint alleged that Stewart was HIV positive (rather than specifying that her HIV had advanced to the AIDS stage), the majority imposed a higher pleading requirement for litigants with multi-stage disabilities. Although this case was not decided on a Rule 12(b)(6) motion, the EEOC was not allowed to rely on evidence regarding Stewart's disability (AIDS) for the sole reason that its complaint alleged only "HIV positive." Second, the majority created a specific knowledge requirement in situations involving employers who are aware of a disability but are not aware of the actual extent of that disability.

**Comment of Richard Seymour on *EEOC v. Lee's Log Cabin, Inc.*:** The Seventh Circuit ever astonishes. It issues some of the most intelligently reasoned decisions in the context of employment discrimination, and it issues some of the most bizarre. This refusal ranks among the latter.

## **H. Family and Medical Leave Act**

### **1. Falsification of Part of Medical Report Bars Employee from Leave**

*Smith v. Hope School*, 560 F.3d 694 (7th Cir. 2009), affirmed the grant of summary judgment to the FMLA defendant. Plaintiff added to her physician's statement in his certification form. The court held that this disqualified her from FMLA leave: "In a case such as this, where an employee adds to a medical care provider's certification form a condition that she has not been diagnosed with, without the knowledge or approval of her physician, an employer can deny her request for FMLA leave." *Id.* at 701. The court cautioned that its ruling had a limited scope:

We wish to emphasize the limited nature of today's ruling, however. The record here presents an especially strong inference that an employee submitted false paperwork to her employer. Smith not only altered the FMLA paperwork she faxed to the Hope School, but she backdated the form and submitted a second form that her physician had never filled out or signed. In these circumstances, we hold that an employee is not entitled to FMLA leave on the basis of the falsified paperwork. We obviously do not reach the question of whether other, more insignificant alterations, such as correcting a typographical error or correcting or adding to a portion of the form with the knowledge and approval of a treating physician, would result in a similar ruling. Nor, because there was only a single attempt to submit certification paperwork in this case, do we need to consider the result if an employee re-submitted authentic, unaltered paperwork certifying her request for leave after first submitting altered, false documentation.

*Id.* at 701-02. The court held that, because plaintiff's FMLA leave was unauthorized, the defendant could lawfully fire her for unexcused absences on the days on which she thought she was on FMLA leave. *Id.* at 702.

### **2. Joint Employers and Integrated Enterprises**

*Grace v. USCAR*, 521 F.3d 655, 13 WH Cases 2d 815 (6th Cir. 2008), reversed the grant of summary judgment to defendants on plaintiff's FMLA claim. Plaintiff was employed by a staffing agency that provided her services to USCAR, a joint venture of U.S. automakers, and worked in that capacity for eight years. However, plaintiff's original staffing agency went into bankruptcy and defendant Bartech took over its contracts. Plaintiff needed to go on FMLA leave eleven months after Bartech took over her contract and became her employer. Construing the Department of Labor's regulations under the FMLA, the court held at 665 that USCAR and Bartech were not an "integrated enterprise." There was no common management of the core responsibilities and operations of each business, their operations were not interrelated but performed entirely different functions at different locations, their employment relations as a whole were not interrelated even though both communicated with some of the same employees, and there was no common ownership or control. However, the court held, USCAR and Bartech were joint employers under 29 C.F.R. § 825.106. *Id.* at 665-67. The court held that Bartech was a successor in interest to the prior staffing agency, and was thus covered by the FMLA. *Id.* at 671-76. The court rejected USCAR's argument that it was not an employer because it did not have any employees on its payroll, holding that the relevant criterion is whether USCAR had

employment relationships, not just whether such relationships were reflected on the payroll. *Id.* at p. 676.

### 3. Notice

*Grace v. USCAR*, 521 F.3d 655, 670, 13 WH Cases 2d 815 (6th Cir. 2008), reversed the grant of summary judgment to defendants on plaintiff's FMLA claim. Plaintiff was employed by a staffing agency that provided her services to USCAR, a joint venture of U.S. automakers, and worked in that capacity for eight years. The court held that plaintiff's notice to her staffing agency was notice to both employers.

### 4. Estoppel

*Reed v. Lear Corp.*, 556 F.3d 674, 14 WH Cases 903, 38 NDLR P 161 (8th Cir. 2009), affirmed the grant of summary judgment to the FMLA defendant. The court held that the grant of provisional FMLA leave, explicitly dependent on receipt of an adequate medical certification, did not estop defendant from denying the leave and considering the time off during the provisional leave as not authorized by the FMLA.

### 5. Constructive Termination Allows Back Pay Claim

*Strickland v. United Parcel Service, Inc.*, 555 F.3d 1224, 2009 WL 448183, 105 FEP Cases 971, 14 WH Cases 1003 (10th Cir. 2009), reversed the grant of judgment as a matter of law to the FMLA defendant, holding that her resignation did not conclusively bar an award of back pay under the FMLA because she had shown a genuine issue as to whether she had been constructively terminated. The court stated at 1229:

Here, Strickland did not have job responsibilities taken from her, but she did believe her job was in jeopardy, she was repeatedly told by her supervisors her performance was unacceptable, and she was not provided support to perform her job when she requested it. In addition, her supervisors forced her to make written "commitments" to win certain contracts, which in her view was a deliberate attempt to set her up to fail. She testified her meetings with supervisors to discuss her performance interfered with her ability to do her job. Roten exploded when she tried to take advantage of the company's open door policy and effectively told her she could not utilize the policy. She was held to higher standards than her co-workers. Finally, she attempted to improve her situation by filing an internal complaint and requesting a transfer, but neither action was helpful. This evidence, viewed in the light most favorable to Strickland, suggests a workplace more intolerable than the workplace in *Acrey*, and UPS is not entitled to judgment as a matter of law on this basis.

The court held at pp. 1229-1230 that defendant's offer of an alternative job, four months after she stopped working, with an unreasonable commute and no guarantee that she would not again be assigned to work for her former manager, could have been found by a rational jury "to be an unrealistic option, and therefore judgment as a matter of law was improper on these grounds as well." Judge Gorsuch concurred in this part of the decision.

## **I. ERISA**

*LaRue v. DeWolff, Boberg & Associates, Inc.*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1020, 1026, 169 L. Ed. 2d 847, 42 EB Cases 2857 (2008), held that, “although § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account.” Plaintiff’s former employer was the plan administrator, and plaintiff alleged that it never made changes he had directed as to the investments he held in his 401(k) account. *Id.* at 1022-23. Justice Thomas, joined by Justice Scalia, wrote an opinion concurring in the judgment. *Id.* at 1028.

*Metropolitan Life Insurance Co. v. Glenn*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2343, 2346, 43 EB Cases 2921 (2008), held that a common arrangement in employer-provided benefits plans creates a conflict of interest that must be taken into account when benefits are denied:

The Employee Retirement Income Security Act of 1974 (ERISA) permits a person denied benefits under an employee benefit plan to challenge that denial in federal court. 88 Stat. 829, as amended, 29 U.S.C. § 1001 *et seq.*; see § 1132(a)(1)(B). Often the entity that administers the plan, such as an employer or an insurance company, both determines whether an employee is eligible for benefits and pays benefits out of its own pocket. We here decide that this dual role creates a conflict of interest; that a reviewing court should consider that conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits; and that the significance of the factor will depend upon the circumstances of the particular case.

The Chief Justice concurred in part and concurred in the judgment. *Id.* at 2352-55. Justice Kennedy concurred in part and dissented in part. *Id.* at 2355-56. Justice Scalia dissented, joined by Justice Thomas. *Id.* at 2356-61.

## **J. Privacy: Employer’s Access to Employee Communications**

*Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 910-11, 27 IER Cases 1377 (9th Cir. 2008), reversed the grant of summary judgment to the defendant text messaging contractor on plaintiffs’ claims that it improperly turned over to the City of Ontario, their employer, the archived text of text messages sent over City pagers. The court stated at 896-97:

The City had no official policy directed to text-messaging by use of the pagers. However, the City did have a general “Computer Usage, Internet and E-mail Policy” (the “Policy”) applicable to all employees. The Policy stated that “[t]he use of City-owned computers and all associated equipment, software, programs, networks, Internet, e-mail and other systems operating on these computers is limited to City of Ontario related business. The use of these tools for personal benefit is a significant violation of City of Ontario Policy.” The Policy also provided:

C. Access to all sites on the Internet is recorded and will be periodically reviewed by the City. The City of Ontario reserves the right to monitor and log all network activity

including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources.

D. Access to the Internet and the e-mail system is not confidential; and information produced either in hard copy or in electronic form is considered City property. As such, these systems should not be used for personal or confidential communications. Deletion of e-mail or other electronic information may not fully delete the information from the system.

E. The use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language in the e-mail system will not be tolerated.

In 2000, before the City acquired the pagers, both Quon and Trujillo had signed an "Employee Acknowledgment," which borrowed language from the general Policy, indicating that they had "read and fully understand the City of Ontario's Computer Usage, Internet and E-mail policy." The Employee Acknowledgment, among other things, states that "[t]he City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice," and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." Two years later, on April 18, 2002, Quon attended a meeting during which Lieutenant Steve Duke, a Commander with the Ontario Police Department's Administration Bureau, informed all present that the pager messages "were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing." Quon "vaguely recalled attending" this meeting, but did not recall Lieutenant Duke stating at the meeting that use of the pagers was governed by the City's Policy.

Although the City had no official policy expressly governing use of the pagers, the City did have an informal policy governing their use. Under the City's contract with Arch Wireless, each pager was allotted 25,000 characters, after which the City was required to pay overage charges. Lieutenant Duke "was in charge of the purchasing contract" and responsible for procuring payment for overages. He stated that "[t]he practice was, if there was overage, that the employee would pay for the overage that the City had. . . . [W]e would usually call the employee and say, 'Hey, look, you're over X amount of characters. It comes out to X amount of dollars. Can you write me a check for your overage[?]'"

The court held that, under these facts, the employees had a reasonable expectation of privacy in their text messages and the City's search of their archived messages was improper. It stated at 910-11:

As a matter of law, Arch Wireless is an "electronic communication service" that provided text messaging service via pagers to the Ontario Police Department. The search of Appellants' text messages violated their Fourth Amendment and California constitutional privacy rights because they had a reasonable expectation of privacy in the content of the text messages, and the search was unreasonable in scope. While Chief Scharf is shielded by qualified immunity, the City and the Department are not shielded by statutory immunity. In light of our conclusions of law, we affirm in part, reverse in part, and remand to the district court for further proceedings on Appellants' Stored

Communications Act claim against Arch Wireless, and their claims against the City, the Department, and Glenn under the Fourth Amendment and California Constitution.

**K. Defamation by Truthful Employer**

*Noonan v. Staples, Inc.*, 556 F.3d 20, 28 IER Cases 1229, 46 EB Cases 1241 (1st Cir. 2009), affirmed the grant of summary judgment to defendant on Massachusetts State-law claims involving his severance agreement and stock options, but reversed the grant of summary judgment on plaintiff's defamation claim. The court began its opinion at p. 22: "Alan S. Noonan was fired from his job as a salesman at Staples, Inc. for allegedly padding expense reports. A Staples executive then sent a mass e-mail to about 1,500 employees informing them that Noonan had been fired for violating the company's travel and expense policy." The court stated that the discovery of a \$1,622 anomaly on one travel expense form led to the formation of an investigative team that included CPAs and a former police officer. The results did not bode well for plaintiff:

Noonan admitted to the team that he often "pre-populated" his reports before a given trip—that is, he estimated what his expenses would be in advance, and submitted the report with these estimates, but with (Noonan claims) the intention to amend the report later to the extent the actual expenses differed from the estimates. The team found that Noonan had failed to enter such adjustments on a number of expense reports and discovered other anomalies, such as entries where the amount claimed was exactly \$100 more than what the item actually cost, and entries where decimal points had been shifted two places to the right (resulting, for example, in an \$1,129 meal at an airport McDonald's, instead of \$11.29). Noonan also committed errors in Staples's favor. When the team asked him about the large amounts of extra money that had been deposited into his checking account, Noonan responded that he had not noticed.

*Id.* at 23. Plaintiff was fired "for cause," justifying cancellation of his benefits under the severance agreement and his stock options. "The following day, Executive Vice-President Jay Baitler sent an e-mail to all the employees in Staples's North American Division, a group whose precise number is unknown and disputed, but that totaled somewhere around 1,500 people." *Id.* at 23. The e-mail began: "It is with sincere regret that I must inform you of the termination of Alan Noonan's employment with Staples. A thorough investigation determined that Alan was not in compliance with our [travel and expenses] policies." *Id.* The e-mail ended with a mention of the company's Code of Ethics. *Id.* The court held at 26 that truth was an absolute defense to a libel action but with a caveat: "Massachusetts law, however, recognizes a narrow exception to this defense: the truth or falsity of the statement is immaterial, and the libel action may proceed, if the plaintiff can show that the defendant acted with 'actual malice' in publishing the statement." The court held that each statement in the e-mail was substantially true. It held that "actual malice" for persons who are not public figures has a broader meaning than it does for public figures, and that for non-public figures it has its common-law meaning of ill will. The court continued, citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000):

The district court concluded that there was no evidence of actual malice. Viewing "actual malice" as "ill will," we disagree. First, in Baitler's twelve years with the company, he had never previously referred to a fired employee by name in an e-mail or

other mass communication. From this evidence, a jury could permissibly infer that Baitler singled out Noonan in order to humiliate him. To be sure, Staples has offered a non-malicious explanation. Baitler stated in his deposition that he considered the e-mail naming Noonan to be important in effectively making the point to his employees that they must comply with Staples's travel and expense policies. But, a jury could nevertheless conclude that Baitler's explanation for the deviation from policy was pretextual. . . . Further, should the jury reject this explanation, such conclusion might lend further support to an inference of malicious intent. . . . Considering the conflicting explanations evinced by the record, it is properly for the jury to decide whether to credit Baitler's explanation or instead to draw the competing inferences advanced by Noonan.

Second, Baitler had supervised Dorman and had failed to notice his misfeasance. Moreover, Baitler did not send around a similar e-mail regarding Dorman's actions. Noonan explains that he will argue to the jury that they should infer that Baitler singled out Noonan to detract attention away from the Dorman scandal. These facts, while speculative on their own, could provide additional background to support Noonan's pretext argument.

Third, Baitler sent the e-mail to a list of 1500 or 1600 employees of Staples. Noonan contends that many individuals on that list did not travel and so had no reason to be advised of the travel policy. Noonan will thus ask the jury to infer that the e-mail's excessive publication shows Baitler's, and thus Staples's, malevolent desire to harm Noonan's reputation. . . . The record is not clear as to the identity and job description of each person who received the e-mail. But even in its present state, the record permits, though certainly does not require, a conclusion that publication was excessive since the record does not establish that the wide distribution was made only to those inside the "narrow group who shared an interest in the communication." . . . Thus, considering the large number of recipients, a jury could find that Baitler published the e-mail excessively.

In this case, the presence of these three pieces of evidence support inferences upon which a jury could base a verdict for Noonan. In this case, where "motive and intent play a leading role, summary judgment should not be granted" since Noonan presented evidence beyond conclusory allegations or mere speculation. . . .

*Id.* at 30-31.

**Comment of Richard Seymour on *Noonan v. Staples, Inc.*:** Plaintiffs' attorneys should see whether their own State libel laws provide a remedy for excessive publication. Employers that issue press releases telling the public that the plaintiff was fired for poor performance, or making other kinds of defamatory statements, may be subject to account for excessive publication of even a true statement, under the approach taken by *Noonan*.

## **VI. Theories and Proof**

## A. The Inferential Model

### 1. Drawing the Inference Because a Pretextual Explanation Was Advanced

*Snyder v. Louisiana*, \_\_ U.S. \_\_, 128 S. Ct. 1203, 1212, 170 L. Ed. 2d 175 (2008) (Alito, J.), a *Batson* case, held that the prosecutor’s explanations for peremptory challenges to two black jurors were pretextual. The Court held that this justified drawing the inference of racial discrimination:

As previously noted, the question presented at the third stage of the *Batson* inquiry is “whether the defendant has shown purposeful discrimination.” . . . The prosecution’s proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent. See *id.*, at 252, 125 S. Ct. 2317 (noting the “pretextual significance” of a “stated reason [that] does not hold up”); *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (*per curiam*) (“At [the third] stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination”); *Hernandez*, 500 U.S., at 365, 111 S. Ct. 1859 (plurality opinion) (“In the typical peremptory challenge inquiry, the decisive question will be whether counsel’s race-neutral explanation for a peremptory challenge should be believed”). Cf. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) (“[R]ejection of the defendant’s proffered [nondiscriminatory] reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination”).

Justice Thomas, joined by Justice Scalia, dissented. *Id.* at 1212-15.

### 2. Application

*Yeschick v. Mineta*, 521 F.3d 498, 102 FEP Cases 1729 (6th Cir. 2008), reversed the grant of summary judgment to the ADEA defendant Department of Transportation. Plaintiff was a former Air Traffic Controller and member of PATCO who had been fired under President Reagan because of unlawful strike activity. He re-applied in 1993 under President Clinton’s authorization for re-employment, for those who re-applied within a 45-day window. A letter sent by the FAA to plaintiff in 2000 was returned undelivered because he had moved to a different residence and the forwarding order had expired. His other contact information was accurate, however. Plaintiff was never informed of the need to update his residential information, he was not allowed to make any further application, and the form he initially filled out could reasonably have led him to believe that his 1993 application would remain active in perpetuity. The FAA performed an *ad hoc* inactivation of applications filed by former PATCO members, without notice to them. The lower court held that plaintiff was no longer an active applicant in 2002, when several younger applicants were hired. Reversing, the court of appeals held that there was a genuine issue or material fact as to whether the application remained active. The court relied heavily on the lack of any systematic inactivation of applications for non-former-PATCO applicants or for younger applicants, and the FAA’s continuing efforts to hire applicants without current contact information.

### 3. Qualifications

*Ruiz Diaz v. Eagle Produce Ltd. Partnership*, 521 F.3d 1201, 1208, 103 FEP Cases 16 (9th Cir. 2008), affirmed in part and reversed in part the grant of summary judgment to the ADEA defendant. The court held that three of the plaintiffs had adequately shown a triable issue as to the adequacy of their job performance because the incidents defendant stated it relied upon (including accidents and attendance) were often infrequent and minor and had never before been treated seriously by the company. It held that one employee failed to make this showing because he had openly violated company policy for years by running a check-cashing business outside the pay office, and continued to do so after he had received a specific warning.

### 4. Adverse Employment Actions

*Maclin v. SBC Ameritech*, 520 F.3d 781, 102 FEP Cases 1839, 20 AD Cases 712 (7th Cir. 2008), affirmed the grant of summary judgment to defendant on plaintiff's Title VII claims. The court held at 788 that denial of a discretionary bonus is not an adverse employment action. The court also held that plaintiff's change in job title after her return from leave was not an adverse employment action. The court stated at 789: "An adverse employment action must involve a material, substantive change in an employee's pay and responsibilities. . . . An employee has not suffered an adverse employment action if her title changes but her position remains the same in terms of responsibilities, salary, benefits and opportunities for promotion. . . . Even a change in title that deprives an employee of prestige is insufficient if it lacks more substantive effect." (Citations omitted.)

**Comment of Richard Seymour on *Maclin v. SBC Ameritech*:** The Seventh Circuit standard would result in immunizing an employer that gave only discretionary bonuses, but had a discount factor for race and sex under which the bonus was cut in half if it was to be awarded to a woman, and cut by three-quarters if it was to be awarded to an African-American. While one can understand the desire of the judiciary to resolve only issues they consider of importance, this rule cannot be squared with the language of Title VII. There is no *de minimis* exception in the statute.

*Davis v. Team Electric Co.*, 520 F.3d 1080, 1089-90, 102 FEP Cases 1641 (9th Cir. 2008), reversed the grant of summary judgment to the Title VII defendant. The court reaffirmed at 1089 that "assigning more, or more burdensome, work responsibilities, is an adverse employment action." (Citations omitted.) The court held that plaintiff established the third and fourth elements of the *prima facie* case by showing triable issues that she was assigned "a disproportionate amount of dangerous and strenuous work," and that she was excluded from meetings with her supervisor and co-workers. The court rejected the lower court's reasoning that the exclusion was "mere ostracism," and thus not actionable. After discussing the facts of its ostracism cases, the court stated at 1090: "Davis's ban from an important area of the workplace, the trailer, is more severe than these types of exclusion, particularly because there is evidence that the restriction prevented her from discussing work matters with her supervisor. Davis's ability to work was similarly hampered by the alleged fact that she was sometimes ignored by supervisors when she called in over the radio. We need not decide whether either of these actions alone would be sufficient to establish an adverse employment action because, together with the discriminatory work assignments, they materially affected the terms and conditions of Davis's employment."

## 5. Replacement by Person Outside the Class

*Grace v. USCAR*, 521 F.3d 655, 670-71, 13 WH Cases 2d 815 (6th Cir. 2008), reversed the grant of summary judgment to defendants on plaintiff's FMLA claim. The court held that plaintiff showed a triable issue of fact whether she was replaced by a Bartech employee named Spolarich, as opposed to defendants' explanation that her job was eliminated in a restructuring:

As to the issue of restructuring, the plaintiff points to the notes and deposition of Martin (the USCAR Director of Operations) from the meeting in which the decision to terminate Grace was made. After being apprised of the need to have a "legitimate business reason" to avoid the risk of being "sued by Roz [Grace] . . . [who was] out on *disability*," the following question was raised: "*Can lawyers construct a way to make it [Grace's termination] doable?*" . . . This statement alone is a smoking gun and raises a genuine issue of material fact, subject to a jury determination, as to whether the restructuring would have occurred had she not taken leave due to her disability. . . . Moreover, the plaintiff argues that Spolarich, who was ostensibly part-time, performed sufficiently comparable work to constitute a full-time position "equivalent to" the one she held prior to taking leave. . . . It is not disputed that Spolarich was compensated at a higher rate than Grace, which would support her theory that his was an equivalent position, at least in terms of the cost to USCAR. . . . *see also* JA 1314 (Martin's notes describing how they could replace plaintiff with a part-time position). Together, these facts raise a genuine issue of material fact.

(Emphasis in original; citation omitted.)

*Ruiz Diaz v. Eagle Produce Ltd. Partnership*, 521 F.3d 1201, 1210, 103 FEP Cases 16 (9th Cir. 2008), affirmed in part the grant of summary judgment to the ADEA defendant. The court held that the decisionmaker must have known that his replacements were older than the persons he terminated because the work force was moderate in size and he had had personal contacts with them.

## 6. Circumstances Giving Rise to Inference of Discrimination

*Holcomb v. Iona College*, 521 F.3d 130, 139-40, 102 FEP Cases 1844 (2d Cir. 2008), vacated the grant of summary judgment to the Title VII defendant, and stated:

The college decided to fire Holcomb, a white man married to a black woman, and Chiles, a black man, while retaining O'Driscoll, a white man who was not in an interracial relationship. Moreover, it is plain that Brennan and Petriccione both knew that Holcomb was married to a black woman, and the record suggests that both Brennan and Petriccione played a role in the termination decision. For each of these men, finally, Holcomb has adduced evidence of racially improper motives. As further detailed below, the record permits an inference that Brennan sought to reduce African-American presence at basketball program events for the sake of alumni relations and fundraising. From this perspective, it would make sense for Brennan to want to keep O'Driscoll, as the only white member of the staff without a black girlfriend or spouse, rather than Holcomb. And in the case of Petriccione, there is clearly evidence in the record indicating his

disapproval of Holcomb's marriage to a black woman, and, indeed, of Petriccione's willingness to act on his disapproval by insulting Holcomb in public.

The fact that the college decided to keep Ruland, who was also in an interracial relationship, does not allay the suspicion that the firings were grounded in an illegitimate motive. It was agreed all around that Ruland was simply too expensive to fire, with over five years left on his contract, whether or not he was in a relationship with a black woman. At the prima facie stage, then, these circumstances are more than sufficient to support an inference that Holcomb was terminated on the basis of his interracial marriage.

## **7. Reductions in Force**

*Ruiz Diaz v. Eagle Produce Ltd. Partnership*, 521 F.3d 1201, 1207 n.2, 103 FEP Cases 16 (9th Cir. 2008), affirmed in part and reversed in part the grant of summary judgment to the ADEA defendant. The court held that in a RIF, “circumstantial evidence other than evidence concerning the identity of a replacement employee may also warrant an inference of discrimination.”

## **8. Adequacy of Employer’s Nondiscriminatory Reason**

*Duncan v. Fleetwood Motor Homes of Indiana, Inc.*, 518 F.3d 486, 102 FEP Cases 1249 (7th Cir. 2008) (*per curiam*), vacated the grant of summary judgment to the ADEA defendant. The court held that defendant never produced a legitimate nondiscriminatory reason for demoting plaintiff. Defendant agreed that plaintiff was meeting defendant’s legitimate expectations in performing the Material Handler job, but demoted him for inability to perform the job as set forth on the paper job description. The court stated: “These positions are impossible to reconcile.” *Id.* at 491. The court added: “It follows that by effectively conceding that Duncan was meeting its legitimate performance expectations, Fleetwood also conceded that the 73-and 97-pound lifting requirements set out in the job description are not genuine demands of the job. By its own account, then, the reason Fleetwood gave for removing Duncan was false—i.e., not legitimate—so the company never discharged its burden to come forward with a *legitimate*, nondiscriminatory justification for the employment action.” *Id.* (emphasis in original).

*Ruiz Diaz v. Eagle Produce Ltd. Partnership*, 521 F.3d 1201, 1211-12, 103 FEP Cases 16 (9th Cir. 2008), affirmed in part the grant of summary judgment to the ADEA RIF defendant. The court held at p. that defendant had failed to meet its burden of proffering a nondiscriminatory explanation for plaintiff Diaz’s termination, because defendant asserted only that he was fired in a RIF without proffering an explanation of why Diaz was selected for the RIF. The court stated: “To suffice under *McDonnell Douglas*, an employer’s explanation must explain why the plaintiff ‘in particular’ was laid off.” *Id.* at 1211 (citations omitted).

*Davis v. Team Electric Co.*, 520 F.3d 1080, 1094-95, 102 FEP Cases 1641 (9th Cir. 2008), reversed the grant of summary judgment to the Title VII retaliation defendant. The court held that defendant failed to proffer an adequate nondiscriminatory reason for terminating

plaintiff in a layoff because it failed to offer any explanation why she was one of the persons selected for layoff.

#### **9. Defendant's Attempted Outsourcing of Responsibility for Bias**

*Duncan v. Fleetwood Motor Homes of Indiana, Inc.*, 518 F.3d 486, 492-93, 102 FEP Cases 1249 (7th Cir. 2008) (*per curiam*), vacated the grant of summary judgment to the ADEA defendant. The court rejected defendant's attempt to blame WorkSTEPS, assertedly a consultant, for the demotion:

Fleetwood also tries to suggest that WorkSTEPS bears responsibility for the decision to remove Duncan from his job. According to Fleetwood, the essential job functions for the position of material handler "were set forth in a job description created by an independent entity, WorkSTEPS" and thus the company should be insulated from any allegation of discriminatory motive. This contention is nonsensical, most importantly because there is absolutely nothing in the record to suggest that Fleetwood did not play a dominant role in creating the job description. Indeed, Fleetwood's representation that WorkSTEPS created the job description is not supported by any evidence at all, apart from the appearance of the WorkSTEPS name on the document. There is no evidence that the WorkSTEPS consultant ever visited the Fleetwood facility, performed any evaluation, made any observations, or interviewed anyone. The only evidence about the job description is the document itself, which Fleetwood's personnel manager knew nothing about, other than that it was the job description on file. And despite signature lines for WorkSTEPS and Fleetwood representatives, the document is not signed or dated by anyone. Similarly, Fleetwood introduced no testimony from the occupational therapist hired to verify the WorkSTEPS job description. A defendant's legitimate, nondiscriminatory reason must be "clearly set forth, through the introduction of admissible evidence." . . . Fleetwood did not introduce any admissible evidence about what the material handler job required, so Duncan's uncontradicted testimony about the job requirements would be enough for a jury to conclude that Fleetwood's explanation was phony.

#### **10. District Court's Adoption of Rationale Never Advanced by Defendant**

*DeCaire v. Mukasey*, 530 F.3d 1, 102 FEP Cases 1758 (1st Cir. 2008), reversed the grant of summary judgment to the Title VII defendant. The court stated at p. \*17 of the original opinion:

We have great concern over the district court's utilization of a theory not advanced by either party to the case. Fairness alone requires that the parties have notice of the theories so that the parties can gear their evidence toward what is at stake. Indeed the entire analytic structure of *McDonnell Douglas* depends upon clear articulations by both plaintiff and defendant. The employer must articulate a neutral, non-discriminatory reason for the action; plaintiff may show the reason is pretext. The same is true of mixed motive analysis-that analysis requires clear statements by both sides of the motives which are at issue. Both sides to this litigation were prejudiced by the court's spontaneous introduction of a new theory of justification.

This was changed in the published opinion to:

We are concerned that the district court's utilization of a theory not advanced by either party may have prejudiced the parties in this case. That is not invariably true. Judges, like juries, may draw inferences, so long as they are supported by the evidence. Parties, it should be noted, are always free to move in the district court for reconsideration. But the analytic structure of *McDonnell Douglas* requires the plaintiff to show that defendant's proffered non-discriminatory motive is pretextual; that can be difficult to do without a clear articulation of defendant's purported motive. Although district courts sitting for bench trials are entitled to draw inferences from the evidence presented, here the court's spontaneous introduction of a new theory of justification may have prejudiced the plaintiff's ability to show pretext and the defendant's view of what the case was about. Our holding does not rest on possible prejudice, though.

*Id.* 20 n.11. at The court rejected the defendant's attempt to embrace the new rationale on appeal, finding that it was grounded not in the record, but on speculation. *Id.* at 20-21.

## 11. Pretext

### a. Special Problems with Multiple Claims

*Grace v. USCAR*, 521 F.3d 655, 678, 13 WH Cases 2d 815 (6th Cir. 2008), reversed the grant of summary judgment to defendants on plaintiff's FMLA claim but affirmed the grant of summary judgment to defendants on plaintiff's Title VII claim. The court explained:

An examination of whether the plaintiff has fulfilled her burden and established that the defendant's justification was pretextual requires us to distinguish the FMLA and Title VII claims. In support of her FMLA claim, discussed *supra*, the plaintiff offers considerable evidence that her pending return to her job prompted the defendants to restructure the IT business; that is, that the restructuring was merely a pretext for not restoring her to her former position. As to the claim of gender discrimination, the plaintiff simply alleges she was replaced "by a male that [sic] was less qualified." . . . This fact goes to her ability to make a prima facie gender discrimination claim, but it does not help her overcome her burden of showing that "discriminatory animus" motivated the defendants decision to replace her with a male employee. Unlike the FMLA claim, where Grace need only demonstrate that her *prior position*—or equivalent—*still existed* at the time she returned from unpaid leave, the Title VII claim requires her to make some showing that gender informed the decision to hire a male to replace her. Grace is unable to do so. She does not allege, for example, that USCAR specifically requested a male employee or that either USCAR or Bartech had a policy of replacing female employees with male employees. Rather, the facts suggest that USCAR merely requested a replacement employee, regardless of gender. Because Grace does not offer any evidence that gender played a role in USCAR and Bartech's decision to replace her with a male employee, her claim cannot survive either defendant's motion for summary judgment on the merits of her gender discrimination claim.

(Emphases in original.)

*Fitzgerald v. Action, Inc.*, 521 F.3d 867, 876-77, 103 FEP Cases 30, 44 EB Cases 1096 (8th Cir. 2008), held that plaintiff had shown pretext as to the defendant's explanations for his termination and reversed the grant of summary judgment to defendant on plaintiff's ERISA § 510 claim but affirmed the grant of summary judgment on the ADEA claim because there was no evidence directly pointing to age discrimination and some evidence favored the defendant on that claim.

**b. Temporal Proximity Between Misconduct and Discharge Supports Employer**

*Ruiz Diaz v. Eagle Produce Ltd. Partnership*, 521 F.3d 1201, 1214, 103 FEP Cases 16 (9th Cir. 2008), affirmed in part the grant of summary judgment to the ADEA RIF defendant. The court held that defendant's discharge of plaintiff Moreno one day after he caused \$10,000 in damage in an accident "leaves little doubt that the property damage, rather than age, motivated Brandt's decision," despite the court's holding that plaintiff showed adequate evidence of satisfactory job performance to establish his *prima facie* case.

**c. Employer's Waiting for First Opportunity to Retaliate**

*Hamilton v. General Elec. Co.*, 556 F.3d 428, 436, 105 FEP Cases 737 (6th Cir. 2009), reversed the grant of summary judgment to the Kansas Civil Rights Act defendant. Plaintiff was fired three months after he filed an EEOC charge of age discrimination, and sued under the KCRA for retaliation. The court held that this temporal proximity, coupled with evidence of increased supervision, satisfied the causation element. The court held that the showing that GE waited for an opportunity to fire plaintiff demonstrated pretext as well as the element of causation: "We have held that when an 'employer . . . waits for a legal, legitimate reason to fortuitously materialize, and then uses it to cover up his true, longstanding motivations for firing the employee,' the employer's actions constitute 'the very definition of pretext.'" (Citation omitted.) Judge Griffin dissented.

**d. Intervening Action Favorable to Employee Does Not Preclude Pretext**

*Hamilton v. General Elec. Co.*, 556 F.3d 428, 435-36, 105 FEP Cases 737 (6th Cir. 2009), reversed the grant of summary judgment to the Kansas Civil Rights Act defendant. Plaintiff was fired three months after he filed an EEOC charge of age discrimination, and sued under the KCRA for retaliation. The court held that this temporal proximity, coupled with evidence of increased supervision, satisfied the causation element. The court also rejected GE's argument that its innocence was established by intervening favorable treatment of plaintiff:

GE asserts that after Hamilton filed his EEOC complaint in May 2005, GE had cause to fire him in June 2005, but it chose not to, instead warning him and letting him continue working until his termination in August 2005. GE argues that because it did not fire Hamilton at the first opportunity that arose after he filed his EEOC complaint, the choice to fire him must not have been retaliatory. GE asserts that its "favorable treatment [i.e., its decision to give Hamilton another chance] dissolves any inference of retaliatory motive on the part of GE." . . . Were we to adopt GE's position, any employer could

insulate itself from a charge of retaliatory termination by staging an incident to display its purported “favorable treatment” and then waiting for a second opportunity to terminate the employee. Accordingly, we refuse to adopt GE’s argument, and we hold that an employer’s intervening “favorable treatment” does not insulate that employer from liability for retaliatory termination.

*Id.* at 436. Judge Griffin dissented.

e. **Multiple Consistent Explanations Do Not Raise Inference of Pretext**

*Ruiz Diaz v. Eagle Produce Ltd. Partnership*, 521 F.3d 1201, 1213-14, 103 FEP Cases 16 (9th Cir. 2008), affirmed in part the grant of summary judgment to the ADEA RIF defendant. The court held that defendant’s two explanations for laying off two employees—a downturn in business and comparative performance—were consistent and thus did not give rise to an inference of pretext.

f. **Employer’s Good-Faith Error Does Not Constitute Pretext**

*Soto v. Core-Mark Int’l, Inc.*, 521 F.3d 837, 842, 102 FEP Cases 1855 (8th Cir. 2008), affirmed the grant of summary judgment to the Title VII and Minnesota-law defendant. The court stated: “In determining whether a plaintiff has produced sufficient evidence of pretext, the key question is not whether the stated basis for termination actually occurred, but whether the defendant believed it to have occurred.” (Citation omitted)

g. **Failure to Follow Handbook Policies Allows Inference of Pretext**

*Ruiz Diaz v. Eagle Produce Ltd. Partnership*, 521 F.3d 1201, 1214, 103 FEP Cases 16 (9th Cir. 2008), reversed in part the grant of summary judgment to the ADEA RIF defendant. The court held that the decisionmaker’s failure to follow the company policy set forth in the handbook in selecting employees for layoff, was evidence of pretext:

Plaintiffs also argue that summary judgment is inappropriate in part because of evidence that Brandt violated a company policy in terminating their employment. We agree. Brandt testified that he did not consider the length of the workers’ employment at the Aguila farm prior to laying them off. This violated Eagle Produces company handbook, which required him to consider “skill, ability, attendance, production records, and the length of employment.” Reasonable jurors could conclude that this irregularity further undermines the credibility of the proffered explanations for the layoffs: if age was truly irrelevant to Brandt’s decisionmaking, he presumably would not have failed to weigh the factor in the handbook that weighed most heavily in favor of retaining older workers. The evidence is consistent with the view that Brandt disregarded company policy because it conflicted with his intent to discriminate. *See Brennan v. GTE Govt. Sys. Corp.*, 150 F.3d 21, 29 (1st Cir.1998) (“Deviation from established policy or practice may be evidence of pretext.”).

## **h. Circumstantial Evidence**

*DeCaire v. Mukasey*, 530 F.3d 1, 20, 102 FEP Cases 1758 (1st Cir. 2008), reversed the grant of summary judgment to the Title VII defendant. The court held that the lower court erred when it held that either direct evidence, or circumstantial evidence with a close temporal connection, was necessary in order to show pretext.

*Holcomb v. Iona College*, 521 F.3d 130, 141, 102 FEP Cases 1844 (2d Cir. 2008), vacated the grant of summary judgment to the Title VII defendant, and stated: “Direct evidence of discrimination, ‘a smoking gun,’ is typically unavailable . . . and this case is no exception to that pattern. It is well settled, however, that employment discrimination plaintiffs are entitled to rely on circumstantial evidence. In this respect, we have noted the need to be “alert to the fact that employers are rarely so cooperative as to include a notation in the personnel file that the firing is for a reason expressly forbidden by law.” (Footnote and citations omitted.)

*Davis v. Team Electric Co.*, 520 F.3d 1080, 1088 n.4, 1091, 102 FEP Cases 1641 (9th Cir. 2008), reversed the grant of summary judgment to the Title VII defendant. The court stated that there was no need to resolve the question whether plaintiff was required to show “specific” and “substantial” evidence of pretext, because she had made such a showing.

## **12. Same Decisionmaker**

*Fitzgerald v. Action, Inc.*, 521 F.3d 867, 877, 103 FEP Cases 30, 44 EB Cases 1096 (8th Cir. 2008), affirmed the grant of summary judgment to the ADEA defendant despite discriminatory remarks, in part because defendant hired plaintiff at the age of 50 and fired him at the age of 52. The court never indicated any awareness that it was extending the “same actor” inference to a “same company” inference. See the discussion of this case below, in the section on “Courts Rejecting Biased Statements.”

*Ruiz Diaz v. Eagle Produce Ltd. Partnership*, 521 F.3d 1201, 1209-10, 103 FEP Cases 16 (9th Cir. 2008), affirmed in part the grant of summary judgment to the ADEA defendant. The court held that the statistical evidence was very different after one decisionmaker replaced another, and held that the difference gave rise to an inference of discrimination.

## **13. Employer’s Failure to Deviate from Policies is Evidence of Pretext**

*Morgan v. New York Life Insurance Co.*, 559 F.3d 425, 436-38, 105 FEP Cases 1217 (6th Cir. 2009), affirmed the judgment of age discrimination liability and the \$ 6 million compensatory-damages award under the Ohio Civil Rights Act. The court held that there was ample evidence that defendant consistently deviated from its policies in favor of younger managers, and held that the jury could reasonably conclude that the only reason defendant did not deviate in favor of plaintiff was his age.

## **B. Mixed Motives**

*Holcomb v. Iona College*, 521 F.3d 130, 141-42, 102 FEP Cases 1844 (2d Cir. 2008), vacated the grant of summary judgment to the Title VII defendant, and stated: “It is important to stress, moreover, that a plaintiff who, like Holcomb, claims that the employer acted with mixed

motives is not *required* to prove that the employer's stated reason was a pretext. A plaintiff alleging that an employment decision was motivated both by legitimate and illegitimate reasons may establish that the 'impermissible factor was a motivating factor, without proving that the employer's proffered explanation was not some part of the employer's motivation.'" (Citations omitted).

*Brown v. J. Kaz, Inc.*, \_\_\_ F.3d \_\_\_, 2009 WL 2902248, 107 Fair Empl.Prac.Cas. (BNA) 229 (3d Cir. Sept. 11, 2009) (No. 08-2713), reversed the grant of summary judgment to the § 1981 defendant as to plaintiff's termination claim. The court held at p. \*6 that mixed-motives analysis applies to a racial discrimination claim by an independent contractor, and that evidence of biased remarks may create a triable issue of fact even if they are not made in connection with the challenged employment decision. The court then rejected defendant's explanation that it terminated Brown's involvement with the company because she engaged in a "heated exchange" with the company official who had uttered the bigoted remarks. The court explained at p. \*7:

Indeed, the District Court essentially concluded that Craftmatic was entitled to terminate Brown's contract because, following what were at the very least racially insensitive remarks, she engaged in a heated verbal altercation with Morris. Although the District Court was surely correct that Girty "would be justifiably concerned that one of [his sales representatives] would participate in a heated verbal exchange" with a customer, a fact finder may conclude that the incident between Morris and Brown could not legitimately form the basis for such a concern given Morris' discriminatory comments. Nothing in the record suggests that Brown would have conducted herself as she did but for Morris' comments.

(Footnote omitted.) Judge Jordan concurred.

*Darchak v. City of Chicago Bd. of Educ.*, \_\_\_F.3d \_\_\_, 2009 WL 2778227 (7th Cir. Sept. 3, 2009) (No. 08-2732), reversed the grant of summary judgment to defendant on plaintiff's national-origin discrimination claim. The court held at p. \*7 that defendant may well be able to show a nondiscriminatory reason for the refusal to renew plaintiff's contract, because of the funding cuts, but that plaintiff's claim would still survive in part:

Finally, even if the Board is able to prove valid reasons for not renewing Darchak's contract—OLCE's funding cuts as well as Darchak's performance issues suggest the Board is able to provide reasons—such proof does not by itself extinguish Darchak's claim. This is because Darchak presented evidence of discrimination, which a jury could find also played a role in the employment decision. In mixed-motive cases, the defendant "escapes having to pay damages but, by virtue of the 1991 amendment [to the Civil Rights Act], still has to pay the plaintiff's attorney's fees and is also subject to declaratory and injunctive relief" if the employment decision had some discriminatory motivation. *Boyd v. Ill. State Police*, 384 F.3d 888, 900 (7th Cir.2004) (Posner, J., concurring); see 42 U.S.C. § 2000e-5(g)(2)(B); see also *Venters*, 123 F.3d at 973 n. 7. Because Darchak's evidence of discrimination is sufficient to reach a jury, she does not bear the burden of proving that the defendant's reasons for terminating her were pretextual—such a burden attaches only under the indirect method of proof, a standard not applicable here. *Venters*, 123 F.3d at 974.

## C. Disparate Impact

### 1. Burden of Production and Persuasion on Justification

*Meacham v. Knolls Atomic Power Laboratory*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2395, 103 FEP Cases 908 (2008), held that the employer bears both the burden of production and the burden of persuasion in showing a reasonable factor other than age in justification of a practice that has a disparate impact on older workers. The Court held that the RFOA defense was an affirmative defense, like the BFOQ defense. It emphasized that plaintiff had the burden of identifying the specific practice causing the adverse impact, and that the burden was not trivial. Justice Scalia concurred in the judgment. *Id.* at 2407. Justice Thomas concurred in part and dissented in part. *Id.* at 2407-08.

### 2. Adverse Impact

*Dunlap v. Tennessee Valley Authority*, 519 F.3d 626, 102 FEP Cases 1538 (6th Cir. 2008), reversed the judgment for plaintiff on his Title VII disparate-impact claim, finding that there was insufficient evidence of disparate impact. Plaintiff challenged only the hiring process used in his own interview as one of 27 referrals from the boilermakers' union, and did not present any broader evidence.

### 3. Defendant's Manipulation Showed Intent

*Dunlap v. Tennessee Valley Authority*, 519 F.3d 626, 630-32, 102 FEP Cases 1538 (6th Cir. 2008), affirmed the judgment for plaintiff on his Title VII disparate-treatment claim. The court held that defendant had manipulated the ostensibly objective matrix system for making hiring decisions, so as to discriminate on the basis of race. First, the defendant altered the weighting of factors, devaluing substantive qualifications in violation of TVA policy, and favoring subjective communications skills. Second, the scoring was biased:

During the interview, the scores varied widely even on seemingly objective questions. Dunlap reported that his attendance record was excellent with only a few days off for family illness and received a score of 3.7. In contrast, when two white applicants gave essentially the same answer, they received a 4.2 and a 5.5. For Dunlap's perfect safety record, he received a 4, while another applicant who had had two accidents in eleven years received a score of 6. Points were also awarded for politeness in answering the first interview question, with an extra half-point awarded for answering "yes, ma'am."

*Id.* at 631. Third, there was a "score balancing" process in which further manipulations occurred, in further violation of TVA policy. "The district court found that some of the score sheets were changed as many as seventy times, and there is no evidence of legitimate reasons to support such revisions." *Id.* The court held that this was enough: "Once a proffered reason is found to be pretextual, a court may infer the ultimate fact of intentional discrimination." *Id.* at 632 (citation omitted). Notwithstanding the court's reversal of the finding of disparate-impact discrimination, the court affirmed the awards of damages and attorneys' fees.

## D. Retaliation

## 1. Associational Discrimination

See the discussion of *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 511-13, 105 FEP Cases 1097 (6th Cir. 2009), above, in connection with Title VII and § 1981, and below, in connection with hostile working environments.

*Thompson v. North American Stainless, LP*, 520 F.3d 644, 102 FEP Cases 1633 (6th Cir. 2008), reversed the grant of summary judgment. The court stated the case succinctly, at 645: “Shortly after Appellant Eric Thompson's fiancée filed a discrimination charge with the EEOC against their common employer, the Appellee, Thompson was terminated. The parties to this appeal ask whether the anti-retaliation provisions in Title VII of the Civil Rights Act protect a related or associated third party from retaliation under such circumstances. We hold that that they do, and REVERSE the district court's grant of summary judgment to the employer.” The court relied on the EEOC COMPLIANCE MANUAL, and on the purposes of the statute. Judge Griffin dissented.

## 2. Protected Conduct

*Crawford v. Metropolitan Government of Nashville and Davidson County*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 846, 105 FEP Cases 353 (2009), reversed the decision of the Sixth Circuit and held that employees who give evidence of harassment in an internal investigation in response to the employer's questions, without having come forward on their own and without any EEOC charge having been filed, are protected by the opposition clause of § 704(a) of Title VII. Plaintiff and two other women described harassment by Employee Human Relations Director Hughes. No action was taken against Hughes, but all three women were fired. Plaintiff was assertedly fired for embezzlement. The Court stated at 850-51:

The opposition clause makes it “unlawful ... for an employer to discriminate against any ... employe[e] ... because he has opposed any practice made ... unlawful ... by this subchapter.” § 2000e-3(a). The term “oppose,” being left undefined by the statute, carries its ordinary meaning . . . : “to resist or antagonize ...; to contend against; to confront; resist; withstand,” Webster's New International Dictionary 1710 (2d ed.1958). Although these actions entail varying expenditures of energy, “RESIST frequently implies more active striving than OPPOSE.” . . . ; see also Random House Dictionary of the English Language 1359 (2d ed.1987) (defining “oppose” as “to be hostile or adverse to, as in opinion”).

The statement Crawford says she gave to Frazier is thus covered by the opposition clause, as an ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee, an answer she says antagonized her employer to the point of sacking her on a false pretense. Crawford's description of the louche goings-on would certainly qualify in the minds of reasonable jurors as “resist[ant]” or “antagoni[stic]” to Hughes's treatment, if for no other reason than the point argued by the Government and explained by an EEOC guideline: “When an employee communicates to her employer a belief that the employer has engaged in ... a form of employment discrimination, that communication” virtually always “constitutes the employee's *opposition* to the activity.” . . . It is true that one can imagine exceptions, like an employee's description of a

supervisor's racist joke as hilarious, but these will be eccentric cases, and this is not one of them.<sup>FN2</sup>

FN2. Metro suggests in passing that it was unclear whether Crawford actually opposed Hughes's behavior because some of her defensive responses were “inappropriate,” such as telling Hughes to “bite me” and “flip[ping] him a bird.” Brief for Respondent 1-2 (internal quotation marks omitted). This argument fails not only because at the summary judgment stage we must “view all facts and draw all reasonable inferences in [Crawford's] favor” . . . but also because Crawford gave no indication that Hughes's gross clowning was anything but offensive to her.

The Sixth Circuit thought answering questions fell short of opposition, taking the view that the clause “ ‘demands active, consistent “opposing” activities to warrant ... protection against retaliation,’” . . . and that an employee must “instigat[e] or initiat[e]” a complaint to be covered . . . . But though these requirements obviously exemplify opposition as commonly understood, they are not limits of it.

“Oppose” goes beyond “active, consistent” behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a position beyond disclosing it. Countless people were known to “oppose” slavery before Emancipation, or are said to “oppose” capital punishment today, without writing public letters, taking to the streets, or resisting the government. And we would call it “opposition” if an employee took a stand against an employer's discriminatory practices not by “instigating” action, but by standing pat, say, by refusing to follow a supervisor's order to fire a junior worker for discriminatory reasons. . . . There is, then, no reason to doubt that a person can “oppose” by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.

(Citations omitted.) The Court's reference to the Sixth Circuit's distinction as “a freakish rule” seems to display a certain impatience with innovative ways to limit the reach of the fair employment laws. Justices Alito and Thomas concurred in the judgment.

*Smith v. International Paper Co.*, 523 F.3d 845, 103 FEP Cases 37 (8th Cir. 2008), affirmed the grant of summary judgment to the Title VII racial discrimination defendant on plaintiff's retaliation claim. Plaintiff complained to Human Resources that his supervisor was constantly cursing and criticizing him, and asserted that his supervisor later told him that the supervisor would “get him” for making the complaint. The court held at p. 848 n.2 that, even if this were considered direct evidence as plaintiff asserted, the complaint itself was not protected by Title VII because plaintiff never said he was complaining of racial discrimination. The court observed that plaintiff's complaint to his supervisor, accusing the supervisor of prejudice, may well have been protected, but plaintiff never asserted that he was retaliated against for that complaint. *Id.* at p. 849.

*Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1278–79, 102 FEP Cases 716 (11th Cir. 2008), affirmed the judgment on a jury verdict for the Title VII and § 1981 retaliation plaintiff. Plaintiff was fired immediately after he refused to sign an agreement to arbitrate his pending charge. Because he was willing to arbitrate future claims, the dispute was only about arbitration of his pending employment discrimination claim. The court distinguished its earlier decision that refusal to sign an arbitration agreement was not protected conduct, because Bagby imposed the requirement knowing that plaintiff had a pending charge. The court stated: “No other employee had a pending charge when Goldsmith was terminated, although other employees with pending charges had been terminated earlier. When another employee objected to the dispute resolution agreement, the employee was urged to reconsider, but Goldsmith was not. Taken together, this evidence was sufficient for a reasonable jury to find a causal relation between the filing of Goldsmith’s charge of discrimination and his termination.” *Id.* at 1278–79. The court held that the failure to sign the arbitration agreement was not a nondiscriminatory reason, because it was retaliatory. *Id.* at 1279.

### **3. Defendant’s Ignorance of Protected Affiliation Bars Claim**

*Zerante v. DeLuca*, 555 F.3d 582, 585-86, 28 IER Cases 1133 (7th Cir. 2009), affirmed the grant of summary judgment to the First Amendment political-affiliation defendants because plaintiff could not show that defendants knew of her prior support for competing candidates, or that her decision not to support them was a motivating factor in her termination.

### **4. How Specific Must Defendant’s Knowledge of Protected Conduct Be?**

*Cline v. BWXT-12, LLC*, 521 F.3d 507, 514, 102 FEP Cases 1859 (6th Cir. 2008), reversed the grant of summary judgment to the Tennessee Human Rights Act defendant. There was no dispute that the decisionmaker changed his decision to hire plaintiff because he was informed that plaintiff was in litigation with the company. The lower court held that this was not enough, because there was no showing that the decisionmaker knew the substance of the claim involved in the litigation, and it could have involved unprotected conduct. Reversing, the court of appeals stated:

While we have no Tennessee case that tells us so, we doubt that the Tennessee courts would allow the State's anti-retaliation provision to be so easily evaded by the simple expedient of refusing to hire (or discharging) any individual with any litigation claim against the company. Two triable issues of fact thus exist: (1) Do the Mack and Zava statements (and any other relevant evidence) permit the inference that the company knew about the content of Cline's claim against the company; and (2) do the Mack and Zava statements (and any other relevant evidence) permit the inference that the company had a policy against hiring (or retaining) individuals with litigation against the company?

### **5. Determinations of Actionable Conduct**

*Billings v. Town of Grafton*, 515 F.3d 39, 53–57, 102 FEP Cases 1091 (1st Cir. 2008), reversed the grant of summary judgment to the Title VII and Massachusetts-law sexual harassment and retaliation defendant, and held that defendant’s transfer of plaintiff from a non-union clerical position in the office of the Town Administrator to a union clerical position

elsewhere, and barring her from coming into the Selectmen's Office to attend meetings there, opening an investigation of her for opening her boss's private mail from his attorney, and requiring her to take personal time off for her deposition, met the *Burlington Northern* standard and was actionable.

*Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 346, 102 FEP Cases 1165 (6th Cir. 2008), affirmed in part and reversed in part the grant of summary judgment to Ohio law defendant, using Title VII principles. Plaintiff Hill complained that, in retaliation for reporting harassment, the harasser set her car on fire. Plaintiff Jackson complained that, in retaliation for participating in an internal investigation of another woman's harassment complaint, the harasser set her house on fire. The court held that, "in appropriate circumstances, Title VII permits claims against an employer for coworker retaliation." *Id.* at 346. The court then defined the "appropriate circumstances":

Taking into account our caselaw and the guidance provided by *Burlington Northern*, we hold that an employer will be liable for the coworker's actions if (1) the coworker's retaliatory conduct is sufficiently severe so as to dissuade a reasonable worker from making or supporting a charge of discrimination, (2) supervisors or members of management have actual or constructive knowledge of the coworker's retaliatory behavior, and (3) supervisors or members of management have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the plaintiff's complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances.

*Id.* at 347. The court held that Hill had provided enough evidence to survive summary judgment. She had informed management that Robinson had set the fire in retaliation for her complaint of sexual harassment, and management's only response was to chide her for making the complaint. *Id.* at 347–49. The court held that, regardless of whether Jackson was protected, defendant took reasonable action: "Anheuser-Busch undertook proactive steps to protect both Jackson and Hawkins from retaliation when it decided to fire Robinson, including coordinating with law enforcement to monitor Robinson, hiring a security guard to follow him, and offering Jackson the protection of a security guard at her home, which she refused." *Id.* at 349.

*Abdullahi v. Prada USA Corp.*, 520 F.3d 710, 713, 102 FEP Cases 1537 (7th Cir. 2008), reversed the grant of summary judgment to defendant on plaintiff's Title VII retaliation claim, holding that plaintiff stated a valid claim by alleging that her former employer spread derogatory rumors about her in retaliation for her filing of her charge of discrimination.

*Semsroth v. City of Wichita*, 555 F.3d 1182, 105 FEP Cases 1049 (10th Cir. 2009), affirmed the grant of summary judgment to the Title VII retaliation defendants. The court held at 1185 that under *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 57 (2006), "We take a case-by-case approach, asking whether the record contains objective evidence of material disadvantage or merely the bald personal preferences of the plaintiff. . . . If only the latter, the retaliation claim fails." (Citations omitted.) The court held that the initial denial, and later reversal, of a requested transfer of plaintiff Warehime from one duty station to another, without a delay in the effective date of the transfer, was not shown to create a material disadvantage. *Id.* at 1186. The court similarly held that an assignment of plaintiff Voyles to one light-duty position

rather than another, subjectively preferred, position had not been shown to create a material disadvantage, particularly where the plaintiff ultimately received a transfer to a position in which she had previously expressed interest. *Id.* Finally, the court held that plaintiff Semsroth had not shown that a fitness-for-duty examination created a material disadvantage where it was not imposed on her, she voluntarily continued with the examination after being informed of its nature, and the Police Department ignored the results of the examination. *Id.* at 1187. The court stated: “The voluntary nature of the appointment with Dr. Bowman drains the incident of any material adversity that a mandatory fitness-for-duty test might present.” *Id.*

## 6. Causation

### a. Temporal Proximity

*DeCaire v. Mukasey*, 530 F.3d 1, 19, 102 FEP Cases 1758 (1st Cir. 2008), reversed the grant of summary judgment to the Title VII defendant. The court stated: “Instead, our law is that temporal proximity alone can suffice to ‘meet the relatively light burden of establishing a prima facie case of retaliation.’ . . . All of the events described here took place within a period of about one year. In our view, the court may have overlooked the temporal closeness of events by focusing on the fact that Dichio had mistreated DeCaire prior to her complaint.” (Citation omitted.)

*Hamilton v. General Elec. Co.*, 556 F.3d 428, 435-36, 105 FEP Cases 737 (6th Cir. 2009), reversed the grant of summary judgment to the Kansas Civil Rights Act defendant. Plaintiff was fired three months after he filed an EEOC charge of age discrimination, and sued under the KCRA for retaliation. The court held that this temporal proximity, coupled with evidence of increased supervision, satisfied the causation element:

In analyzing causation, the district court stated that “[u]nder Sixth Circuit precedent, . . . temporal proximity is not enough to satisfy the causation element of Plaintiff’s prima facie case.” . . . We have recognized, however, that in some cases temporal proximity may be sufficient to establish causation. *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 523-26 (6th Cir. 2008). In *Mickey*, we held that “[w]here an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a prima facie case of retaliation.” *Id.* at 525. Hamilton’s case, however, does not rest on temporal proximity alone. Instead, Hamilton alleges that his bosses heightened their scrutiny of him after he filed his EEOC complaint. See *Jones v. Potter*, 488 F.3d 397, 408 (6th Cir. 2007) (noting that an employer cannot conceal an unlawful discharge by closely observing an employee and waiting for an ostensibly legal basis for discharge to emerge). On a motion for summary judgment, we view the facts in the light most favorable to Hamilton, and he has testified in his deposition that GE increased its scrutiny of him after he filed his EEOC complaint. The combination of this increased scrutiny with the temporal proximity of his termination occurring less than three months after his EEOC filing is sufficient to establish the causal nexus needed to establish a prima facie case.

The court rejected the lower court's view that GE's scrutiny of plaintiff was understandable in light of the Last Chance Agreement:

Hamilton does not argue that his work had not been scrutinized before, but he states that the level of scrutiny increased greatly after he filed the EEOC complaint. The fact that the scrutiny *increased* is critical. The district court also emphasized Hamilton's prior disciplinary history. Though this case includes information about the pre-existing relationship between Hamilton and GE, we must decide what made GE fire Hamilton when it did. GE did not terminate Hamilton until *after* he filed an EEOC complaint alleging age discrimination. We hold that this temporal proximity of less than three months combined with the assertion that GE *increased* its scrutiny of Hamilton's work only after the EEOC complaint was filed are sufficient to establish the causation element of a *prima facie* case of retaliatory termination.

*Id.* at 436 (emphases in original). The court also rejected GE's argument that its innocence was established by intervening favorable treatment of plaintiff:

GE asserts that after Hamilton filed his EEOC complaint in May 2005, GE had cause to fire him in June 2005, but it chose not to, instead warning him and letting him continue working until his termination in August 2005. GE argues that because it did not fire Hamilton at the first opportunity that arose after he filed his EEOC complaint, the choice to fire him must not have been retaliatory. GE asserts that its "favorable treatment [i.e., its decision to give Hamilton another chance] dissolves any inference of retaliatory motive on the part of GE." . . . Were we to adopt GE's position, any employer could insulate itself from a charge of retaliatory termination by staging an incident to display its purported "favorable treatment" and then waiting for a second opportunity to terminate the employee. Accordingly, we refuse to adopt GE's argument, and we hold that an employer's intervening "favorable treatment" does not insulate that employer from liability for retaliatory termination.

*Id.* at 436. The court held that the showing that GE waited for an opportunity to fire plaintiff demonstrated pretext as well as the element of causation: "We have held that when an 'employer . . . waits for a legal, legitimate reason to fortuitously materialize, and then uses it to cover up his true, longstanding motivations for firing the employee,' the employer's actions constitute 'the very definition of pretext.'" *Id.* (citation omitted). Judge Griffin dissented.

*Fitzgerald v. Action, Inc.*, 521 F.3d 867, 875-76, 103 FEP Cases 30, 44 EB Cases 1096 (8th Cir. 2008), reversed the grant of summary judgment to the ERISA § 510 defendant in part because of the temporal proximity between plaintiff's announcement that he needed expensive shoulder surgery and his termination. The court quoted an earlier decision to the effect that "Viewed within the context of the overall record, temporal proximity may directly support an inference of retaliation, and it may also affect the reasonableness of inferences drawn from other evidence." *Id.* at 875. The court continued: "Here only a few days elapsed between Fitzgerald's notification of his intent to have surgery and Action's decision to terminate him, and temporal proximity provides support for an inference of retaliatory intent. Moreover, the reason Action gave for terminating Fitzgerald—accumulated misconduct—had existed for months before Fitzgerald notified Action of his surgery." The court stated a general rule:

Where an employer tolerates an undesirable condition for an extended period of time, and then, shortly after the employee takes part in protected conduct, takes an adverse action in purported reliance on the long-standing undesirable condition, a reasonable jury can infer the adverse action is based on the protected conduct. . . . In this case, a fact finder could reasonably infer Action would have terminated Fitzgerald sooner if accumulated misconduct had been the true motivation for his discharge.

Viewed in concert with other evidence of pretext, the close temporal proximity between Fitzgerald’s notification and Action’s termination decision provides support for an inference of retaliatory intent. Because material questions of fact exist on the issue of pretext, we conclude it was error for the district court to grant Action summary judgment on Fitzgerald’s ERISA claim.

*Id.* at 875-76 (citation omitted).

*Davis v. Team Electric Co.*, 520 F.3d 1080, 1094, 102 FEP Cases 1641 (9th Cir. 2008), reversed the grant of summary judgment to the Title VII retaliation defendant. The court held at that temporal proximity established the causation element of plaintiff’s prima facie case: “Davis’s termination was sufficiently proximate, as she was terminated on September 7, 2001, three days after the EEOC dismissed her claim.” (Citation omitted.)

*Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1278, 102 FEP Cases 716 (11th Cir. 2008), affirmed the judgment on a jury verdict for the Title VII and § 1981 retaliation plaintiff. The court rejected defendant’s argument that the eight-month gap between the filing of plaintiff’s EEOC charge and his termination precluded any inference of causation. The court held that the argument was a “straw man” because plaintiff was fired immediately after he refused to sign an agreement to arbitrate his pending charge. Because plaintiff was willing to arbitrate future claims, the dispute was only about arbitration of his pending employment discrimination claim. The court held that plaintiff adequately showed a connection between his EEOC charge and his termination.

**b. Disloyalty Defense**

*DeCaire v. Mukasey*, 530 F.3d 1, 19, 102 FEP Cases 1758 (1st Cir. 2008), reversed the grant of summary judgment to the Title VII defendant. The court rejected the lower court’s disloyalty defense, which had not been urged by the parties. The court stated: “As a matter of law, the filing of an EEO complaint cannot be an act of disloyalty to either the U.S. Marshals Service or the Marshal which would justify taking adverse actions.”

**c. Prior Discriminatory Actions Defense**

*DeCaire v. Mukasey*, 530 F.3d 1, 19, 102 FEP Cases 1758 (1st Cir. 2008), reversed the grant of summary judgment to the Title VII defendant. The court rejected the lower court’s view that discrimination against plaintiff because of her gender before she filed her EEOC charge negated her claims of retaliation after she filed the charge.

**E. Circumstantial Evidence**

## **1. Changing Stories**

*Wilson v. Phoenix Specialty Mfg. Co., Inc.*, 513 F.3d 378, 387–88, 20 AD Cases 193 (4th Cir. 2008), affirmed the judgment for the ADA plaintiff on his claim that defendant discriminated against him because it regarded him as disabled. The court upheld the lower court’s finding after a bench trial that all of defendant’s explanations were pretextual, based in large part on the fact that defendant offered an explanation at trial that it had not previously offered to the EEOC. Judge Niemeyer dissented. *Id.* at 388–95.

*Fitzgerald v. Action, Inc.*, 521 F.3d 867, 872-74, 103 FEP Cases 30, 44 EB Cases 1096 (8th Cir. 2008), reversed the grant of summary judgment to defendant on plaintiff’s ERISA § 510 claim, although it affirmed the grant of summary judgment on the ADEA claim, in part because the defendant changed its story. It told plaintiff he was being fired for lack of work, and did not challenge plaintiff’s claim for unemployment compensation which stated that reason. In litigation, however, defendant asserted that plaintiff was fired for accumulated misconduct. The court stated at 873: “Action’s different justifications ‘give rise to a genuine issue of fact with respect to pretext since they suggest the possibility that [none] of the official reasons was the true reason.’ . . . ‘A rational trier of fact could find these varying reasons show that the stated reason was pretextual, for one who tells the truth need not recite different versions of the supposedly same event.’ . . .” (Citations omitted) The court rejected defendant’s argument that plaintiff’s demand for a reason for his termination justified its changing stories. *Id.* at 873 n.2.

## **2. Failure to Follow Employer’s Own Policies**

See the discussion of *Fitzgerald v. Action, Inc.*, 521 F.3d 867, 103 FEP Cases 30, 44 EB Cases 1096 (8th Cir. 2008), in the section below on “Defendant’s Lack of Comparators.”

## **3. Discriminatory Statements**

*Davis v. Team Electric Co.*, 520 F.3d 1080, 1091-92, 102 FEP Cases 1641 (9th Cir. 2008), reversed the grant of summary judgment to the Title VII defendant. The court relied on evidence of discriminatory statements as helping to show pretext. See the discussion of this case in the section of this paper below on “Courts Relying on Biased Statements.”

## **4. Absence of Female Supervisors**

*Davis v. Team Electric Co.*, 520 F.3d 1080, 1092, 102 FEP Cases 1641 (9th Cir. 2008), reversed the grant of summary judgment to the Title VII defendant. The court relied on the absence of female supervisors as helping to show pretext.

## **5. “Counterweight” Evidence**

*Davis v. Team Electric Co.*, 520 F.3d 1080, 1093, 102 FEP Cases 1641 (9th Cir. 2008), reversed the grant of summary judgment to the Title VII defendant. The court held that defendant’s favorable response to a number of plaintiff’s complaints could not establish the absence of discrimination against her:

To be sure, Team Electric did a number of helpful things for Davis, including

accommodating her childcare needs by assigning her to her preferred site and allowing her to work a later shift. Team Electric responded to many of Davis's grievances, including providing her with improved safety equipment, giving her a radio, allowing her to come to meetings, transferring two female electricians to the site after she filed her BOLI questionnaire, assigning her a new supervisor when she reported that Loughary had a negative attitude toward her, and re-assigning her to a different wing of the building on one occasion, when she complained about working with Monokote.

Even if, however, we were to take Team Electric's responses to some of Davis's grievances as counterweights to Davis's proffer of specific and substantial evidence of discriminatory motive, a counterweight is not enough to eliminate the need for a fact-finder to weigh the facts on both sides. A jury could weigh Team Electric's response as mitigating facts, but the litany of complaints answered may also be taken by a reasonable jury as evidence that Davis was treated differently because she was a woman. The fact that Davis's supervisors had never before had complaints about work assignments would support this conclusion. Although "this is a close case ... [s]uch uncertainty at the summary judgment stage must be resolved in favor of the plaintiff."

(Citation omitted.)

## **F. Comparators**

### **1. Supreme Court's Use of Comparators**

*Snyder v. Louisiana*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1203, 1209-11, 170 L. Ed. 2d 175 (2008) (Alito, J.), a *Batson* case, relied on analysis of comparators in holding that the prosecutor's explanations for peremptory challenges to two black jurors were pretextual. Justice Thomas, joined by Justice Scalia, dissented. *Id.* at 1212-15.

### **2. Defendant's Lack of Comparators**

*Fitzgerald v. Action, Inc.*, 521 F.3d 867, 874, 103 FEP Cases 30, 44 EB Cases 1096 (8th Cir. 2008), reversed the grant of summary judgment to defendant on plaintiff's ERISA § 510 claim, although it affirmed the grant of summary judgment on the ADEA claim, in part because the defendant failed to show that it had breached its own disciplinary standards or terminated any other employees based on the asserted grounds on which it fired plaintiff. The court stated: "Additionally, under Action's termination policy, an employee would only be terminated after being written up three times for the same violation. . . . Easley admitted Fitzgerald had not been written up three times for abusing restroom privileges and was 'terminated in violation of Action's policy.' . . . Easley also admitted he had not fired anyone other than Fitzgerald for abuse of restroom privileges." The court continued: "We conclude Fitzgerald has shown that the circumstances surrounding his termination contravened Action's normal policies and are evidence Action's proffered explanation was pretextual."

### **3. Rejection of Defendant's Comparators**

*Holcomb v. Iona College*, 521 F.3d 130, 140, 102 FEP Cases 1844 (2d Cir. 2008), vacated the grant of summary judgment to the Title VII defendant, and held that the plaintiff former coach had shown adequate evidence that he was fired because he was white and was married to a black woman, and rejected the defendant's comparator:

The fact that the college decided to keep Ruland, who was also in an interracial relationship, does not allay the suspicion that the firings were grounded in an illegitimate motive. It was agreed all around that Ruland was simply too expensive to fire, with over five years left on his contract, whether or not he was in a relationship with a black woman. At the prima facie stage, then, these circumstances are more than sufficient to support an inference that Holcomb was terminated on the basis of his interracial marriage.

*Strickland v. United Parcel Service, Inc.*, 555 F.3d 1224, 105 FEP Cases 971, 14 WH Cases 1003 (10th Cir. 2009), reversed the grant of judgment as a matter of law to the Title VII defendant. The court held that defendant's failure to discriminate against another female employee did not compel judgment for defendant. The court stated at p. 1230: "A sex discrimination claim does not fail simply because an employer does not discriminate against every member of the plaintiff's sex. . . . While Harper's treatment might be relevant to the issue of UPS's intent, it does not resolve the issue as a matter of law." (Citation omitted.) The court

noted that a male co-worker had sales numbers worse than plaintiff's, but that he was not treated as harshly as plaintiff. The court stated at p. 1231:

The evidence UPS cites regarding the treatment of Strickland's male co-workers also does not compel judgment as a matter of law. Even though the male co-workers complained of Roten's managerial style, they and others also testified Strickland was treated differently from every male employee Roten supervised. Bishop is the only male employee who was subjected to treatment approaching what Strickland experienced. While his testimony, like Harper's, may undermine Strickland's sex discrimination claim, it does not defeat that claim as a matter of law in light of other testimony that she was treated worse than her male coworkers, including Deaton, who had inferior sales numbers. . . . (“[A]n employer is not immunized from liability simply because some males received detriments before or contemporaneously with a Title VII plaintiff.”). Therefore, the district court erred in preventing Strickland's sex discrimination claim from going to the jury.

(Citation and footnote omitted.) Judge Gorsuch dissented from this part of the decision.

#### **4. Acceptance of Plaintiff's Comparators**

*Jackson v. FedEx Corporate Services, Inc.*, 518 F.3d 388, 102 FEP Cases 1543 (6th Cir. 2008), reversed the grant of judgment as a matter of law to the Title VII and § 1981 racial discrimination defendant. The trial court granted judgment as a matter of law to defendant on the conclusion of plaintiff's evidence, after finding that plaintiff had presented no evidence of comparators who were similarly situated, for purposes of his *prima facie* case. The lower court had stated: “to be similarly situated . . . with whom the Plaintiff seeks to compare treatment must have the same supervisor, be subject to the same standards, having engaged in similar conduct without differentials or mitigation . . . It means these individuals have to have similar background, education, experience, job responsibilities, and performance. It means that the job responsibilities must require the same skills and abilities. And the job responsibilities are equal and interchangeable.” *Id.* at 391. The court of appeals disagreed, stating at 396-97:

Here, the district court impermissibly placed a burden of producing a significant amount of evidence in order to establish a *prima facie* case. That burden is not appropriate at the *prima facie* state [sic], but rather is better suited for the pretext stage that occurs later. The purpose of Title VII and Section 1981 are not served by an overly narrow application of the similarly situated standard. The district court's formulation of factors in order to analyze Jackson's *prima facie* evidence is too narrow and restrictive. It was not proper for the district court judge to define the relevant factors based solely upon narrow job functions and FedEx's stated requirements for the PowerPad project. In effect, the district court is requiring an exact correlation between the position of the employee prior to the ECA and the requirements of the PowerPad project. The number of employees with whom Jackson could be compared for purposes of establishing a comparable is relatively small. Jackson held a unique position within the workgroup, as he was the only system administrator. The district court's narrow definition of similarly situated effectively removed Jackson from the protective reach of the antidiscrimination laws. . . . The district court's finding that Jackson had no comparables from the six other

employees in the PowerPad project deprived Jackson of any remedy to which he may be entitled under the law.

(Citation omitted.) Judge Rogers dissented.

*Fitzgerald v. Action, Inc.*, 521 F.3d 867, 874-75, 103 FEP Cases 30, 44 EB Cases 1096 (8th Cir. 2008), reversed the grant of summary judgment to the ERISA § 510 defendant in part because plaintiff showed that an employee who had engaged in obviously worse misconduct, including insubordination, but who had not announced a need for expensive surgery, was treated more leniently.

*Ruiz Diaz v. Eagle Produce Ltd. Partnership*, 521 F.3d 1201, 1210, 103 FEP Cases 16 (9th Cir. 2008), affirmed in part the grant of summary judgment to the ADEA RIF defendant. The court held that the decisionmaker's failure to fire less experienced younger workers gave rise to an inference of discrimination. The court held that it did not matter that, because of high turnover, plaintiffs could not identify their individual replacements. *Id.* at 1210-11.

## **5. Rejection of Plaintiff's Comparators**

*Fields v. Shelter Mutual Insurance Co.*, 520 F.3d 859, 102 FEP Cases 1652 (8th Cir. 2008), affirmed the grant of summary judgment to the Title VII and § 1981 pay discrimination defendant because the African-American plaintiff failed to show that any similarly situated white employees were paid more. The court held that two proffered comparators were not similarly situated because they had been hired from competitors pursuant to a policy under which such new hires were paid more than employees promoted internally to the same positions. It held that two other proffered comparators were not similarly situated because they had worked significantly longer for defendant and had significantly more experience. It held that a fifth proffered comparator was not similarly situated because he had a different supervisor. Finally, it rejected plaintiff's final comparator because plaintiff was paid more than the comparator.

### **G. Comparative Qualifications and Evidence Bearing on Employee Performance**

*Ruiz Diaz v. Eagle Produce Ltd. Partnership*, 521 F.3d 1201, 1210-11, 103 FEP Cases 16 (9th Cir. 2008), affirmed in part the grant of summary judgment to the ADEA RIF defendant. The court held that the superior comparative qualifications of the older workers laid off, compared to the younger workers retained, gave rise to an inference of discrimination. The court held that it did not matter that, because of high turnover, plaintiffs could not identify their individual replacements.

### **H. Statistics**

*Ruiz Diaz v. Eagle Produce Ltd. Partnership*, 521 F.3d 1201, 1208-10, 103 FEP Cases 16 (9th Cir. 2008), affirmed in part and reversed in part the grant of summary judgment to the ADEA defendant. The court held at 1208-09 that none of the statistical evidence would by itself support an inference that age discrimination was responsible for the layoff of the three plaintiffs with viable claims, but that the evidence was probative of age discrimination when the actions of individual supervisors were separated out. It then stated at 1209-10:

A different picture emerges, however, when we consider the data with Brandt in mind. He first began to make personnel decisions for Crew 94 when he was hired as a supervisor in May 2001. The average age of the workers hired before that date was 44.29. For the period of May 2001 to January 2002, during which Daffern and Brandt both made personnel decisions, the average age of Crew 94 hires dropped to 40.8. Once Brandt took over as the sole hiring authority, the average age dropped still further to 35.28. By contrast, the average age of workers laid off from Crew 94 increased slightly from 46.2 during the period of Daffern's and Brandt's joint supervision to 51.1 after Brandt became the sole supervisor. In short, the disparity between the average age of those hired and those laid off increased from slightly less than two years to nearly 16 years once Brandt started to make personnel decisions. This evidence suggests that although Eagle Produce was not responsible for discriminatory hiring practices prior to Brandt's advent, Brandt used his authority to replace older workers with younger counterparts.

Reasonable jurors could find that this interpretation of the data supports an inference of discrimination. Viewing the statistical evidence with Brandt in mind helps to explain how Eagle Produce could both hire Plaintiffs without regard to age and also terminate their employment because of age shortly thereafter. Because Brandt did not work at Eagle Produce until May 2001, he could not preclude the hiring of Mancilla in approximately 1996, Diaz in 1997, and Moreno in 2000. However, he could lay off these workers because of their ages in the winter of 2002.

## **I. Discriminatory Statements**

### **1. Courts Refusing to Rely on Biased Statements**

*Fitzgerald v. Action, Inc.*, 521 F.3d 867, 876-77, 103 FEP Cases 30, 44 EB Cases 1096 (8th Cir. 2008), affirmed the grant of summary judgment to the ADEA defendant despite discriminatory remarks. “According to Fitzgerald, during the course of his employment, Easley told him they were getting ‘too old for that type of work’ and ‘needed to retire.’” . . . Fitzgerald claims after the incident with Yandell, Easley’s ‘mood changed.’ . . . Instead of referring to both of them, Easley began to comment Fitzgerald was getting ‘too old for the job’ and ‘needed to retire.’ . . . In addition, when asked who Action hired to replace Fitzgerald, Easley stated he could not remember exactly who, but he ‘usually [didn’t] hire older guys ... because [younger guys] are cheaper to work, cheaper labor.’” *Id.* at 876. The court continued:

“Stray remarks” standing alone do not give rise to an inference of discrimination. . . . But, neither are they irrelevant. . . . “[S]uch comments are ‘surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, thus providing additional threads of evidence that are relevant to the jury.’” . . . When combined with other evidence, stray remarks “constitute circumstantial evidence that ... may give rise to a reasonable inference of age discrimination.” . . .

*Id.* at 876-77. The court held that no inference of age discrimination could be drawn because plaintiff’s ERISA comparator, an employee three years younger with far worse conduct who had no pending surgery and was retained, was in the protected age group, and because of a “same company” extension of the “same decisionmaker” rule. “Further, Action hired Fitzgerald when

he was fifty and terminated him when he was fifty-two. We have noted it is unlikely a supervisor would hire an older employee and then discriminate on the basis of age, and such evidence creates a presumption against discrimination.” (Citation omitted) The court concluded: “Under different circumstances, the remarks attributed to Easley might create an inference of discrimination. In this instance, however, they are insufficient to overcome the presumption created by the fact Action hired Fitzgerald at age fifty.” *Id.* at 877.

**RTS Comment on *Fitzgerald v. Action, Inc.*:** The court clearly went off the rails on the age discrimination claim. The derailment was in several steps. *First*, it classified the clear indications of age bias as “stray,” without ever identifying any facts or law that would bar the remarks from being considered as direct evidence of discrimination. *Second*, the court never addressed the fact that Easley seems to have been speaking to plaintiff within the scope of his employment, making his remarks admissions of discrimination. *Third*, the court never analyzed the permissibility of its rejection of probative evidence in light of *Reeves*. Its one cited decision that mentioned *Reeves* found that it was unnecessary to consider the permissibility of drawing the inference of discrimination based only on discriminatory remarks because there was other evidence suggesting discrimination. *Fourth*, the court never analyzed the fact that plaintiff’s comparator was three years younger than plaintiff. *Fifth*, the court never considered the claim as a combined age-plus-ERISA discrimination claim. *Sixth*, the court’s extension of the “same-actor” inference to a “same company” inference was unsupported by any analysis. *Seventh*, the court sat as a jury without even realizing it.

## **2. Courts Relying on Biased Statements**

*Holcomb v. Iona College*, 521 F.3d 130, 142-43, 102 FEP Cases 1844 (2d Cir. 2008), vacated the grant of summary judgment to the Title VII defendant. The court relied on numerous explicit racist statements made by plaintiff’s supervisor. It explained:

This is obvious in the case of Petriccione, who was apparently in the habit of making racially questionable remarks, and who in particular is alleged to have made a strikingly racist remark to Holcomb about him and his wife. In the case of Brennan, a reasonable jury might conclude that he possessed a more subtle racial motive. Viewing the evidence in the light most favorable to Holcomb, and bearing in mind Brennan’s apparent desire to appeal to Iona’s mostly white alumni base, a rational finder of fact could conclude that Brennan had an incentive, for the purposes of alumni relations, to minimize the number of African Americans involved with the basketball team.

*Duncan v. Fleetwood Motor Homes of Indiana, Inc.*, 518 F.3d 486, 493, 102 FEP Cases 1249 (7th Cir. 2008) (*per curiam*), vacated the grant of summary judgment to the ADEA defendant. The court held that, even if defendant had produced a legitimate nondiscriminatory reason, biased statements by managers would have helped plaintiff show pretext. “At his deposition Duncan also testified that before he was removed from his job he overheard a production manager comment that older workers cost the company a lot of money (Fleetwood itself introduced this testimony at summary judgment). Additionally, as Stucky was escorting Duncan out of the plant, Stucky made a comment that could be construed as indicating that Duncan was removed because of his age. Perhaps Stucky’s words could be construed differently, but finding meaning in ambiguous statements is the province of the jury.” (Citation omitted.)

*Davis v. Team Electric Co.*, 520 F.3d 1080, 1091-92, 102 FEP Cases 1641 (9th Cir. 2008), reversed the grant of summary judgment to the Title VII defendant. The court relied on evidence of discriminatory statements as helping to show pretext, and rejected the lower court's dismissal of the probative force of these statements:

Davis alleged a series of discriminatory comments made by her supervisors. In one conversation, foreman Walsh pulled her aside to tell her that he "felt uncomfortable" around her. In the same conversation, he and Davis discussed her need to drop off her child at daycare, and Walsh allegedly said "this is a man's working world out here, you know." In another incident, Davis told foreman Loughary that her work was causing her neck pain. Loughary allegedly responded that he would assign Burkitt to be her foreman because he "needs a girlfriend." At another point, Loughary allegedly said that food for a meeting was only "for the guys." Finally, when Davis told a supervisor, Dave Davis, that she was doing most of the work entailing exposure to Monokote, he allegedly said something to the effect of "the guys don't mind having a girl working with them if they don't complain."

The magistrate judge disregarded Walsh's comments because they were not tied to any job assignment on the Clackamas County High School site, and Walsh did not transfer Davis. Even so, a reasonable jury could conclude that Walsh's response that she was in a "man's working world" is relevant evidence of pretext. A jury could also infer pretext from Loughary's suggestion that she could do another work assignment so that she could be a foreman's "girlfriend." The magistrate judge inexplicably dismissed Loughary's statement that food was only "for the guys" as "not overtly gender-based."<sup>7</sup>

The magistrate judge also disregarded Dave Davis's comments because she found that there was no evidence that he had any input into work assignments, and his comments expressed a "generalized opinion about the mindset of male electricians." The magistrate judge clearly erred in suggesting that Dave Davis was a co-worker with no managerial power. Davis asserts, and Team Electric does not deny, that she "was put under him to work," and that Dave Davis "made [her] start picking up" her things at a certain time. The magistrate judge's findings even go on to refer to Dave Davis as "one of her supervisors." Further, in assuming that Dave Davis was referring to electricians in general rather than to Team Electric, the magistrate judge erred in failing to view the evidence in the light most favorable to the plaintiff.

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<sup>7</sup> Team Electric contends that Loughary and Walsh's comments are not direct evidence of pretext because they are not "clearly sexist . . . insulting, humiliating, intimidating . . . derogatory . . . [or] threatening in any way," and did not "unreasonably interfere with Davis's work performance." . . . This is not an unreasonable interpretation of the comments, but it would also be reasonable for a jury to infer otherwise. On summary judgment all inferences must be drawn in favor of the moving party. . . . If the statements are not direct evidence of pretext, they are at the least circumstantial evidence from which a jury could infer pretext. "[A] single discriminatory comment by a plaintiff's supervisor or decisionmaker is sufficient to preclude summary judgment for the employer." . . .

(Citations omitted.)

### **3. Speakers Who Were Not Formal Decisionmakers**

*Holcomb v. Iona College*, 521 F.3d 130, 143, 102 FEP Cases 1844 (2d Cir. 2008), vacated the grant of summary judgment to the Title VII defendant. The court relied on numerous explicit racist statements made by plaintiff's supervisor, and rejected defendant's argument that the supervisor was not the decisionmaker. The court stated:

Here, there is ample evidence from which a reasonable jury could infer that Brennan, Petriccione, or both, played a meaningful role in the decision to terminate Holcomb. Brennan himself has testified that he told Brother Liguori that O'Driscoll was the best of the three coaches to retain; Petriccione was one of four actors who made the final firing decisions. True, the college has produced evidence that, if given a free hand, both Brennan and Petriccione would have preferred not to terminate any of the assistant coaches. Brennan's report recommended retention of all three, and Petriccione claims to have favored the same course as an initial matter. But a reasonable jury could perfectly well accept this evidence, and still find that the termination decision was motivated in part by racial discrimination. Once the decision was taken to fire two of the coaches and retain one for the sake of continuity, Brennan or Petriccione might well have urged the selection of O'Driscoll out of discriminatory motives. This is, at least, an issue of fact for the jury to decide. A rational trier of fact could, in other words, conclude that, once the decision was reached to retain the Head Coach and one of the three assistant coaches, Brennan and/or Petriccione urged the selection of O'Driscoll instead of Holcomb, and that at least one of them did so in part for racially discriminatory reasons.

### **4. The Odd Notion that Most Expressions of Bigotry Are Irrelevant**

*Darchak v. City of Chicago Bd. of Educ.*, \_\_\_F.3d \_\_\_, 2009 WL 2778227 (7th Cir. Sept. 3, 2009) (No. 08-2732), reversed the grant of summary judgment to defendant on plaintiff's national-origin discrimination claim. The court held at pp. \*6-\*7 that the lower court erred in disregarding plaintiff's testimony—about biased remarks by Principal Acevedo—on the ground that plaintiff had not shown they were made in reference to the non-renewal of her contract:

This brings us to the district court's second reason for dismissing Darchak's discrimination claim: the court determined that Darchak failed to demonstrate that Acevedo's comments were causally related to her decision not to renew [Darchak's contract]." . . . This appears to be a question of timing. But the bare fact that Darchak was not fired immediately after Acevedo allegedly made these remarks does not destroy the potential causal connection. The structure of the school year dictated the employment timetable, and Acevedo may not have been able to recommend nonrenewal of Darchak's contract any earlier than she did. In any event, we have previously found that three to four months between a remark and an employment action is not so long as to defeat the inference of a causal nexus, *Bellaver v. Quanax Corp.*, 200 F.3d 485, 493 (7th Cir.2000), and not much more time than that, if any, elapsed here.

The connection between Acevedo's discriminatory remarks and her ultimate recommendation not to renew Darchak's contract raises a question of intent. The fact that Acevedo rehired another Polish teacher is evidence of a possible answer to that question, but, as a question of intent, it is properly put to the jury, not to the court on summary judgment. *Payne*, 337 F.3d at 770. It is possible the district court simply did not believe Darchak; indeed, as we have noted, she presented no evidence of Acevedo's comments besides her own testimony, and the only other person present during these conversations—Acevedo—denies having made them.<sup>FN4</sup> But we repeat that it is not the court's job to assess the persuasiveness of Darchak's testimony. *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410 (7th Cir.1997) (warning courts against “invas[ing] the province of the factfinder by attempting to resolve swearing contests and the like” and collecting cases). Employment discrimination cases often center on parties' intent and credibility, which must go to a jury unless “no rational factfinder could draw the contrary inference,” *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 894 (7th Cir.1996). That is not the case here.

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<sup>FN4</sup>. Also suggestive is that Darchak failed to complain about discrimination until she filed this lawsuit. This can defeat a claim where an employer has in place anti-discrimination policies and the employee fails to take advantage of them, see *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998), but the Board may not maintain a *Faragher/Ellerth* defense here because in addition to Acevedo's discriminatory remarks, Darchak has also shown that she suffered a tangible employment action. See *Jackson v. County of Racine*, 474 F.3d 493, 500-01 (7th Cir.2007) (*Ellerth* and *Faragher* established that in situations where “the supervisor's harassment resulted in ‘a tangible employment action, such as discharge, demotion, or undesirable reassignment,’ ... the employer's vicarious liability is strict, in the sense that no defense is available once the other elements of the case have been proven.”) (internal citation omitted). The district court dismissed a putative hostile work environment claim on *Faragher/Ellerth* grounds, but Darchak has not challenged that ruling.

## **J. Harassment**

### **1. The Prima Facie Case**

*Barrett v. Whirlpool Corp.*, 556 F.3d 502, 515, 105 FEP Cases 1097 (6th Cir. 2009), affirmed in part and reversed in part the grants of summary judgment to the Title VII and § 1981 defendant. The court stated:

To establish a prima facie case of a racially hostile work environment, a plaintiff must demonstrate that (1) she was a member of a protected class; (2) she was subjected to unwelcome racial harassment; (3) the harassment was based on race; (4) the harassment unreasonably interfered with her work performance by creating an intimidating, hostile, or offensive work environment; and (5) the employer is liable. . . . A plaintiff, though not within a protected class, may satisfy the first prong of this test based on her association with or advocacy on behalf of protected employees. By introducing evidence that she was

subjected to unwelcome racial comments as a result of her association with or advocacy for protected employees, a plaintiff satisfies the second and third prongs.

(Citation omitted.)

## **2. Conduct Neutral in Form**

*EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 102 FEP Cases 1735 (4th Cir. 2008), reversed the grant of summary judgment to the Title VII religious harassment defendant. The court held that the charging party was subjected to conduct that went beyond the normal pranks to which other employees were subjected. The court stated: “For instance, Ingram's timecard was hidden most frequently on Fridays, the day he went to congregational prayer. On the Friday before Ingram filed the written complaint, his timecard was hidden on at least five separate occasions.” *Id.* at 317-18. The court also held that conduct lacking a religious nexus could still be considered part of the religious harassment because there was so much harassment targeted at Muslims that “a reasonable jury could infer that other harassing incidents were also motivated by a disdain for Ingram's faith.” *Id.* at 318.

*Tademy v. Union Pacific Corp.*, 520 F.3d 1149, 1159, 102 FEP Cases 1798 (10th Cir. 2008), reversed the grant of summary judgment to the Title VII and § 1981 racial harassment defendant. The court rejected the lower court's holding that a noose hanging from the time clock could not be considered racially hostile because of an innocent explanation proffered by the employee who hung the noose. The court explained:

Like “a slave-masters whip,” the image of a noose is “deeply a part of this country's collective consciousness and history, any [further] explanation of how one could infer a racial motive appears quite unnecessary.” . . . In light of the potential implausibilities in Mr. Erickson's story and the fact that a noose is often employed as a racist symbol, we think a reasonable jury could find that Mr. Erickson's hanging of a life-size noose stemmed from racial animus.

(Citations omitted.)

## **3. Severe or Pervasive**

*Billings v. Town of Grafton*, 515 F.3d 39, 49–52, 102 FEP Cases 1091 (1st Cir. 2008), reversed the grant of summary judgment to the Title VII and Massachusetts-law sexual harassment defendant, and held that repeatedly staring at the breasts of plaintiff and other women met the objective test of unwelcomeness and was sufficiently severe or pervasive to support a claim. It also rejected defendant's argument that staring at a woman's breasts is not sexual.

*Aulicino v. New York City Dept. of Homeless Services*, \_\_\_ F.3d \_\_\_, 2009 WL 2854028, 107 Fair Empl.Prac.Cas. (BNA) 277 (2d Cir. Sept. 8, 2009) (No. 06-5605-CV), reversed the grant of summary judgment as to the white plaintiff's Title VII claim of a racially hostile work environment. The court held at p. \*10 that the lower court did not adequately consider the potentially threatening nature of the harassment:

2. *Severity*. We also think the magistrate judge should have considered, but did not, the severity of John and Singleton's comments in the light most favorable to Aulicino, in two respects.

First, the R & R omits to report that two of the comments may be inferred to be physical threats: Singleton's remark to Aulicino that he was an "ex-felon," which Aulicino took to be a threat that Singleton would "assault" him, Aulicino Aff. ¶ 5, and John's threat to "get" Aulicino, Aulicino Dep. 154-56.

Second, the R & R concludes that Aulicino "fails to establish that defendants' conduct interfered with his job performance or responsibilities," R & R 14, but omits mention of Aulicino's testimony that he has contemplated transferring out of the Hinsdale Depot, and has not done so only because he does not yet know "where else to go" in light of his "very limited" choices. Aulicino Dep. 169.

This evidence is material. *See Richardson*, 180 F.3d at 437 (requiring courts to consider "whether the conduct was physically threatening or humiliating, or a mere offensive utterance" and whether it caused "unreasonabl[e] interfer[ence] with [the] plaintiff's work" (internal quotation marks omitted)). The magistrate judge should consider it on remand.FN10

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FN10. The parties do not address whether racial comments to or about a white person should be judged as to their "severity" in the same way that racial slurs used about racial minorities should be assessed. *See Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir.1993) ("Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates .") (internal quotation marks and citation omitted)). We therefore do not reach the issue.

*EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 102 FEP Cases 1735 (4th Cir. 2008), reversed the grant of summary judgment to the Title VII religious harassment defendant. The court stated that the objective prong of the "severe or pervasive" element of a hostile-environment claim cannot be determined by mathematical precision but must be evaluated in the context of all of the circumstances. *Id.* at 315. The court continued, at pp. \*6-\*7:

While this standard surely prohibits an employment atmosphere that is "permeated with discriminatory intimidation, ridicule, and insult" . . . it is equally clear that Title VII does not establish a "general civility code for the American workplace" . . . . This is because, in order to be actionable, the harassing "conduct must be [so] extreme [as] to amount to a change in the terms and conditions of employment." . . . Indeed, as the Court observed, "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." . . . .

Our circuit has likewise recognized that plaintiffs must clear a high bar in order to satisfy the severe or pervasive test. Workplaces are not always harmonious locales, and

even incidents that would objectively give rise to bruised or wounded feelings will not on that account satisfy the severe or pervasive standard. Some rolling with the punches is a fact of workplace life. Thus, complaints premised on nothing more than “rude treatment by [coworkers]” . . . “callous behavior by [one's] superiors” . . . or “a routine difference of opinion and personality conflict with [one's] supervisor” . . . are not actionable under Title VII.

The task then on summary judgment is to identify situations that a reasonable jury might find to be so out of the ordinary as to meet the severe or pervasive criterion. That is, instances where the environment was pervaded with discriminatory conduct “aimed to humiliate, ridicule, or intimidate,” thereby creating an abusive atmosphere. . . . With these principles in mind, we examine whether a reasonable person in Ingram's position would have found the environment to be sufficiently severe or hostile.

*Id.* at 315-16. The court held that the environment here met the “severe or pervasive” standard. *Id.* at 316-19.

*Barrett v. Whirlpool Corp., Barrett v. Whirlpool Corp.*, 556 F.3d 502, 512, 105 FEP Cases 1097 (6th Cir. 2009), affirmed in part and reversed in part the grants of summary judgment to the Title VII and § 1981 defendant. Plaintiffs were white employees who stated that they suffered a hostile working environment because of their association with, and advocacy of, African-American employees. The court stated at 515-16:

In assessing the fourth prong in this case, we cannot treat all incidents of harassment of African-Americans as contributing to a hostile work environment; rather, only harassment that was directed toward Plaintiffs themselves or toward others who associated with or advocated on behalf of African-American employees is relevant to our analysis, and only to the extent that Plaintiffs were aware of it. . . . In other words, only harassment that specifically targeted those who associated with and advocated for African-Americans will result in an actionable hostile work environment claim for such individuals.

(Citations omitted.) The court affirmed the grants of summary judgment against all plaintiffs but one, on the ground that the harassment of which they complained was mainly directed against African-American employees and not against whites who associated with African-American employees, and the remainder was either entirely subjective or not severe. It reversed the grant of summary judgment against plaintiff Nickens:

While Whirlpool contests the facts surrounding many of her allegations, a reasonable jury could find that Nickens was subjected to a severe or pervasive hostile work environment that altered the conditions of her employment: she received a threat of physical violence for reporting racist language, she was subjected to a regular stream of offensive comments about her relationship with an African-American co-worker, and the same relationship was allegedly used as a reason to prevent her from applying for improved job positions. Nickens has alleged facts giving rise to Whirlpool's liability in that she reported nearly all of the relevant incidents involving co-worker harassment to one of two supervisors, Bingham and Knight, and they failed to take corrective action. Furthermore,

Nickens has alleged that both of these supervisors, particularly Knight, harassed her directly.

*Id.* at 519-20.

*Grace v. USCAR*, 521 F.3d 655, 679, 13 WH Cases 2d 815 (6th Cir. 2008), affirmed the grant of summary judgment to defendants on plaintiff's Title VII sexual harassment claim.

The plaintiff attempts to support her hostile work environment claim with the following evidence of Flaherty's behavior: (1) according to a colleague, she referred to Grace as a "dancing girl" or a "call girl" . . . (2) that Flaherty ignored Grace, except to comment on her appearance . . . (3) that Shimon, upon hearing the complaints, stated "Let's just try to make it through the next few months [until Flaherty's known end date at USCAR]" . . . and (4) caused another employee, Jennie Sweet, to quit. . . . It is unclear whether the incidents listed in (2)-(4) demonstrate that the alleged abuse resulted from Grace's status as a female.

The court held that the conduct in question was not severe or pervasive.

*Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 102 FEP Cases 1165 (6th Cir. 2008), affirmed in part and reversed in part the grant of summary judgment to Ohio law defendant, using Title VII principles. The court held that, in determining whether the harassing conduct was severe or pervasive, conduct that is personally invasive or threatening must be weighted more heavily, and conduct that is continuous in nature must be weighted more heavily than conduct that is sporadic. *Id.* at 333-34. The court added: "This court's caselaw therefore makes clear that the factfinder may consider similar acts of harassment of which a plaintiff becomes aware during the course of his or her employment, even if the harassing acts were directed at others or occurred outside of the plaintiff's presence." *Id.* at 336. The court held that the comparative weighting of such actions depends on the circumstances. "When determining the relative weight to assign similar past acts of harassment, the factfinder may consider factors such as the severity and prevalence of the similar acts of harassment, whether the similar acts have been clearly established or are mere conjecture, and the proximity in time of the similar acts to the harassment alleged by the plaintiff." *Id.* Serial harassers raise different concerns, however: "On the other hand, more weight should be given to acts committed by a serial harasser if the plaintiff knows that the same individual committed offending acts in the past. This is because a serial harasser left free to harass again leaves the impression that acts of harassment are tolerated at the workplace and supports a plaintiff's claim that the workplace is both objectively and subjectively hostile." *Id.* at 337. The court held that plaintiffs Hill and Cunningham met the "severe or pervasive" test.

*Sandoval v. American Bldg. Maintenance Industries, Inc.*, \_\_\_ F.3d \_\_\_, 2009 WL 2602263, 107 Fair Empl.Prac.Cas. (BNA) 38 (8th Cir. Aug. 26, 2009) (No. 08-2271), reversed the grant of summary judgment on some of the sexual harassment claims. The court held at pp. \*12-\*14 that two plaintiffs' failure to complain under the company procedures could be excused because there was sufficient evidence that defendant had constructive knowledge of widespread sexual harassment, based on a large number of complaints. Judge Gruender dissented from this part of the holding.

*Davis v. Team Electric Co.*, 520 F.3d 1080, 1095-96, 102 FEP Cases 1641 (9th Cir. 2008), reversed the grant of summary judgment to the Title VII defendant on plaintiff's hostile-environment claims. The court disapproved of the lower court's rejection of her claims as tainted by paranoia, and held that the lower court should have considered the comments of managers that were overtly hostile to women in determining the severity or pervasiveness of the conduct in question. The court stated at 1096: "Although the incidents fall far short of physical abuse or aggressive sexual advances, 'the required showing of severity . . . of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct.'" (Citation omitted.) The court added: "In close cases such as this one, where the severity of frequent abuse is questionable, it is more appropriate to leave the assessment to the fact-finder than for the court to decide the case on summary judgment." (Citations omitted.)

*Tademy v. Union Pacific Corp.*, 520 F.3d 1149, 1160, 102 FEP Cases 1798 (10th Cir. 2008), reversed the grant of summary judgment to the Title VII and § 1981 racial harassment defendant. The court stated:

However, drawing all reasonable inferences in favor of Mr. Tademy, we further conclude that there is genuine issue of fact as to whether the racist graffiti, Mr. Cagle's use of the term "boy," the slaves e-mail, and Mr. Bleckert's reference to "F\* \* \*ing Kunta Kinte" were part of the same hostile work environment as the hanging of the noose. In our view, a reasonable jury could find that each was calculated to demean or intimidate African-American employees.

The Cagle "boy" incident, for example, underscores why summary judgment was inappropriate. As typically used in everyday English, there is nothing inherently offensive about the word "boy." Nevertheless, it is a term that has been used to demean African-American men, among others, throughout American history. In conversation, a slight difference in emphasis on a particular word or syllable in a sentence can alter its meaning. Here, we are confronted with conflicting testimony about whether the term was used in an offensive way in this particular instance. Union Pacific's decision to send Mr. Cagle to sensitivity training indicates that the company recognized the racial implications of his comment. Given all of the facts of this case, whether Mr. Cagle's comment was racially motivated and what effect it had on Mr. Tademy are judgments of the sort we are not equipped to make as an appellate court reviewing a cold record. Nor were they appropriate for the district court in ruling on a summary judgment motion. . . . And we believe this assessment applies equally to the "slaves" e-mail and the racist graffiti.

We also believe that the number of incidents in the given timespan is sufficient to constitute a hostile environment. Our precedent reveals no talismanic number of incidents needed to give rise to a hostile discrimination claim. As we will discuss in greater detail below, whether a hostile environment claim is actionable depends not only on the number of incidents, but also on the severity of the incidents. Here, the incidents include highly offensive graffiti and a noose hanging in the south shanty. As we outline below, we think that a jury could find that although Mr. Tademy may not have been subjected to racism on a daily basis, he has presented evidence sufficient to support his hostile environment claim. Considering all of the circumstances, we are persuaded that a reasonable jury could conclude that these incidents constituted the same employment practice.

(Citation omitted.) The court held that the harassment was severe, but not pervasive. That was sufficient. *Id.* at 1161-64.

#### 4. Thwarting “Critical Mass” Determinations in Harassment Cases

*Aulicino v. New York City Dept. of Homeless Services*, \_\_ F.3d \_\_, 2009 WL 2854028, 107 Fair Empl.Prac.Cas. (BNA) 277 (2d Cir. Sept. 8, 2009) (No. 06-5605-CV), reversed the grant of summary judgment as to the white plaintiff’s Title VII claim of a racially hostile work environment. The court held that two periods of harassment by two different supervisors, with a gap in between, could not be analyzed together with the gap in between, as indicating a low overall intensity of racially hostile activity, but had to be analyzed without the gap:

The magistrate judge's R & R recommended that the hostile work environment claim be dismissed. Assessing the frequency of the comments of John and Singleton, the magistrate judge noted that they collectively “occurred over a five-year time period.” R & R 14. With that observation, and citing *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759 (2d Cir. 1998), the magistrate judge concluded that the comments, while “unfortunate,” were too “isolated and discrete” to be actionable. *Id.* The magistrate judge then went on to assess the comments' severity:

Plaintiff ... fails to establish that defendants' conduct interfered with his job performance or responsibilities.... [P]laintiff admits that his work hours were never altered. Plaintiff also acknowledges that he got along with his fellow employees on the job.

*Id.* (citations omitted). In our view, this analysis is unpersuasive inasmuch as it does not appear to us to consider the record evidence *in the light most favorable to the plaintiff*, as it is required to do.

1. *Frequency.* The evidence supporting Aulicino's hostile work environment claim reflects two sets of derogatory comments by two different people during two different periods of time. The specific comments by John in the record are alleged to have occurred between December 2001 and September 2002. The specific comments by Singleton are alleged to have occurred some years later, between January and July 2005.

Correctly, the magistrate judge looked to the frequency of these remarks. And a review of the R & R discloses that she considered them “cumulatively” to obtain a “realistic view” of the workplace environment. See [Schwapp, 118 F.3d at 110-11](#). But she appears to have done so by calculating the length of time from the first specific comment by John, which occurred during one period of time, to the last specific comment by Singleton, which occurred several years later, and then asking whether eight comments in that period of time constituted sufficient “frequency.” See R & R 12-13 (listing four comments by John and four by Singleton); *id.* at 14 (“The incidents plaintiff describes occurred over a five-year time period. They are unfortunate, but they are isolated and discrete incidents.”). We acknowledge that there are different ways in which sets of hostile comments might be considered “cumulatively,” but we think the R & R's approach improperly draws inferences against Aulicino rather than for him as required.

First, the R & R takes into consideration two comments by John reported by third parties to Aulicino, *see* R & R 12 (“[P]laintiff alleges that John questioned one of plaintiff’s Caucasian co-workers ‘why all the white people take the same days off?’ ”); *id.* at 13 (“[P]laintiff claims that another supervisor, Sterling Ferguson, overheard John stating that ‘he would not hire that white fuck’ referring to plaintiff.”), but fails to mention a third: John’s threat to Gary Brown that he would “get” Aulicino, referring to Aulicino as a “white fuck.” Aulicino Dep. 154-56. The omission of this threat was detrimental to Aulicino’s claim. <sup>FN9</sup>

Second, the calculation in the R & R of the relevant time period in which the alleged derogatory comments were made appears to have been analyzed in the light least, rather than most, favorable to the plaintiff. The magistrate judge viewed the comments as having been made “over a five-year time period,” R & R 14, even though the first comment it mentions dates from December 2001 and the last was in July 2005, less than four years later, *id.* at 12-14. In addition, the “cumulative” assessment contained in the R & R includes a 26-month period between the last comment by John and the first comment by Singleton. We think that, in order to take the facts of this case in the light most favorable to Aulicino, the court should have discounted from its analysis, if not altogether disregarded, the intervening period between comments by one supervisor and comments by another. In our view, a “realistic” picture of the hostile workplace alleged by Aulicino is not obtained by focusing on a two-year stretch of time in which he fails to allege acts of hostility, and using that time to dilute the strength of his claims based on two discrete periods of more intense harassment.

Third, the court’s reliance on *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759 (2d Cir.1998), for the proposition that “*thirty* episodes occurring over a seven-year period d[o] not constitute a hostile work environment,” R & R 14 (emphasis added), appears to us to have been misplaced. The facts on which the *Quinn* opinion was based undercut that reading. *See Quinn*, 159 F.3d at 768 (“Quinn did ... make *two* allegations ... that appear to be timely.... Quinn’s hostile work environment claim ... rests on these *two* alleged incidents.” (emphasis added)). More importantly, whether the comments in this case are sufficiently frequent to be actionable may not be determined by extrapolation inasmuch as the applicable legal standard “is not, and by its nature cannot be, a mathematically precise test.” *Harris*, 510 U.S. at 22. Indeed, “even a single episode of harassment, if severe enough, can establish a hostile work environment.” *Richardson*, 180 F.3d at 437 (citation and internal quotation marks omitted). On remand, the court therefore ought not to treat *Quinn* as providing a precise standard for the number of hostile incidents over a particular time span so as to give rise to a viable hostile work environment claim.

## 5. Unwelcomeness

*EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 314, 102 FEP Cases 1735 (4th Cir. 2008), reversed the grant of summary judgment to the Title VII religious harassment defendant. The court held at p. \*5 that the charging party’s frequent complaints to managers and co-workers

about the harassing behavior, and his effort to obtain a transfer, adequately showed a triable issue as to the unwelcomeness of the behavior.

*Davis v. Team Electric Co.*, 520 F.3d 1080, 1096, 102 FEP Cases 1641 (9th Cir. 2008), reversed the grant of summary judgment to the Title VII defendant on plaintiff's hostile-environment claims. The court stated: "It is obvious from Davis's distraught journal entries that these incidents upset her and made it more difficult for her to work." Given the number of low-level incidents, the court continued: "Here the conduct occurred repeatedly over the course of Davis's employment, and we believe that a reasonable woman could have had a reaction similar to Davis's."

## 6. The "Boorish Workplace" Defense

*EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 318, 102 FEP Cases 1735 (4th Cir. 2008), reversed the grant of summary judgment to the Title VII religious harassment defendant. The court rejected the lower court's reasoning that defendant's workplace was inherently coarse and should be allowed wider latitude:

While the district court suggested that the harassment might be discounted because the environment was inherently coarse, Title VII contains no such "crude environment" exception, and to read one into it might vitiate statutory safeguards for those who need them most. Of course, if Sunbelt's environment was somehow so universally crude that the treatment of Ingram was nothing out of the ordinary, the jury would be entitled to take that into account. However, the evidence here suggests that the jury could also take the opposite view-that the harassment of Ingram was unique.

## 7. The "Paramour" Defense

*Forrest v. Brinker International Payroll Co.*, 511 F.3d 225, 229 (1st Cir. 2007), affirmed the grant of summary judgment to the Title VII and Maine Human Rights Act defendant, but rejected the lower court's determination that harassment by a former paramour is not harassment because of sex.

## 8. Employer's Vicarious Liability

*Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 338-40, 102 FEP Cases 1165 (6th Cir. 2008), affirmed in part and reversed in part the grant of summary judgment to Ohio law defendant, using Title VII principles. The court held that plaintiffs Hill and Cunningham had put defendant on notice of the harassing conduct. While plaintiff Cunningham later denied that she had been harassed, this was months later and the court held that it did not affect defendant's notice. *Id.* at 340.

*Davis v. Team Electric Co.*, 520 F.3d 1080, 1096, 102 FEP Cases 1641 (9th Cir. 2008), reversed the grant of summary judgment to the Title VII defendant on plaintiff's hostile-environment claims. The court held that the participation of defendant's managers in the harassment of plaintiff made the defendant liable: "A reasonable jury could find Team Electric liable for the hostile environment described by Davis because its supervisors played a significant

role in creating the environment, making it clear to Davis on more than one occasion that women were not welcome on the work site.”

## 9. Employer’s Duty to Cure Any Harassment That Does Occur

*EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 320, 102 FEP Cases 1735 (4th Cir. 2008), reversed the grant of summary judgment to the Title VII religious harassment defendant. The court held at pp. \*11-\*12 that a reasonable jury could find defendant’s response to plaintiff’s repeated complaints inadequate. Defendant did little to investigate or provide a remedy for the actions described in the charging party’s verbal complaints. While local managers did perform an investigation after a written complaint was faxed to Human Resources, and warned employees not to comment on the charging party or on Islam, they simply accepted everyone’s denial of engaging in harassment and urged the charging party to adopt a more positive attitude. The court continued:

After Ingram complained to Dempster about the religious harassment starting up again, he was met with accusations of paranoia and litigation. Rather than investigating the matter further or taking any form of corrective action, Dempster dismissed Ingram’s complaint and accused him of “being paranoid,” “seeing things,” and “trying to build a case against” Sunbelt.

The mere existence of an anti-harassment policy does not allow Sunbelt to escape liability. While the “adoption of an effective anti-harassment policy is an important factor in determining whether it exercised reasonable care,” the policy must be effective in order to have meaningful value. . . . Here the existence of the policy might still leave a jury unconvinced that Sunbelt worked in a serious fashion to combat the rampant harassment in its midst-harassment of which it was repeatedly made aware and which nonetheless continued unabated.

*Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 340–41, 102 FEP Cases 1165 (6th Cir. 2008), affirmed in part and reversed in part the grant of summary judgment to Ohio law defendant, using Title VII principles. The court held that defendant’s sexual harassment policy did not entitle it to summary judgment:

Although the brewery’s sexual harassment policy, which includes procedures for reporting harassment, is relevant to the question of whether Anheuser-Busch reasonably attempted to prevent harassment in the first instance, it does not absolve the brewery from liability if it knew or should have known about the harassing conduct yet failed to respond appropriately. An employer’s responsibility to prevent future harassment is heightened where it is dealing with a known serial harasser and is therefore on clear notice that the same employee has engaged in inappropriate behavior in the past.

*Id.* at 341. The court held that “a jury could find that, in light of the brewery’s knowledge that Robinson was a serial harasser, management acted inappropriately by repeatedly removing the victims of harassment from line 75 while failing to undertake more fundamental action, such as training, warning, or monitoring Robinson.” *Id.* at 342. It stated that lesser actions may be appropriate for persons who were not serial harassers or had engaged in less threatening

behavior. The court discussed at length the steps that could have been taken but were not shown in the record as having been taken. It rejected defendant's argument that it could not have taken any further action because Robinson had denied engaging in harassment:

Anheuser-Busch defends the steps it took by asserting that management could not have taken additional steps to discipline Robinson because he denied that he had ever harassed Hill. The brewery knew, however, that Robinson had a history of lying about harassing women. During its investigation into Robinson's harassment of Chiandet, Robinson denied authoring the threatening notes to her. He admitted writing the notes only after the brewery confronted him with evidence that he had been identified by a handwriting expert. This history calls into question Anheuser-Busch's assertion that Robinson's denial was entitled to significant weight and supports Hill's assertion that there is a genuine issue of material fact as to the appropriateness of Anheuser-Busch's response.

*Id.* at 343–44. The court also rejected defendant's argument that, because the union had once gotten Robinson back on the job, defendant could take no further action.

*Davis v. Team Electric Co.*, 520 F.3d 1080, 1097, 102 FEP Cases 1641 (9th Cir. 2008), reversed the grant of summary judgment to the Title VII defendant on plaintiff's hostile-environment claims. The court held that defendant had failed to establish its affirmative defense:

Team Electric has failed to show that it took steps to prevent sexual harassment in its workplace. There is no evidence, for example, that it had an anti-harassment policy, or that it had any other preventive measures in place, such as sexual harassment training. . . . One of Team Electric's project managers stated in a deposition that "pretty much whoever has a problem goes to the project manager, and it's dealt with in that manner." Nothing in the record shows whether this is a written policy, or even whether employees are informed of the policy. Davis alleged that she was prohibited from reporting her problems to anyone but her immediate supervisors—the very supervisors who allegedly created the hostile environment.

Team Electric's only apparent attempt to correct the harassment came after Davis contacted the BOLI, following several months of alleged mistreatment by her supervisors. There is no evidence that any of these supervisors were disciplined for their conduct or even told to behave differently, and Team Electric has not shown that Davis failed to take advantage of any preventive or corrective opportunities that it offered. In sum, Team Electric has not successfully asserted an affirmative defense to Davis's claim.

(Citation omitted.)

*Tademy v. Union Pacific Corp.*, 520 F.3d 1149, 102 FEP Cases 1798 (10th Cir. 2008), reversed the grant of summary judgment to the Title VII and § 1981 racial harassment defendant. The court held at 1165 that plaintiff had shown a triable issue of fact as to defendant's knowledge of the harassment. It stated: "we assume that Union Pacific was, or at least should have been, on notice that the Salt Lake service unit had a serious problem with bigoted messages appearing in public spaces around the time Mr. Tademy raised his complaints. we assume that

Union Pacific was, or at least should have been, on notice that the Salt Lake service unit had a serious problem with bigoted messages appearing in public spaces around the time Mr. Tademey raised his complaints.” The court considered racist graffiti observed by others, but declined to consider noose incidents at other locations because they would not have put management on notice of a problem at plaintiff’s location. The court also held that plaintiff had shown a triable issue as to the adequacy of defendant’s response, because defendant routinely failed to investigate or follow up on the many complaints made. The court stated that the fact that racist messages “appeared, and in some instances remained, in areas accessible to all employees may well reveal more about what is acceptable in the work environment than any EEO manuals, which may or may not be distributed to or read by employees.” *Id.* at 1166. The court pointed out the many remedies available to employers for widespread anonymous graffiti. *Id.* at 1166-67.

#### 10. Failure to Complain, and Adequacy of Complaints

*Monteagudo v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 554 F.3d 164, 172, 105 FEP Cases 494 (1st Cir. 2009), affirmed the judgment on a jury verdict for the Title VII and Puerto Rican law sexual harassment plaintiff. The court held that the jury could reasonably have determined that plaintiff had good reasons not to complain under defendant’s sexual harassment policy, or through the union:

From our review of the record, Monteagudo presented several reasons for not reporting the sexual harassment to Vargas. Vargas admitted that he was friends with Arce. Monteagudo also testified that Vargas and Arce would often go out drinking together. Monteagudo was thus understandably reluctant to report Arce's behavior to Vargas because of the closeness of Vargas's relationship with Arce.

The more difficult question, however, is whether Monteagudo's failure to report Arce's conduct to Crespo was unreasonable on the basis of Crespo's alleged friendship with Arce and Vargas. The only evidence that Monteagudo proffers for this friendship are conversations she overheard by Vargas and Arce and the fact that Crespo testified that he may have gone out with Arce for drinks. Admittedly, Monteagudo did not establish Crespo's relationship with Arce as clearly as she established Vargas's relationship with Arce; however, as we acknowledged in *Reed*, “juries are supposed to be good at detecting false claims and at evaluating reasonable behavior in human situations.” *Id.* at 37.

Further, other factors that the jury could have taken into account in deciding that it was reasonable for Monteagudo not to report to her superiors included Figueroa's advice to her that the matter was “extremely difficult and quite delicate” given the people involved, and the fact that witnesses to the alleged harassment failed to report the sexual harassment as well. FN7 In addition, there was a significant age differential between Monteagudo, 22, and Arce, 45, when the harassment occurred. Although Monteagudo was not a minor as was the plaintiff in *Reed*, her relative youth compared to Arce bears at least some relevance. See *id.* (noting that a jury could consider the trauma inflicted by a supervisor who was more than double the age of a seventeen year old whom the supervisor was alleged to have assaulted). While Monteagudo's evidence is not overwhelming, we believe that a reasonable jury could conclude that her failure to report

was based on “more than ordinary fear or embarrassment” and was therefore reasonable.  
FN8

FN7. Monteagudo testified that Vargas and her colleague, Marilyn Del Valle-Cruz (“Del Valle”), were aware of the sexual harassment. Although Vargas and Del Valle deny knowledge of the sexual harassment, the jury was entitled to believe Monteagudo's version given the facts surrounding the case.

FN8. AEELA also maintains that a jury could not reasonably conclude that Monteagudo's failure to file a complaint with her union pursuant to the collective bargaining agreement was reasonable. We disagree. Monteagudo was advised by Figueroa, a union delegate, that filing a complaint would be futile because the matter involved people that made it “extremely difficult and quite delicate”; that the union was weak; and that the union president was friendly with Vargas. Furthermore, Monteagudo stated that the union was unresponsive to a prior complaint she had filed on an unrelated matter.

*EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 102 FEP Cases 1735 (4th Cir. 2008), reversed the grant of summary judgment to the Title VII religious harassment defendant. The court rejected the lower court's reasoning that the charging party did not consider much of the harassment to be severe or pervasive because it had not been included in his only written complaint. The court stated at 319-20:

Sunbelt, like the district court, makes much of the fact that the incidents highlighted in the written complaint lacked a direct religious nexus. But this fact is not dispositive for several reasons.

First, when filing the complaint, Ingram made very clear to HR Specialist Wilson that he believed the harassment was because of his religion—a fact Wilson passed on in her report to Riddlemoser and Dempster. Second, Ingram explained that the examples provided in the written complaint were never intended to be an exhaustive list. Rather, given his limited time and his understanding of the directions, he simply wrote about incidents that had happened near the time of the complaint. Third, the written submission cannot be viewed in isolation, but rather in conjunction with the repeated oral complaints.

Based on the evidence presented, and in light of Gray's corroborating testimony, we believe that any doubts espoused by the district court about whether Sunbelt had sufficient notice were misplaced. Evidence of repeated complaints to supervisors and managers creates a triable issue as to whether the employer had notice of the harassment.

(Citation omitted.)

#### **K. Independent Investigations**

*Metzger v. Illinois State Police*, 519 F.3d 677, 681-84, 102 FEP Cases 1744 (7th Cir. 2008), affirmed the grant of summary judgment to the Title VII defendant retaliation claim. The court held that the independent investigation of the Illinois Department of Central Management

Services (“CMS”) into plaintiff’s job classification and pay grade barred any finding of retaliation despite the alleged retaliatory animus of a non-decisionmaker.

*Lakeside-Scott v. Multnomah County*, 556 F.3d 797, 105 FEP Cases 876, 28 IER Cases 1217 (9th Cir. 2009), reversed the lower court’s denial of judgment as a matter of law to the First Amendment defendant, and overturned a \$650,000 jury verdict. The court stated the question presented at 799: “Can a final decision maker’s wholly independent, legitimate decision to terminate an employee insulate from liability a lower-level supervisor involved in the process who had a retaliatory motive to have the employee fired? We conclude that, on the record in this case, the answer must be yes, because the termination decision was not shown to be influenced by the subordinate’s retaliatory motives.” The court emphasized that the chain of events leading to plaintiff’s termination began in a proper investigation of another employee, and that the evidence against plaintiff arose during the course of that inquiry. Plaintiff’s supervisor, who had been one of plaintiff’s targets, had no role other than making the report to the decisionmaker that was required by her duties. The court distinguished the case from one in which a biased official tainted the final decision, and stated at 807:

The facts before us here show a workplace in which the initial report of possible employee misconduct came from a presumably biased supervisor, but whose subsequent involvement in the disciplinary process was so minimal as to negate any inference that the investigation and final termination decision were made other than independently and without bias. We must not “place an employee in a *worse* ‘position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.’” . . . But concomitantly the Supreme Court has admonished that we must not “place an employee in a *better* position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. . . . [T]hat [employee] ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record. . . .”

Judge Berzon concurred in the judgment.

## VII. Litigation

### A. Exhaustion

*Federal Express Corp. v. Holowecki*, \_\_ U.S. \_\_, 128 S. Ct. 1147, 102 FEP Cases 1153 (2008), held by a 7-2 majority that an intake questionnaire attached to a sworn affidavit was an adequate ADEA charge of discrimination, where the affidavit requested the EEOC to obtain relief for the complainant and the EEOC construed the document as a charge, even though it was not served on the employer and no formal charge was filed until after suit had been filed. The Court cautioned that the holding should not be assumed to be applicable to other statutes enforced by the EEOC, because of differences in statutory wording:

As a cautionary preface, we note that the EEOC enforcement mechanisms and statutory waiting periods for ADEA claims differ in some respects from those pertaining to other statutes the EEOC enforces, such as Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq., and the Americans with Disabilities Act

of 1990, 104 Stat. 327, as amended, 42 U.S.C. § 12101 et seq. While there may be areas of common definition, employees and their counsel must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination. *Cf. General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 586–587, 124 S. Ct. 1236, 157 L. Ed. 2d 1094 (2004). This is so even if the EEOC forms and the same definition of charge apply in more than one type of discrimination case.

*Id.* at 1153. The Court held that the ADEA and the EEOC’s implementing regulations in 29 C.F.R. §§ 1626.6 and 1626.8 did not clearly set forth the required elements of a charge, but deferred to the EEOC’s interpretation of its own regulations under *Auer v. Robbins*, 519 U.S. 452, 461 (1997):

In accord with this standard we accept the agency's position that the regulations do not identify all necessary components of a charge; and it follows that a document meeting the requirements of § 1626.6 is not a charge in every instance. The language in §§ 1626.6 and 1626.8 cannot be viewed in isolation from the rest of the regulations. True, the structure of the regulations is less than clear. But the relevant provisions are grouped under the title, “Procedures–Age Discrimination in Employment Act.” A permissible reading is that the regulations identify the procedures for filing a charge but do not state the full contents a charge document must contain. This is the agency’s position, and we defer to it under *Auer*.

*Id.* at 1155. The Court accepted the EEOC’s policy, even though unevenly applied, that a charge must contain a request for action. “Here, the relevant interpretive statement, embodied in the compliance manual and memoranda, has been binding on EEOC staff for at least five years. . . . True, as the Government concedes, the agency's implementation of this policy has been uneven. . . . In the very case before us the EEOC’s Tampa field office did not treat respondent's filing as a charge, as the Government now maintains it should have done. And, as a result, respondent filed suit before the agency could initiate a conciliation process with the employer.” *Id.* at 1156. It found no reason to conclude that the most recent policy utterance had been framed to benefit the plaintiff in this litigation. *Id.* at 1156–57. The Court found the EEOC’s position reasonable, because under the ADEA the EEOC has both an educational and an enforcement function: “Of about 175,000 inquiries the agency receives each year, it docketed around 76,000 of these as charges. . . . Even allowing for errors in the classification of charges and noncharges, it is evident that many filings come from individuals who have questions about their rights and simply want information.” *Id.* at 1157. The Court was concerned that a policy of treating every filing as a charge would deter individuals from enquiring about their rights. The Court summarized its holding succinctly: “We conclude as follows: In addition to the information required by the regulations, *i.e.*, an allegation and the name of the charged party, if a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee.” *Id.* at 1157–58. The Court then rejected the employer’s argument that a filing can only be considered a charge if it is served on the respondent:

Asserting its interest as an employer, petitioner urges us to condition the definition of charge, and hence an employee's ability to sue, upon the EEOC's fulfilling its mandatory duty to notify the charged party and initiate a conciliation process. In

petitioner's view, because the Commission must act “[u]pon receiving such a charge,” 29 U.S.C. § 626(d), its failure to do so means the filing is not a charge.

The agency rejects this view, as do we. As a textual matter, the proposal is too artificial a reading of the statute to accept. The statute requires the aggrieved individual to file a charge before filing a lawsuit; it does not condition the individual's right to sue upon the agency taking any action. *Ibid.* (“No civil action may be commenced by an individual under [the ADEA] until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission”); Cf. *Edelman v. Lynchburg College*, 535 U.S. 106, 112–113, 122 S. Ct. 1145, 152 L. Ed. 2d 188 (2002) (rejecting the argument that a charge is not a charge until the filer satisfies Title VII's oath or affirmation requirement). The filing of a charge, moreover, determines when the Act's time limits and procedural mechanisms commence. It would be illogical and impractical to make the definition of charge dependent upon a condition subsequent over which the parties have no control. . . .

*Id.* at 1158–59 (citation omitted). The Court stated that the EEOC regarded the filing as a charge, even though the Tampa EEOC office had not. It stated that the Intake Questionnaire statements on their own were likely not enough, and noted that the 2001 form of the EEOC's Intake Questionnaire was purely informational and did not lend itself to treatment as a charge. The Court continued: “There might be instances where the indicated discrimination is so clear or pervasive that the agency could infer from the allegations themselves that action is requested and required, but the agency is not required to treat every completed Intake Questionnaire as a charge.” *Id.* at 1159. The Court held that the attached affidavit satisfied the “request to act” requirement. “At the end of the last page, respondent asked the agency to “[p]lease force Federal Express to end their age discrimination plan so we can finish out our careers absent the unfairness and hostile work environment created within their application of *Best Practice/High-Velocity Culture Change*.” *Id.*, at 273. This is properly construed as a request for the agency to act.” *Id.* at 1159–60. The Court next rejected the employer's argument that the request for confidentiality in the filing barred its treatment as a charge, but did so on grounds unique to the case at bar:

Petitioner says that, in context, the statement is ambiguous. It points to respondent's accompanying statement that “I have been given assurances by an Agent of the U.S. Equal Employment Opportunity Commission that this Affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding.” . . . Petitioner argues that if respondent intended the affidavit to be kept confidential, she could not have expected the agency to treat it as a charge. This reads too much into the assurance of nondisclosure. Respondent did not request the agency to avoid contacting her employer. She stated only her understanding that the affidavit itself would be kept confidential. Even then, she gave consent for the agency to disclose the affidavit in a “formal proceeding.” Furthermore, respondent checked a box on the Intake Questionnaire giving consent for the agency to disclose her identity to the employer. . . . Here the combination of the waiver and respondent's request in the affidavit that the agency “force” the employer to stop discriminating against her were enough to bring the entire filing within the definition of charge we adopt here.

*Id.* at 1160. The Court was concerned that plaintiff's filing of suit before filing of a formal charge was unfair to the employer:

The employer's interests, in particular, were given short shrift, for it was not notified of respondent's complaint until she filed suit. The court that hears the merits of this litigation can attempt to remedy this deficiency by staying the proceedings to allow an opportunity for conciliation and settlement. True, that remedy would be imperfect. Once the adversary process has begun a dispute may be in a more rigid cast than if conciliation had been attempted at the outset.

*Id.* at 1160–61. Justice Thomas dissented, joined by Justice Scalia. *Id.* at 1161-68.

**Comments of Richard Seymour on Potential Pitfalls in *Holowecki*:** This was a rescue from thin ice, and plaintiffs' lawyers will need to take great care to avoid the numerous risks highlighted by the decision. *First*, some of the Court's reasoning specifically draws on the language of the ADEA, and some of the rescue ropes they cast for the plaintiff may be unavailable under Title VII and the ADA. *Second*, many Circuits have held that charges drafted by attorneys are held to a stricter standard than lay charges, and these Circuits may take a narrower approach under *Holowecki* where an attorney drafted the intake questionnaire. *Third*, clients commonly want confidentiality, and the plaintiff here came very close to sinking her ship by making a demand for confidentiality. It was only her exceptions that saved her claim. As in internal sexual harassment complaints, plaintiffs' attorneys have to counsel their clients strongly and sharply on the self-defeating possibilities of such demands. *Fourth*, plaintiffs' attorneys need to amend charges while there is time, to avoid future jurisdictional fights. *Fifth*, the case illustrates the dangers posed by racing to the courthouse before exhaustion is beyond challenge. Plaintiffs' attorneys should never, ever, refrain from taking all available steps to avoid risks to the clients' right to be in court.

Plaintiffs' attorneys in the D.C. Circuit should argue that the Court's suggestion of a temporary stay for conciliation gives reason to reconsider Circuit case law to the effect that an early request for a Title VII Notice of Right to Sue, less than 180 days from the EEOC's assumption of jurisdiction over a charge and before the end of the EEOC's processing, requires abrogation of the litigation, a return to the agency, and a new lawsuit even where the case had been tried to a verdict.

*Fantini v. Salem State College*, 557 F.3d 22, 105 FEP Cases 961 (1st Cir. 2009), affirmed in part and reversed in part the lower court's grant of defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim. The court rejected the lower court's holding that plaintiff had not sufficiently highlighted sex discrimination in her charge before the Massachusetts Commission Against Discrimination, and had thus failed to exhaust her remedies under State law and Title VII. The court relied on the charge's several allegations of more favorable treatment for male employees, and its statement that defendants' justifications for their actions were a pretext for sex discrimination.

*Holender v. Mutual Industries North Inc.*, 527 F.3d 352, 357, 103 FEP Cases 712 (3d Cir. 2008), reversed the grant of summary judgment to the ADEA defendant and found plaintiff's EEOC Form 5 and affidavit to be sufficient to be a charge. The court rejected defendant's argument that a plaintiff must meet a higher standard when the plaintiff has counsel, stating: "There is no need to require that counseled submissions to the EEOC contain some

magic combination of words explicitly seeking agency action. A charge, submitted by counsel or not, may imply such a request.”

*Tademy v. Union Pacific Corp.*, 520 F.3d 1149, 1167-70, 102 FEP Cases 1798 (10th Cir. 2008), reversed the grant of summary judgment to the Title VII and § 1981 racial harassment defendant. The court held that plaintiff could rely on allegations of harassment contained in his earlier EEOC charge, which he had settled for an EEO training program that the defendant shortly abandoned.

## **B. Timeliness**

### **1. EEOC**

*Duron v. Albertson's LLC*, 560 F.3d 288, 105 FEP Cases 870 (5th Cir. 2009) (*per curiam*), vacated the grant of summary judgment to the Title VII defendant. The lower court held that plaintiff’s affidavit—swearing that she did not receive the EEOC’s October 4, 2004 Notice of Right to Sue prior to August 24, 2006, when a copy was sent to them after they has requested issuance of a suit letter—was not sufficient to rebut the presumption of timely receipt. The court described the affidavit at 289-90:

In a sworn affidavit, Duron denied receipt of this notice. She stated that she and her attorney made several calls to the EEOC to inquire as to the status of her case both prior to Hurricane Katrina in August 2005 and in the first half of 2006—all without a response. On July 18, 2006, her attorney wrote a letter to the EEOC’s regional attorney and subsequently delivered a copy of that letter. The letter indicates that Duron’s attorney had discussed her case with an EEOC official before and advised the EEOC that Duron wanted to pursue her rights in this case. Duron’s attorney also emailed that EEOC official. On August 24, 2006, Duron’s attorney received a copy of the EEOC right-to-sue letter dated October 4, 2004. In her affidavit, Duron stated that this was “the first time I or my attorney had ever seen this right to sue letter.” Her counsel represented to the court that he did not receive a copy of this letter until August 24, 2006.

The court held that the mailbox rule invoked by the district court—that receipt of a government notice was presumed within seven days of the stated date of mailing—was dependent on adequate evidence that the notice was mailed on the date stated. Here, defendant’s HR representative was listed as a cc on the notice but defendant produced no evidence that it had ever received the notice. The court stated at 291 that in a prior case “we stated that “[w]here critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant, or where it is so overwhelming that it mandates judgment in favor of the movant, summary judgment is appropriate,” and that both grounds were satisfied here. (Citation and footnote omitted.) The court drew particular significance from the fact that the affidavit represented that plaintiff’s counsel had spoken with an EEOC official in the interim. The court ended by noting that the dispute would never have arisen if the EEOC had followed its former practice of sending notices by certified mail. *Id.* The court noted a significant complication that it did not address:

We also note that the parties did not raise, and we do not consider, a claimant's duty to monitor the status of her proceedings in the EEOC. The governing statute requires the EEOC to notify the charging party “within [180] days from the filing of such charge” if it or a state enforcement agency has not filed an action. 42 U.S.C. § 2000e-5(f)(1). Should a state or local agency initiate an enforcement action, under 42 U.S.C. § 2000e-5(c) or § 2000e-5(d), the period for EEOC notification may be longer. Accordingly, a lack of diligence on the part of a claimant, e.g. failure to file a suit or contact the EEOC within 270 days of filing a charge with the EEOC (the 90-day period in addition to the 180-day period for action), may support a conclusion that an action is barred as untimely as a matter of law.

*Id.* at 291 n.13.

## **2. Hostile Environment**

*Tademy v. Union Pacific Corp.*, 520 F.3d 1149, 102 FEP Cases 1798 (10th Cir. 2008), reversed the grant of summary judgment to the Title VII and § 1981 racial harassment defendant. The court held that there was enough racially harassing activity within the charge-filing period to make plaintiff’s claim timely. It held that one incident, involving an employee’s failure to follow plaintiff’s orders because of his race, was not part of the same pattern of harassment, but that all other incidents were. The court rejected defendant’s argument that there had to be the same type of harassment, frequency, and perpetrator. The court stated at p. 9:

Indeed, the rule Union Pacific champions would have troubling implications. Under Union Pacific's theory, an employer could escape liability for a racially hostile work environment by employing a legion of bigots, each of whom committed but a solitary act of racism. Such a workplace would hardly operate to “achieve equality of employment opportunities.” Furthermore, requiring proof of repeat perpetrators would also provide employers with a reason to avoid conducting thorough investigations aimed at rooting out the culpable party. Here, for example, Mr. Erickson, Mr. Cagle, Mr. Bleckert, Mr. White, or some other employee could have been responsible for any number of the incidents of racist graffiti. However it is impossible to know because Union Pacific failed to investigate the incidents of graffiti or the etchings on Mr. Tademy's locker. By contrast, when the company did conduct an investigation, the perpetrator was discovered. Yet if only repeat offenders could render the company liable for a hostile work environment, the company's failure to investigate the incidents and identify the perpetrator might devolve to its benefit.

(Citation omitted.) The court added: “In addition, the fact that all of these incidents occurred in the same service unit persuades us that they are sufficiently related at this stage of the case.” *Id.* at p. \*10. The court held that the same principle applies to § 1981 claims of racial harassment. *Id.* at pp. \*20-\*22.

## **3. Requests for Reasonable Accommodation**

*Tobin v. Liberty Mutual Insurance Co.*, 553 F.3d 121, 21 AD Cases 769 (1st Cir. 2009), affirmed the judgment on a jury verdict for the ADA and Massachusetts-law plaintiff. The court

rejected defendant's argument that plaintiff's time to file a charge began running with the first denial of his requests for reasonable accommodations that exceeded what the employer was willing to provide, and that his further requests were simply efforts to seek reconsideration and could not revive a stale claim. "Liberty Mutual's argument misapprehends the difference between instances in which the employer commits multiple acts, each of which is independently discriminatory, and those circumstances in which an employee attempts to rely on either the ongoing effects of the employer's single discriminatory act or the employee's efforts to obtain reversal of that singular act of alleged discrimination." *Id.* at 131. The court relied on *Ledbetter* to make its point:

Tobin's allegations here are materially different from those in the cases we have described. He alleges that Liberty Mutual consistently denied his repeated requests for accommodations and asserts that each denial constituted a discrete act that was the basis for a separate claim of discrimination and carried with it a new statute of limitations. The correctness of his view is the in-avoidable teaching of the Supreme Court's cases in this area. In *Ledbetter*, the Court emphasized that "[a] new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from . . . past discrimination." 127 S. Ct. at 2169. However, "if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed." *Id.* Indeed, in the context of disability discrimination, any other approach would fail to take into account the possibility of changes in either the employee's condition or the workplace environment that could warrant a different response from the employer to renewed requests for accommodation.

*Id.* at 132-33. The court held that plaintiff had presented "thin" but adequate evidence that he had requested the accommodation of being assigned a Mass Marketing account, which would have enabled him to meet his quotas, but had been denied because he did not meet the eligibility criterion of being a high producer before the assignment. The evidence consisted of plaintiff's statement that he kept making the request in his weekly meetings with his supervisor, and his supervisor's notes of his complaint that he was "not on a level playing field" with other agents, and her notes saying "No MM." *Id.* at 133-36. The court rejected defendant's objection that the jury was not asked to decide the limitations defense specifically, because it did not ask that such a determination be placed in the verdict form. The court stated:

Although we have reservations about whether the jury would have understood Question 4 to incorporate the pertinent statute of limitations question, Liberty Mutual has only itself to blame for that ambiguity. It did not propose a special verdict question explicitly asking the jury to determine whether a request was made within the statutory periods. In these circumstances, we again have no reason to fault the district court's conclusion that Question 4 "solve[d] the statute of limitations[ ] issue." See *id.* at 918 (noting that parties "ought not to be allowed to base an appeal on the ambiguities and omissions that were the natural consequence of their strategy").

*Id.* at 135-36.

### C. Bars to Suit

## 1. “Last Chance” Agreements

*Hamilton v. General Elec. Co.*, 556 F.3d 428, 434-35, 105 FEP Cases 737 (6th Cir. 2009), reversed the grant of summary judgment to the Kansas Civil Rights Act defendant. Plaintiff signed a Last Chance Agreement promising not to sue the defendant if he were terminated. Plaintiff filed an ADEA charge with the EEOC, was allegedly terminated in retaliation for the filing, and then sued under the Kansas Civil Rights Act for retaliation. General Electric argued that the Last Chance Agreement waived plaintiff’s claim. The court held that Title VII does not allow the prospective waiver of claims, that the Kansas Civil Rights Act is worded similarly to Title VII, and that in the absence of a contrary State court decision the KCRA will also be construed to bar the prospective waiver of claims. Judge Griffin agreed with this holding, but dissented from the remainder of the decision.

## 2. Withdrawal of the EEOC Charge

*EEOC v. Watkins Motor Lines, Inc.*, 553 F.3d 593, 105 FEP Cases 364 (7th Cir. 2009), reversed the lower court’s decision not to enforce an EEOC subpoena issued after the charging party asked to withdraw his charge. The court held that the EEOC’s decision not to allow a charge to be withdrawn effectively transformed the charge into a Commissioner’s charge, and that the lower court could not properly treat the charge as if it had never been filed even if the lower court thought that a settlement of the individual charge was the best course of action. The court likened the situation to the presumption against settlements premised on a vacatur of the court’s prior decisions.

### D. Pleading

*Mendondo v. Centinela Hospital Medical Center*, 521 F.3d 1097, 1103, 27 IER Cases 609 (9th Cir. 2008), reversed the Rule 12(b)(6) dismissal of plaintiffs’ claims for failure to state a claim, holding that claims for wrongful termination in violation of the Federal and California False Claims Acts are subject to the pleading standards of Rule 8(a), and are not subject to the heightened pleading standards of Rule 9(b), Fed. R. Civ. Pro. The court distinguished between claims of substantive violations of the FCA, which are subject to Rule 9(b), and claims of retaliation under the FCA, which are not.

### E. Arbitration

*114 Penn Plaza, LLC., v. Pyett*, \_\_ U.S. \_\_, \_\_ S. Ct. \_\_, 2009 WL 838159, 105 FEP Cases 1441 (April 1, 2009), held that “a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law.” The Court stated that unions that failed to represent their members in good faith in the arbitration were subject to suits for breach of the duty of fair representation, and referred to the safeguard of review under the Federal Arbitration Act, without mentioning the limited nature of the review. Justice Thomas wrote the opinion of the Court. Justice Stevens dissented. Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer.

**Comment of Richard Seymour on *114 Penn Plaza, LLC., v. Pyett*:** The Court’s assumption that a union ought to be able to waive the right of its members to enforce a statutory right in a judicial forum, and its failure to consider the inability of the member to direct the

union's actions, or that the union represents itself rather than individual members in an arbitration, or that a union may have conflicting duties to different members interfering with its ability to provide representation to anyone but itself in an arbitration, or that the union member may also have claims against the union, reflects a blind adherence to arbitration reminiscent of the Court's blindness to statutory goals in *Ledbetter*. This case will be a prime candidate for statutory correction, and the correction may spell the demise of all mandatory arbitration schemes imposed by employers.

*Vaden v. Discover Bank*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1262, 1268 (2009), reversed the Fourth Circuit's affirmances of an order compelling arbitration, which was entered in a Federal-court action to enforce the FAA by compelling cardholders—who were State-law defendants and counter-claim State-law class plaintiffs in state-court proceedings—to arbitrate their claims. The Court described the procedural posture of the case, and its resolution of the matter:

The litigation giving rise to these questions began when Discover Bank's servicing affiliate filed a complaint in Maryland state court. Presenting a claim arising solely under state law, Discover sought to recover past-due charges from one of its credit cardholders, Betty Vaden. Vaden answered and counterclaimed, alleging that Discover's finance charges, interest, and late fees violated state law. Invoking an arbitration clause in its cardholder agreement with Vaden, Discover then filed a § 4 petition in the United States District Court for the District of Maryland to compel arbitration of Vaden's counterclaims. The District Court had subject-matter jurisdiction over its petition, Discover maintained, because Vaden's state-law counterclaims were completely preempted by federal banking law. The District Court agreed and ordered arbitration. Reasoning that a federal court has jurisdiction over a § 4 petition if the parties' underlying dispute presents a federal question, the Fourth Circuit eventually affirmed.

We agree with the Fourth Circuit in part. A federal court may “look through” a § 4 petition and order arbitration if, “save for [the arbitration] agreement,” the court would have jurisdiction over “the [substantive] controversy between the parties.” We hold, however, that the Court of Appeals misidentified the dimensions of “the controversy between the parties.” Focusing on only a slice of the parties' entire controversy, the court seized on Vaden's counterclaims, held them completely preempted, and on that basis affirmed the District Court's order compelling arbitration. Lost from sight was the triggering plea—Discover's claim for the balance due on Vaden's account. Given that entirely state-based plea and the established rule that federal-court jurisdiction cannot be invoked on the basis of a defense or counterclaim, the whole “controversy between the parties” does not qualify for federal-court adjudication. Accordingly, we reverse the Court of Appeals' judgment.

*Hall Street Associates, L.L.C. v. Mattel, Inc.*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1396 (2008), involved an arbitration agreement crafted while the dispute was in litigation in the U.S. District Court for the District of Oregon, and entered as an order by the court. Hall Street claimed a right to indemnification for environmental clean-up costs resulting from Mattel's tenancy in the property leased to it by Hall Street. The agreement approved by the court contained a paragraph providing for judicial review of the arbitrator's award, including authority to “vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.” *Id.* at 1400–01. In the

event, the district court rejected the arbitrator's interpretation of the lease as implausible. The Court held that the provisions for judicial review in §§ 10 and 11 of the FAA, 9. U.S.C. §§ 10, 11, are exclusive and may not be expanded by contract. The Court explained:

To begin with, even if we assumed §§ 10 and 11 could be supplemented to some extent, it would stretch basic interpretive principles to expand the stated grounds to the point of evidentiary and legal review generally. Sections 10 and 11, after all, address egregious departures from the parties' agreed-upon arbitration: "corruption," "fraud," "evident partiality," "misconduct," "misbehavior," "exceed[ing] ... powers," "evident material miscalculation," "evident material mistake," "award[s] upon a matter not submitted;" the only ground with any softer focus is "imperfect[ions]," and a court may correct those only if they go to "[a] matter of form not affecting the merits." Given this emphasis on extreme arbitral conduct, the old rule of *ejusdem generis* has an implicit lesson to teach here. Under that rule, when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows. Since a general term included in the text is normally so limited, then surely a statute with no textual hook for expansion cannot authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just any legal error. "Fraud" and a mistake of law are not cut from the same cloth.

*Id.* at 1404–05. The Court held open the possibility that the parties might contract for review under State law:

In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.

*Id.* at 1406. The Court also held that it was unclear whether this particular agreement was entered into pursuant to the FAA alone, or pursuant to the lower court's authority over alternative dispute resolution procedures. The Court raised but did not resolve these questions, stating:

We are, however, in no position to address the question now, beyond noting the claim of relevant case management authority independent of the FAA. The parties' supplemental arguments on the subject in this Court implicate issues of waiver and the relation of the FAA both to Rule 16 and the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 et seq., none of which has been considered previously in this litigation, or could be well addressed for the first time here. We express no opinion on these matters beyond leaving them open for Hall Street to press on remand. If the Court of Appeals finds they are open, the court may consider whether the District Court's authority to manage litigation independently warranted that court's order on the mode of resolving the indemnification issues remaining in this case.

*Id.* at 1407–08. Justice Stevens, joined by Justice Kennedy, dissented. *Id.* at 1408–10. Justice Breyer dissented. *Id.* at 1410.

**Comment by Richard Seymour on *Hall Street Associates, L.L.C. v. Mattel, Inc.*:**

Employers may be less willing to force arbitration agreements on employees if they are limited to the FAA provisions for judicial review. There is real concern among employers about what a single arbitrator could do to their personnel systems in awarding injunctive relief, or about the possibility of a rogue arbitrator who simply gets everything wrong. Plaintiffs' attorneys are also concerned about rogue arbitrators. One solution may be to use a panel of three arbitrators. Although this increases the cost of arbitration, the employer may be willing to pay the higher fees in order to have this protection in high-stakes cases. In AAA arbitrations, Canon X arbitrators can be used; there is an impartial chair of the panel, and one Canon X arbitrator chosen by each side that can meet with each side and discuss the arbitration—and even strategy—while the arbitration is pending, as long as there is full disclosure of each contact. While the Canon X arbitrators must vote according to their view of the merits, their use assures each side that its views are heard in the caucus. In addition, JAMS rules allow the parties to specify in advance that they want an arbitral appeal of the arbitrator's decision. The JAMS Optional Appeal Procedure is described at <http://www.jamsadr.com/rules/optional.asp>.

*Preston v. Ferrer*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 978, 27 IER Cases 257 (2008), held that the Federal Arbitration Act preempts State laws providing for the resolution of specific types of disputes by administrative machinery. Preston, a California attorney, demanded arbitration in a dispute with his client, “Alex E. Ferrer, a former Florida trial court judge who currently appears as ‘Judge Alex’ on a Fox television network program,” as provided in their contract. Ferrer objected, asserting that Preston was an unlicensed talent agent and that the dispute had to be resolved by the California Labor Commissioner under the California Talent Agencies Act. “Ferrer asserted that Preston acted as a talent agent without the license required by the TAA, and that Preston's unlicensed status rendered the entire contract void.” *Id.* at 982 (footnote omitted). Preston urged that he was a “personal manager” not covered by the TAA. The California Court of Appeal held that the TAA vests exclusive original jurisdiction in the Labor Commissioner, the Supreme Court of California denied review, and the Supreme Court of the United States granted review. The Court noted that Ferrer had argued below that the entire controversy should be finally resolved by the Labor Commissioner, but argued before the Supreme Court that arbitration could follow an initial but non-final resolution by the Labor Commissioner. It also noted that the Labor Commissioner acts as an impartial arbiter under the TAA, and does not act the EEOC. The Court stated its holding simply: “In sum, we disapprove the distinction between judicial and administrative proceedings drawn by Ferrer and adopted by the appeals court. When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.” *Id.* at 987. Justice Thomas dissented. *Id.* at 989.

*In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009), held that a class action waiver in an arbitration agreement between merchants and the American Express Co. was unenforceable where it would eliminate the only feasible means by which the merchants could enforce their rights.

*Mendez v. Puerto Rican Int'l Companies, Inc.*, 553 F.3d 709, 105 FEP Cases 609 (3d Cir. 2009), affirmed the district court's refusal to stay proceedings as to thirty-three employees

who had not been shown to have signed arbitration agreements. The court stated at 711: “Turning to the merits, the issue for resolution is whether a defendant who is entitled to arbitrate an issue which it has with one plaintiff in a suit can insist on a mandatory stay of litigation of issues it has with other plaintiffs who are not committed to arbitrate those issues. We conclude that Section 3 was not intended to mandate curtailment of the litigation rights of anyone who has not agreed to arbitrate any of the issues before the court.”

*Nance v. Goodyear Tire & Rubber Co.*, 527 F.3d 539, 547, 20 AD Cases 1110, 184 LRRM 2198 (6th Cir. 2008), affirmed the grant of summary judgment to the ADA, FMLA, and State-law defendant. The court held that plaintiff was not collaterally estopped by an arbitrator’s finding under the collective bargaining agreement that plaintiff had resigned without notice.

Generally, “once an issue has been fully litigated and necessarily determined by an adjudicatory body, a party and its privies are precluded from raising that issue in a subsequent proceeding.” . . . However, when an employee like Nance submits her grievance to arbitration, she is seeking only to vindicate her contractual rights under a collective bargaining agreement. Such an employee is not barred from bringing a subsequent statutory claim against her employer based on the same conduct, because arbitration over contractual disputes under a collective bargaining agreement is of a “distinctly separate nature” than “independent statutory rights accorded by Congress.” . . . Not only are the two forums independent, but they are in fact, according to the Court, “complementary since consideration of the claim by both forums may promote the policies underlying each.”

(Citations omitted.)

## **F. Summary Judgment**

### **1. Effect of Failure to Contest a Basis for Summary Judgment**

*Satcher v. University of Arkansas at Pine Bluff Bd. of Trustees*, 558 F.3d 731, 734, 105 FEP Cases 1109 (8th Cir. 2009), affirmed the grant of summary judgment to defendants, holding in the alternative that plaintiff’s failure to contest some of the bases of their motion waived those questions.

### **2. Procedure**

*Brannon v. Luco Mop Co.*, 521 F.3d 843, 847, 20 AD Cases 709 (8th Cir. 2008), affirmed the grant of summary judgment to the ADA defendant and held that the lower court did not abuse its discretion in denying plaintiff’s Motion to Strike defendant’s Statement of Uncontroverted Material Facts for failure to include the line number in its citations to pages of transcripts. The court noted that the local rule merely required appropriate citations to the record, and did not specify that line numbers were required. It also noted that the lower court had not found the citations to be burdensome.

### 3. “Sham Affidavits”

*Baker v. Silver Oak Senior Living Management Co., L.C.*, \_\_ F.3d \_\_, 2009 WL 2914159 (8th Cir. Sept. 14, 2009) (No. 08-1036), reversed the grant of summary judgment to the ADEA retaliation defendant. The court held that the lower court abused its discretion in striking plaintiff’s affidavit in opposition to summary judgment, because the flow of questions in her deposition made her answers reasonable, and they were not in contradiction with her statements in her affidavit. The court explained at pp. \*6-\*7:

The district court dismissed Baker's retaliation claims on the ground that she never engaged in activity protected by the statutes, that is, that Baker had not “opposed any practice” made unlawful by the ADEA or the MHRA. Although Baker averred in an affidavit that she “repeatedly told [Thomas] that terminating these employees was wrong,” and “repeatedly told her that you cannot get rid of employees just because they are old,” the district court declined to consider this evidence. The court viewed the affidavit as a “sudden revision” of Baker's deposition testimony and as an “an attempt to create an issue of fact regarding having engaged in protected activity, where none existed before.” Relying on *City of St. Joseph v. Southwestern Bell Telephone*, 439 F.3d 468, 475-76 (8th Cir. 2006), the district court struck the affidavit, and granted summary judgment for Silver Oak on the retaliation claims.

On appeal, Baker contends that the district court improperly struck her affidavit. She argues that her statements to Thomas, as recounted in the stricken affidavit, constitute opposition to age discrimination that is protected under the ADEA and the MHRA.

Our decisions in *City of St. Joseph* and *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361 (8th Cir.1983), address the district court's authority to strike an affidavit submitted by a party in resistance to a motion for summary judgment. We said in *Camfield Tires* that district courts should examine alleged inconsistencies between an affidavit and previous deposition testimony “with extreme care.” *Id.* at 1366. The authority to disregard an affidavit and grant summary judgment on the remaining record, we explained, is limited to situations “where the conflicts between the deposition and affidavit raise only sham issues.” *Id.*

Applying this standard, we conclude that the district court erred by striking Baker's affidavit. We are not convinced that Baker's affidavit was directly contrary to her previous statements, or that it raised only a “sham issue” concerning protected activity. Rather, Baker was entitled to present evidence by way of affidavit concerning the details of her alleged statements to Thomas in opposition to age discrimination.

Silver Oak contends that Baker's affidavit is directly contrary to testimony in her deposition about conversations with Thomas. Near the end of her deposition, Baker was questioned whether she had been given the chance to explain “all the reasons” why she thought she was “terminated based on age.” One question later, she was asked whether she “ever complain[ed] to Ms. Thomas about age discrimination,” and she responded “no.” Viewing this testimony in context, however, a reasonable factfinder need not

conclude that Baker's affidavit is directly contrary to her deposition. The deposition question about complaints to Thomas came immediately after an inquiry about why Baker thought she was terminated based on age. It would have been reasonable for a deponent to understand the question about complaints to Thomas to ask whether Baker had complained to Thomas that Baker herself had been terminated based on age. Baker's affidavit, by contrast, asserted that Baker had complained to Thomas about instructions that Baker should terminate other employees at Silver Oak. The two pieces of evidence do not present the sort of direct contradiction that is necessary to justify striking part of the plaintiff's evidentiary submission on the ground that it presents a "sham issue."

Elsewhere in her deposition, Baker testified that she never made allegations about age discrimination to the human resources department at Silver Oak, never submitted a written complaint to Silver Oak, and never complained about age discrimination to Lindsey, Upshaw, or the director of human resources. None of these questions, however, asked about Baker's oral communications with Thomas, and Baker had no obligation in her deposition to volunteer information that was not requested. *Bass v. City of Sioux Falls*, 232 F.3d 615, 618 (8th Cir.1999).

Silver Oak also points out that Baker was asked in an interrogatory to state all of the evidence supporting any allegation in her complaint, and that Baker responded by incorporating her Rule 26 disclosures and her charge of discrimination with the EEOC and the MCHR. In her charge with the EEOC and the MCHR, Baker stated that she refused Thomas's requests to fire older workers, and that "Thomas ordered [her], over [her] objections, to write up a disciplinary report on Carr ... for incidents for which Carr was not at fault." The interrogatory answer did not set forth the specific statements to Thomas that were recounted later in Baker's affidavit, but we have never held that the failure to include specific details of all communications in an interrogatory answer precludes a plaintiff from supplementing her submission in a subsequent deposition or affidavit. The omission of detailed information from an interrogatory response can be a proper basis for impeachment, but it does not trigger the narrow authority established in *Camfield Tires* to disregard entirely a portion of the plaintiff's evidence.

We therefore conclude that the district court erred by striking Baker's affidavit. Considering the affidavit, there is sufficient evidence for a jury to find that Baker engaged in protected activity under the ADEA and the MHRA before she was terminated. By protesting to Thomas that it was wrong to terminate older employees, and that Silver Oak could not discharge employees "just because they are old," Thomas clearly opposed conduct that she reasonably believed to be unlawful age discrimination. *See Evans v. Kansas City, Mo. Sch. Dist.*, 65 F.3d 98, 100 (8th Cir.1995). Accordingly, the district court erred by dismissing Baker's retaliation claims on the ground that Baker did not engage in protected activity under the statutes.

(Footnote omitted.)

*Brannon v. Luco Mop Co.*, 521 F.3d 843, 847-48, 20 AD Cases 709 (8th Cir. 2008), affirmed the grant of summary judgment to the ADA defendant and held that the lower court did not abuse its discretion in denying plaintiff's Motion to Strike the affidavit of the decisionmaker.

The decisionmaker had testified on deposition that as to his beliefs of the reasons why plaintiff was fired, and his affidavit stated why she was fired. The court held that this was a mere clarification, not a conflict, and noted that the decisionmaker certainly knew his own motives.

#### **4. Disregarding Plaintiff's Statements as "Self-Serving"**

*Darchak v. City of Chicago Bd. of Educ.*, \_\_F.3d \_\_, 2009 WL 2778227 (7th Cir. Sept. 3, 2009) (No. 08-2732), reversed the grant of summary judgment to defendant on plaintiff's national-origin discrimination claim. The court held at p. \*6 that the lower court erred in disregarding plaintiff's testimony—about biased remarks by Principal Acevedo—on the ground that there was no corroboration:

It is true that uncorroborated, self-serving testimony cannot support a claim if the testimony is based on "speculation, intuition, or rumor" or is "inherently implausible." *Payne v. Pauley*, 337 F.3d 767, 773 (7th Cir.2003). But testimony based on first-hand experience is none of those things. Darchak's testimony presents specific facts, even if that testimony may be less plausible than the opposing litigant's conflicting testimony (a question we need not-nay, cannot-reach). *Id.* And while it is also true that isolated remarks are not enough to meet the plaintiff's burden, remarks coupled with an adverse employment action suffice. See *Venters v. City of Delphi*, 123 F.3d 956, 973 & n. 7 (7th Cir.1997) (citing, *inter alia*, *Shager v. Upjohn Co.*, 913 F.2d 398, 402 (7th Cir.1990)). A reasonable jury could find Darchak's report of Acevedo's remarks convincing, and it is undisputed that Darchak's contract was not renewed at Acevedo's recommendation and that contract nonrenewal is an adverse employment action. Nothing more is needed to demonstrate that a plaintiff has established a prima facie case under the direct method of proof. *Sylvester v. SOS Children's Vill. Ill., Inc.*, 453 F.3d 900, 905 (7th Cir.2006). There need not be a rich and varied body of circumstantial evidence (a "mosaic" of discrimination, *Troupe*, 20 F.3d at 737), as long as what evidence there is adds up to discriminatory intent. See *Sylvester*, 453 F.3d at 903-04.

#### **5. Concern for Usurping the Role of the Jury**

*Holcomb v. Iona College*, 521 F.3d 130, 102 FEP Cases 1844 (2d Cir. 2008), vacated the grant of summary judgment to the Title VII defendant, and stated at 137:

We have repeatedly expressed the need for caution about granting summary judgment to an employer in a discrimination case where, as here, the merits turn on a dispute as to the employer's intent. . . . Where an employer has acted with discriminatory intent, direct evidence of that intent will only rarely be available, so that "affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." . . . . Even in the discrimination context, however, a plaintiff must provide more than conclusory allegations to resist a motion for summary judgment.

(Citations omitted) The court continued at 141:

Direct evidence of discrimination, "a smoking gun," is typically unavailable . . . and this case is no exception to that pattern. It is well settled, however, that employment discrimination plaintiffs are entitled to rely on circumstantial evidence. In this respect,

we have noted the need to be “alert to the fact that employers are rarely so cooperative as to include a notation in the personnel file that the firing is for a reason expressly forbidden by law.”

(Citations and footnote omitted).

## 6. Competing Time Lines

*Lindsay v. Yates*, \_\_\_ F.3d \_\_\_, 2009 WL 2568196 (6th Cir. Aug. 21, 2009) (No. 08-3633), reversed the grant of summary judgment to the Fair Housing Act defendants and held that, where the plaintiffs and defendants all assert a time line, only the plaintiff’s time line can be considered on a motion for summary judgment. The court explained at p. \*8:

The Yateses contend that the termination of the purchase agreement on May 24, 2005, occurred several days after Douglas and Brent met, not just two days later as alleged by the Lindsays. As a result, they essentially argue the nexus of events is not as close as the Lindsays claim and is, therefore, inadequate to create an inference of discrimination. But even if the relevant time lapse was ten days, it would still fall within the very close temporal range, which a reasonable juror could consider suspicious. *See DiCarlo*, 358 F.3d at 421-22; (twenty-one day lapse between protected activity and adverse employer action was grounds for inferring an improper motive in Title VII retaliation context). Moreover, whether the alleged time line proffered by the Yateses is actually correct is not relevant at this stage of the proceedings. On summary judgment, we must accept the non-moving party's evidence as true. See Muhammad, 379 F.3d at 416. The Yateses' proposed time-line is simply beyond our purview in the instant appeal.

(Emphasis supplied.)

## 7. Notice

*E.E.O.C. v. Exxon Mobil Corp.*, Slip Copy, 2009 WL 2710072 (5th Cir. Aug. 27, 2009) (No. 08-10624) (unpublished), held that the lower court erred in granting summary judgment to the ADEA defendant based on two fact-based determinations necessary to resolve the claim, where the lower court had restricted discovery to the first of those issues. The court rejected defendant’s argument that the EEOC had waived any objection by failing to object to the discussion of the second issue in defendant’s summary-judgment brief. The court explained at p. \*3:

We agree with Exxon that the EEOC could have been more alert in the summary-judgment proceedings. Nevertheless, the EEOC was entitled to rely on the district court’s specific order that both parties restrict discovery and summary-judgment motions solely to the issue of congruity. The district court’s assumption concerning the rationale justifying the FAA’s regulation was beyond the scope of its scheduling order; and insofar as the court’s decision depended on this assumption, it amounted to a sua sponte grant of summary judgment on an issue and on grounds about which it did not give the EEOC proper notice. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (“[D]istrict courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her

evidence.”); *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 504 (5th Cir.1994) (“The district court failed to give ten days notice of its *sua sponte* motion to grant summary judgment, as required by Federal Rule of Civil Procedure 56(c). This court has strictly enforced this notice requirement.” (footnotes omitted)).

The district court's error of assuming that the rationale for the FAA regulation remained valid-consequently exceeding the scope of its earlier order-was not harmless. The EEOC had indicated the sort of evidence that it would adduce to challenge the continuing validity of the FAA regulation's rationale: at minimum, expert testimony that reliable, individualized testing had been available to ascertain which among older pilots are unsafe. The district court's scheduling order precluded the EEOC from pursuing discovery or presenting such evidence and arguments on summary judgment. The district court nevertheless resolved the issue in Exxon's favor at summary judgment by assuming that the FAA regulation's rationale remained valid, even though the issue had been disputed and was not properly before the court.

In short, the continuing validity of the FAA regulation's rationale was, and is, a crucial and determinative issue in this case. The district court prejudiced the EEOC when it effectively granted summary judgment to Exxon by resolving this issue without giving the EEOC fair notice.FN4

#### **8. Protecting the Record by Getting the Notice of Appeal Correct**

*Nicholson v. Hyannis Air Service, Inc.*, \_\_\_ F.3d \_\_\_, 2009 WL 2857198, 107 Fair Empl.Prac.Cas. (BNA) 261, 09 Cal. Daily Op. Serv. 11,520 (9th Cir. Sept. 8, 2009) (No. 08-15959), reversed the grant of summary judgment to the Title VII sex discrimination defendant, but held at p. \*8 n.5 that the employee manual was not part of the record on appeal because it was attached to a proposed sur-reply in opposition to defendant's motion for summary judgment, the court had denied plaintiff's motion for leave to file the sur-reply, and plaintiff's Notice of Appeal did not specify that she was appealing not only from the final judgment against her, but also from the denial of her motion for leave to file a sur-reply.

#### **9. Defendant's Burden When Moving on Basis of Affirmative Defense**

*Laouini v. CLM Freight Lines, Inc.*, \_\_\_ F.3d \_\_\_, 2009 WL 2535818, 106 Fair Empl.Prac.Cas. (BNA) 1798 (7th Cir. Aug. 20, 2009) (No. 08-3721), reversed the grant of summary judgment to the ADEA defendant. The lower court granted summary judgment because it held that plaintiff did not timely file his EEOC charge. The court held at p. \*2: “Failure to timely file an administrative charge is an affirmative defense, and the burden of proof at summary judgment therefore rests on the defendant.” The court also noted at p. \*6 that the Indianapolis office of the EEOC had a practice of accepting charges received by fax and considering them filed as of the fax receipt date, even though the EEOC regulations did not explicitly authorize that means of receiving charges. Plaintiff had faxed and mailed the charge; the fax would have been timely if received by the EEOC, and the mail was received by the EEOC after the deadline. The lower court gave controlling weight to the EEOC investigative file, which did not show receipt of a faxed charge. Reversing, the court stated at p. \*5:

Although fax confirmations may not always be conclusive proof of receipt, we believe that in this case—where it was not the plaintiff who had to prove receipt, but the defendant who had to prove the absence of receipt—the fax confirmation creates a factual dispute sufficient to preclude summary judgment. Whether it was plaintiff's counsel or his assistant who faxed the charge, the fax confirmation independently verifies that a three-page document was sent from counsel's office to the EEOC before 4:30 p.m. on April 12, the final day for timely filing. As the district court observed, the confirmation itself does not prove the content of the document, but counsel swore in an affidavit that the fax consisted of Laouini's two-page charge and a cover sheet, and there is no evidence to undermine his representation.<sup>FN1</sup> And although at summary judgment the plaintiff did not present evidence establishing that confirmation of a successful transmission necessarily means that the document printed out on the other end, a reasonable factfinder could certainly infer as much. It is commonly understood that “success” in this context means that the two fax machines have performed an electronic “handshake” and that the data has been transmitted from one machine to the other. *See, e.g.,* Information Security Management Handbook 277 (Harold F. Tipton & Micki Krause eds., 6th ed. 2008) (“[O]ne significant advantage the fax has over other forms of data exchange is that the sender immediately knows if the transmission was successful.... [A]ll fax machines have the capability to print a fax confirmation sheet after each fax sent. This sheet confirms if the fax has been successfully transmitted....”); How to Understand Faxes, <http://www.how-to.com/article/details/160> (“Once your fax has been delivered, your system ... will create a page with the end result of the transmission. If the fax was sent successfully, the page will say ‘Okay.’ ”); How to Get Confirmation of a Sent Fax, [http://www.ehow.com/how\\_2015874\\_confirm-fax-sent.html](http://www.ehow.com/how_2015874_confirm-fax-sent.html) (“A confirmation report is a document confirming that your faxes were sent and received.”).

The fax confirmation is thus strong evidence of receipt, and, contrary to the district court's conclusion, CLM offered no evidence to meet its burden of proving non-receipt. In this court CLM asserts that the EEOC “denies ever having received the fax,” but this representation mischaracterizes the evidence. The EEOC never “denied” anything; it simply offered up Laouini's file, which does not contain a faxed copy of the charge of discrimination. The district court concluded that this ended the factual dispute, but the court did not address the possibility that the charge was received but misplaced or simply discarded when the mailed copy arrived the following Monday. Indeed, CLM did not produce any evidence from the EEOC about its internal fax-handling and retention policies. The author of the memo in the EEOC file—the investigator assigned to review the merits of the charge—does not purport to have any involvement in the handling of fax transmissions received in his office, nor does the author of that memo say that he made any effort to discuss with those who are responsible for incoming faxes whether one was received from Laouini's lawyer or even whether any fax was received late in the afternoon on April 12. A bureaucratic officer's uninformed belief that a document was not received is no more conclusive than a fax-transmission record indicating that it was. *Cf. In re Longardner & Assocs., Inc.*, 855 F.2d 455, 459 (7th Cir.1988) (explaining that denial of receipt does not rebut presumption of mail delivery but creates question of fact); *Nimz Transp., Inc.*, 505 F.2d at 179 (concluding that absence of document in clerk's file is insufficient to rebut presumption that document mailed was “received, and thereby filed”). Because a reasonable factfinder could weigh the evidence in this case and

conclude that the EEOC received Laouini's charge but simply lost, misplaced, or otherwise failed to timely process it, summary judgment was inappropriate.

(Footnote omitted.) Footnote 1 raised the question whether counsel could testify on the matter without being disqualified, but said that defendant had not raised the issue.

#### **10. The Prima Facie Case Under McDonnell Douglas**

*Nicholson v. Hyannis Air Service, Inc.*, \_\_\_ F.3d \_\_\_, 2009 WL 2857198, 107 Fair Empl.Prac.Cas. (BNA) 261, 09 Cal. Daily Op. Serv. 11,520 (9th Cir. Sept. 8, 2009) (NO. 08-15959), reversed the grant of summary judgment to the Title VII sex discrimination defendant. The court held that the lower court erred in deciding that plaintiff was not qualified for her pilot position because the determination was based on subjective evaluations. The court explained at p. \*5:

*Lynn's* reasoning is as applicable to a pilot's CRM skills as to the scholarly merit of a professor's work. The evaluation of a pilot's communication and cooperation skills requires a subjective evaluation of the pilot's attitude, manner, tone, and other similar traits—evaluations that are inherently subjective. Here, as in *Lynn*, if such subjective criteria are considered in evaluating a plaintiff's qualifications at step one of the *McDonnell Douglas* inquiry, the entire burden-shifting scheme collapses into a single inquiry into the truth of a subjective claim regarding Nicholson's alleged inadequacies. Thus, here as in *Lynn*, the first step must focus on the plaintiff's objectively measurable qualifications.

Cape Air argues that the subjective/objective distinction should not apply to CRM skills because “CRM for an ATR 42 pilot is an elemental and necessary qualification” and a pilot may “put lives in danger for failing to exhibit proper communication skills.” However, the distinction announced in *Lynn* does not turn on the importance of a particular qualification to the job. It turns instead on the subjective or objective nature of the matter in question. Here, the subjective nature of Nicholson's alleged deficiencies is most apparent from the fact that an instructor at Flight Safety rated her CRM skills “excellent” in June 2004, while her Cape Air co-pilots claimed only two months later that CRM deficiencies made her unsafe to fly.

(Footnote omitted.) The court also held at p. \*8 that very little evidence is needed to show a triable issue of pretext:

To avoid summary judgment at this step, however, the plaintiff must only demonstrate that there is a genuine dispute of material fact regarding pretext. The amount of evidence required to do so is minimal. “We have held that very little evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory motive may suffice to raise a question that can only be resolved by a fact-finder. When the evidence, direct or circumstantial, consists of more than the *McDonnell Douglas* presumption, a factual question will almost always exist with respect to any claim of a nondiscriminatory reason.” *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1124 (9th Cir.2004) (alterations omitted) (citations and internal quotation marks omitted).

## 11. The “Critical Mass” Approach to Finding a Triable Issue

*Baker v. Silver Oak Senior Living Management Co., L.C.*, \_\_ F.3d \_\_, 2009 WL 2914159 (8th Cir. Sept. 14, 2009) (No. 08-1036), reversed the grant of summary judgment to the ADEA defendant. The court held at p. \*5 that the combination of different types of evidence of discrimination may create a triable issue of fact even where each separate type may not:

Whether this evidence of pretext would be enough to reach the jury in a run-of-the-mill case, we need not decide. Here, it is combined with evidence from which a jury could find that the management of Silver Oak harbored a discriminatory attitude toward older employees and desired to displace them in favor of a younger workforce. Viewing all of the evidence together, we conclude that Baker has presented a submissible case of age discrimination under the ADEA.

As a practical matter, this makes adverse precedent less relevant. Decisions saying that evidence of Type “A” is not enough, and decisions saying that evidence of Type “B” is not enough, are not precedent that evidence of Types “A+B” are not enough.

### G. Evidence

#### 1. Admissions

*Hunter v. Valley View Local Schools*, \_\_ F.3d \_\_, 2009 WL 2601863 (6th Cir. Aug. 26, 2009) (No. 08-4109), reversed the grant of summary judgment to the FMLA retaliation defendant. The lower court granted summary judgment although defendant had admitted that it based plaintiff’s termination on a combination of her past use of FMLA leave and her permanent medical restrictions, reasoning that plaintiff would have been fired anyway because of the medical restrictions. The court of appeals held that the Superintendent had essentially admitted liability when she admitted that plaintiff’s entire attendance record was what drove the decision to terminate her, and that she would not have been terminated except for that attendance record.

#### 2. Circumstantial Evidence

*Darchak v. City of Chicago Bd. of Educ.*, \_\_F.3d \_\_, 2009 WL 2778227 (7th Cir. Sept. 3, 2009) (No. 08-2732), reversed the grant of summary judgment to defendant on plaintiff’s national-origin discrimination claim. The court held that plaintiff’s claim failed under the burden-shifting approach but was viable under the direct approach, including circumstantial evidence. It described the categories of circumstantial evidence at p. \*5: “(1) suspicious timing, ambiguous oral or written statements, or behavior toward or comments directed at other employees in the protected group; (2) evidence, whether or not rigorously statistical, that similarly situated employees outside the protected class received systematically better treatment; and (3) evidence that the employee was qualified for the job in question but was passed over in favor of a person outside the protected class and the employer’s reason is a pretext for discrimination.” (Citations omitted.)

### 3. Other Instances of Discrimination

*Sprint/United Management Co. v. Mendelsohn*, \_\_ U.S. \_\_, 128 S. Ct. 1140, 102 FEP Cases 1057 (2008), reversed and remanded the decision of the Tenth Circuit, and held that the lower court erred in concluding that a two-line minute entry of the district court meant that the lower court had adopted a *per se* rule barring testimony of other instances of discrimination, and in conducting its own balancing test as to such testimony instead of remanding the case to the district court. The unanimous Court stated its views on the evidentiary issue succinctly:

The question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. Applying Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry. Because Rules 401 and 403 do not make such evidence *per se* admissible or *per se* inadmissible, and because the inquiry required by those Rules is within the province of the District Court in the first instance, we vacate the judgment of the Court of Appeals and remand the case with instructions to have the District Court clarify the basis for its evidentiary ruling under the applicable Rules.

*Id.* at 1147.

*Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1285–87, 102 FEP Cases 716 (11th Cir. 2008), affirmed the judgment on a jury verdict for the Title VII and § 1981 retaliation plaintiff. The court held that the lower court did not abuse its discretion in admitting evidence of other instances of discrimination, although for the wrong reason. The court rejected the lower court's reliance on Fed. R. Evid. 406, because four instances of termination after filing an EEOC charge are not enough to show a habit. The court held that the evidence was properly admissible under Rule 303(b) to show defendant's motive, intent, and plan to discriminate and retaliate. The court stated: "Goldsmith and coworkers Jemison and Thomas were discriminated against by the same supervisor, Farley, so the experiences of Jemison and Thomas are probative of Farley's intent to discriminate. Steber was involved in the termination decisions of all four individuals, so the experiences of Jemison, Peoples, and Thomas are probative of Steber's intent." The court held that the evidence was also admissible under Rule 402 to prove a hostile work environment. *Id.* at 1286. The court held that the evidence was also admissible on other grounds we well:

The "me too" evidence was also probative of several issues raised by Bagby Elevator either on cross-examination or as an affirmative defense. Counsel for Bagby Elevator asked Goldsmith about any and all racist comments about which he knew, not just what he had heard. Counsel for Bagby Elevator also asked Steber if he would have countenanced a racially hostile work environment in the shop while Goldsmith worked there, whether anyone other than Goldsmith ever complained to him, and whether there were any complaints of racial slurs made by coworkers during Goldsmith's tenure at Bagby Elevator. Steber answered "no" to each question. The evidence regarding Jemison, Thomas, and Peoples is highly probative of these issues and rebuts Steber's negative responses because there was evidence that Jemison was called a monkey by Walker, Thomas was referred to as a slave by Farley and was the target of the ice cream comment, and Peoples complained to Steber and Braswell about their treatment of her.

Bagby Elevator raised a good faith defense, and the “me too” evidence is probative of whether the antidiscrimination and antiretaliation policies of Bagby Elevator were effective.

*Id.* at 1286–87 (citations omitted).

#### **4. Other Instances of Nondiscrimination**

*Strickland v. United Parcel Service, Inc.*, 555 F.3d 1224, 105 FEP Cases 971, 14 WH Cases 1003 (**10th Cir.** 2009), reversed the grant of judgment as a matter of law to the Title VII defendant. The court held that defendant’s failure to discriminate against another female employee did not compel judgment for defendant. The court stated at p. 1229: “A sex discrimination claim does not fail simply because an employer does not discriminate against every member of the plaintiff’s sex. . . . While Harper’s treatment might be relevant to the issue of UPS’s intent, it does not resolve the issue as a matter of law.” The court noted that a male co-worker had sales numbers worse than plaintiff’s, but that he was not treated as harshly as plaintiff. Judge Gorsuch dissented from this holding.

#### **5. After-Acquired Evidence Properly Excluded**

*Perkins v. Silver Mountain Sports Club and Spa, LLC*, 557 F.3d 1141, 1148-49, 105 FEP Cases 977, 14 WH Cases 2d 993 (**10th Cir.** 2009), affirmed the judgment on the jury verdict for the Title VII pregnancy discrimination and FMLA plaintiff. The court held that the trial court did not commit plain error in excluding after-acquired evidence of plaintiff’s misconduct. It rejected defendant’s argument that *McKennon* gave it an absolute right to introduce the evidence to limit back pay and compensatory damages, and held that defendant’s failure to make an adequate offer of proof of the misconduct limited it to plain-error review. The court found no plain error. It described a proper offer of proof under *McKennon*:

In this case, for example, to make a proper *McKennon* proffer at trial, Silver Mountain, among other things, could have demonstrated: (1) a basis for authenticating the \$73 August 2005 payment record; (2) the payment was unauthorized; (3) Perkins was in fact responsible or credibly thought to be responsible for the payment; (4) the unauthorized payment would have been sufficient alone to justify her termination through testimony of a company manager or her supervisor; and (5) when the termination would have occurred and how it would affect her damages claim.

(Footnote omitted.) Defendant never made such an offer.

#### **6. Plaintiff, But Not Defendant, Properly Referred to Withdrawn Allegations**

*Perkins v. Silver Mountain Sports Club and Spa, LLC*, 557 F.3d 1141, 105 FEP Cases 977, 14 WH Cases 2d 993 (**10th Cir.** 2009), affirmed the judgment on the jury verdict for the Title VII pregnancy discrimination and FMLA plaintiff. The court held that the trial court did not err in allowing plaintiff’s counsel to refer several times to defendant’s dismissed allegations that plaintiff was fired for embezzling funds, while not allowing it to introduce evidence on

plaintiff's withdrawn allegations or on its reasons for alleging embezzlement. The court stated at 1150:

Silver Mountain now argues the district court erred in permitting Perkins to “portray Silver Mountain as an oppressive litigant using retaliatory and shifting pleading tactics” while at the same time preventing it from responding. . . . Silver Mountain contends the district court improperly prevented it from eliciting rebuttal testimony concerning Perkins's withdrawn defamation claim as well as its reasons for alleging embezzlement in its own Answer and Counterclaim. We disagree.

The court held that plaintiff was entitled to undermine defendant's credibility by pointing to its shifting rationales, but that defendant had never made an adequate offer of proof why any of the evidence it sought to introduce would have undermined plaintiff's credibility. “Because no relevant grounds for admitting the rebuttal testimony were clear at trial and because Silver Mountain failed to make an offer of proof articulating any relevant grounds, any error by the district court in excluding the testimony must be reviewed solely for plain error.” *Id.* at 1151. The court continued:

First, Silver Mountain never demonstrated to the district court how or what evidence it intended to present that would have demonstrated a factual inconsistency in Perkins's testimony or court filings. Thus, any error by the district court was not plain or obvious. Second, even on appeal Silver Mountain has yet to demonstrate any admissible purpose for the excluded rebuttal testimony. The fact a defamation claim was made does not obviously demonstrate an inconsistency with trial testimony, but more importantly, Silver Mountain never explained to the court how it would do so in conformance with the court's pre-trial rulings.

#### **7. The EEOC “Reasonable Cause” Determination**

*Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1287–89, 102 FEP Cases 716 (11th Cir. 2008), affirmed the judgment on a jury verdict for the Title VII and § 1981 retaliation plaintiff. The court held that the lower court did not abuse its discretion in admitting the EEOC reasonable-cause determination. The court held that the determination was adequately discussed by witnesses and given context at the trial, and that the special instruction provided by the trial court was sufficient to prevent any abuse of the determination.

#### **8. Biased Remarks**

*Aulicino v. New York City Dept. of Homeless Services*, \_\_ F.3d \_\_, 2009 WL 2854028, 107 Fair Empl.Prac.Cas. (BNA) 277 (2d Cir. Sept. 8, 2009) (No. 06-5605-CV), reversed the grant of summary judgment as to plaintiff's Title VII claim of racial discrimination in promotions. Plaintiff was white. The court at pp. \*6-\*7 held that evidence of biased remarks was evidence of pretext for all of the employer's nondiscriminatory reasons:

Again viewing the evidence in the light most favorable to the plaintiff, we also conclude that a rational jury could infer discriminatory intent in the denial of the promotion. The magistrate judge ruled in the R & R that John's comment to Ferguson that “he wouldn't hire that white fuck,” referring to Aulicino, did not support an inference

of discrimination because it is inadmissible hearsay. . . . That may be so, insofar as the statement by Ferguson was elicited through Aulicino's testimony, and insofar as Aulicino's report of the statement is offered to prove what John said.FN6 But irrespective of the existence of that alleged comment and others that were reported to Aulicino by third parties, there remain two specific racially derogatory comments by John for which there is direct evidence: John's comment to Aulicino that Aulicino "deserved" to be called "a white mother fuck" by a DHS client, Aulicino Dep. 136, and his comment to Aulicino that "white people are lazy," id. at 76. We think a reasonable jury could infer from these comments—as to which there is no admissibility dispute—that John's hostility toward Aulicino was race-based, and that that hostility played a role in the denial of the promotion.FN7

Accordingly, we conclude that Aulicino has made out a prima facie case of race discrimination on his failure to promote claim. In light of the racially derogatory comments John made to Aulicino, we also conclude that a rational factfinder could find the defendant's non-discriminatory reasons for failing to promote Aulicino to be pretextual. Because we think the question whether Aulicino was denied a promotion on the basis of race is a genuine issue for trial, we vacate the dismissal of the failure to promote claim and remand that cause for trial.

(Emphases supplied; footnotes omitted.)

*Brown v. J. Kaz, Inc.*, \_\_\_ F.3d \_\_\_, 2009 WL 2902248, 107 Fair Empl.Prac.Cas. (BNA) 229 (3d Cir. Sept. 11, 2009) (No. 08-2713), reversed the grant of summary judgment to the § 1981 defendant as to plaintiff's termination claim. The court held at p. \*6 that mixed-motives analysis applies to a racial discrimination claim by an independent contractor, and that evidence of biased remarks may create a triable issue of fact even if they are not made in connection with the challenged employment decision:

Thus, *Brown* must first present "direct evidence of discrimination," which this court has defined as "evidence sufficient to allow the jury to find that the decision makers placed substantial negative reliance on [the plaintiff's race] in reaching their decision to fire [her]." *Fakete*, 308 F.3d at 338. Here, the District Court assumed that *Brown* had presented such direct evidence based on the incident between *Brown* and *Morris*.

Indeed, taking the evidence in the light most favorable to *Brown*, the record shows that after *Brown* refused to shake *Morris*' hand during their interaction on the third day of training, *Morris* stated, "Well, you ain't nothing but the N word," . . . and responded in the affirmative when *Brown* asked him if he was calling her a "nigga," . . . . These were not simply "stray remarks." *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring). Within minutes of the incident, *Morris*, who was the recruiting manager for *Craftmatic*, told *Brown* that if he had any say in the matter she would not be permitted to work for *Craftmatic* and reported the incident to *Girty*, *Craftmatic*'s owner. *Girty* then decided, upon *Morris*' recommendation, to terminate *Craftmatic*'s contractual relationship with *Brown* without ever speaking to *Brown* or to the other trainees who were present during the incident. As we have explained, "one form of evidence sufficient to shift the burden of persuasion under *Price Waterhouse* is statements of a person involved in the

decisionmaking process that reflect a discriminatory or retaliatory animus of the type complained of in the suit, even if the statements are not made at the same time as the adverse employment decision, and thus constitute only circumstantial evidence that an impermissible motive substantially motivated the decision.” *Fakete*, 308 F.3d at 339.

Judge Jordan concurred.

*Darchak v. City of Chicago Bd. of Educ.*, \_\_F.3d \_\_, 2009 WL 2778227 (7th Cir. Sept. 3, 2009) (No. 08-2732), reversed the grant of summary judgment to defendant on plaintiff’s national-origin discrimination claim. The court held at p. \*6 that plaintiff’s claim failed under the burden-shifting approach but was viable under the direct approach, including circumstantial evidence such as the following statements:

Darchak presented evidence that Acevedo made derogatory remarks to her about Polish people in October and November 2005. Acevedo allegedly said that Hispanic students are “better than Polish” and “deserve more than Polish people.” She called Darchak a “stupid Polack,” and told her, “if you don’t want to do whatever I tell you to do, you can leave my school.” These remarks were followed shortly by a cautionary notice from Acevedo charging Darchak with insubordination and, ultimately, by the nonrenewal of Darchak’s contract several months later. This evidence fits the first category of circumstantial evidence listed above. In fact, the derogatory comments allegedly made by Acevedo are less ambiguous than those in many discrimination cases. The “stupid Polack” remark speaks clearly of discriminatory animus, and the other remarks are suggestive.

*Baker v. Silver Oak Senior Living Management Co., L.C.*, \_\_ F.3d \_\_, 2009 WL 2914159 (8th Cir. Sept. 14, 2009) (No. 08-1036), reversed the grant of summary judgment to the ADEA defendant. The court noted that the Supreme Court has not yet decided whether the burden-shifting approach applies to ADEA cases, but held that it did not matter because the record was fully developed, and the defendant had advanced its nondiscriminatory reason. “Therefore, we may turn directly to the question whether Baker has presented sufficient evidence to raise a genuine issue for trial on the ultimate question of age discrimination *vel non*.” *Id.* at p. \*4. The net effect of the court’s approach was to bypass any need to address each specific reason advanced by the employer. The court relied on biased remarks unconnected to the personnel action at issue as proof of a biased heart:

We conclude that Baker has presented a submissible case of age discrimination for determination by a jury. Most significant are statements of Lindsey and Thomas, who participated in the decision to terminate Baker, evincing a preference for the employment of younger workers over persons in the class protected by the ADEA. Lindsey’s statement to his management team that Silver Oak was “missing the boat by not hiring more younger, vibrant people,” and that employees “should start looking over applications better and try to consider hiring younger people” is evidence that a reasonable jury could take to reflect a discriminatory attitude by one who participated in Baker’s termination. A jury likewise could find that Thomas’s attitude about employment at Silver Oak was biased against older workers, given her directions that Baker should fire certain workers in their 50s and 60s so

that Thomas could hire “younger workers” who would be “better workers, have more energy, be more enthusiastic and stimulate the residents.”

Other comments by Lindsey and Thomas are open to interpretation, but on a motion for summary judgment, they must be viewed in the context of the foregoing statements. Lindsey's desire to rid the company of “dead wood” could be a legitimate preference to terminate unproductive workers regardless of age, but it could also be a manifestation of a discriminatory attitude against older workers in general. Thomas's criticism of Baker for dressing “like an old lady,” and exhortations to “keep up” with younger executives like Lindsey and Upshaw might be given a benign gloss, but they also could be seen reasonably as further evidence of age-based bias. In light of statements by Lindsey and Thomas that clearly reflect a discriminatory attitude against older workers, statements that might otherwise be dismissed as harmless workplace banter assume greater probative value on a motion for summary judgment.

Other evidence regarding Baker's termination lends further support to her age discrimination claim. In March 2005, shortly after Baker refused directions from Thomas to discipline older workers, Thomas placed her on probation for allegedly failing to obtain approval before admitting a special-needs resident and dismissing an employee without an administrator present. Thomas also stipulated that “further problems” would lead to dismissal, and Lindsey relied on this probationary status as a justification for choosing termination, rather than a lesser sanction, for Baker's alleged transgression in July 2005. Baker testified, however, that the March probationary sanction was unfounded, because she did have approval from Thomas for the admission of the new resident, and because Thomas had authorized Baker to dismiss the employee on her own. If believed, this evidence shows both that Baker did not violate rules of the facility and that Thomas *knew* that she did nothing wrong. In addition, there is evidence that the probationary sanction, leading toward termination, was imposed contrary to the Silver Oak's normal progressive discipline policy, which typically begins with a series of oral and written warnings. And during the same four-month period in which the disciplinary sanctions occurred, Thomas twice asked Baker whether she intended to resign, suggesting that the supervisor was searching for a way to end Baker's employment.

*Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1289–90, 102 FEP Cases 716 (11th Cir. 2008), affirmed the judgment on a jury verdict for the Title VII and § 1981 retaliation plaintiff. The court held that the lower court did not abuse its discretion in admitting evidence of racial slurs uttered by Arthur Bagby and Hunter Bagby, top officials of the company, outside the workplace and at least once referring to Bagby employees, even though they were not decisionmakers. The court held that utterance of the slurs was relevant to the existence of racial harassment, was relevant to the company's asserted antidiscrimination policy, was relevant where uttered in front of the decisionmaker, was relevant where uttered by the official who insisted on forcing plaintiff to arbitrate the pending dispute and who rejected his proposed amendment that would have exempted the pending dispute, was relevant to the good-faith defense, was especially relevant where uttered on company premises, and was relevant to impeach the officials. The racial slurs, in short, were relevant.

## 9. The Courtroom Deputy's Testimony

*Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1291, 102 FEP Cases 716 (11th Cir. 2008), affirmed the judgment on a jury verdict for the Title VII and § 1981 retaliation plaintiff. The court held that the lower court did not abuse its discretion in admitting the testimony of the courtroom deputy that, when she went to the witness room to escort a company supervisor to the stand, Arthur Bagby told her “Go get ‘em, champ.” The court explained:

Bagby Elevator was not unfairly prejudiced by the courtroom deputy's testimony. Bagby Elevator was aware of the policy of the district court that its courtroom deputy would report stray remarks. The courtroom deputy had previously reported a comment made by a black juror who was later dismissed because of the comment, and Bagby Elevator did not object to the application of this policy to dismiss the juror.

Bagby Elevator had the benefit of several procedural safeguards to prevent any undue prejudice. Bagby Elevator cross-examined the courtroom deputy on the comment. . . . Bagby Elevator recalled Ward to elicit testimony about this alleged comment, and the courtroom deputy testified only after Ward stated that he did not remember hearing the comment. The district court instructed the jury that the courtroom deputy's testimony should not suggest that the district court or its employees had an opinion about the merits of the case. In the light of these safeguards, Bagby Elevator was not unduly prejudiced when the district admitted the testimony of the courtroom deputy.

(Citation omitted.)

## 10. Shifting Explanations

*Baker v. Silver Oak Senior Living Management Co., L.C.*, \_\_\_ F.3d \_\_\_, 2009 WL 2914159 (8th Cir. Sept. 14, 2009) (No. 08-1036), reversed the grant of summary judgment to the ADEA defendant. The court held at p. \*5 that adding new explanations—whether from witnesses of from defense counsel—was probative of discrimination:

There is also evidence that Silver Oak gave shifting explanations for why Baker was terminated in July 2005. Thomas stated at first that Baker was terminated for failing to comply with Thomas's direction to call the facility daily while Baker was on medical leave. Lindsey, however, added three other reasons for the termination—that Baker encouraged other employees to quit, disobeyed his orders by leaving the center to run errands throughout the day, and generally performed inconsistently. Thomas also added later that Baker “hassled” staff members and residents to leave the facility. Upshaw gave another reason for Baker's termination, namely, that she was fired because of “multiple problems” with resident charts. Finally, in its brief on appeal, Silver Oak introduced two more grounds for Baker's termination, asserting that she presided over a “lagging” facility and refused to accept the transfer to Butler. Not every supplement to an employer's initial statement of reasons gives rise to an inference of pretext, but substantial variations raise suspicion. See [EEOC v. Trans States Airlines, Inc.](#), 462 F.3d 987, 995 (8th Cir.2006).

## 11. The Time Period for Which Evidence Was Permitted

*Abner v. Kansas City Southern R. Co.*, 513 F.3d 154, 166–68, 102 FEP Cases 616 (5th Cir. 2008), affirmed the award of \$125,000 in punitive damages to the Title VII and § 1981 racial harassment plaintiffs. The court held that the lower court did not abuse its discretion in allowing evidence covering a ten-year time period, or in allowing some evidence predating that period, because of the nature of hostile-environment actions under *Morgan*. The court rejected defendant’s argument that any evidence not pinned down to a specific date must necessarily have fallen outside of the time period:

Furthermore, the court's allowance of testimony regarding events that occurred at an unspecified time within the ten-year period, and some events that occurred during a specific year within that period, by no means placed the events outside of that time frame. Nor was any lack of individualized assessment as to each event's relation to the hostile work environment clearly erroneous. Much of the evidence presented from within the ten-year period related directly to the hostile work environment.

*Id.* at 167.

## 12. Timing

*Darchak v. City of Chicago Bd. of Educ.*, \_\_\_F.3d \_\_\_, 2009 WL 2778227 (7th Cir. Sept. 3, 2009) (No. 08-2732), reversed the grant of summary judgment to defendant on plaintiff’s national-origin discrimination claim. The court held at pp. \*6-\*7 that the lower court erred in disregarding plaintiff’s testimony about biased remarks by Principal Acevedo, on the ground that they were not made at the time of the non-renewal. The court stated at p. \*6: “But the bare fact that Darchak was not fired immediately after Acevedo allegedly made these remarks does not destroy the potential causal connection. The structure of the school year dictated the employment timetable, and Acevedo may not have been able to recommend nonrenewal of Darchak's contract any earlier than she did. In any event, we have previously found that three to four months between a remark and an employment action is not so long as to defeat the inference of a causal nexus, *Bellaver v. Quanex Corp.*, 200 F.3d 485, 493 (7th Cir.2000), and not much more time than that, if any, elapsed here.”

## 13. Criminal Conviction Followed by Pardon

*Abner v. Kansas City Southern R. Co.*, 513 F.3d 154, 168–69, 102 FEP Cases 616 (5th Cir. 2008), affirmed the award of \$125,000 in punitive damages to the Title VII and § 1981 racial harassment plaintiffs. The court held that the lower court did not abuse its discretion in allowing evidence that a Foreman Moore, one of plaintiffs’ asserted harassers, had been convicted of a KKK-related offense in 1992 although he had received a pardon in 1995 that did not require any action on his part. “The court determined, after carefully considering both parties' arguments on the issue and the evidence in the case, that the probative value of the conviction evidence outweighed its prejudicial value. The court also made it clear that it would not tolerate “exaggerated discussion, questions and answers, over and over and over about the conviction of Mr. Moore.” (Footnote omitted.)

#### **14. Secret Tape Recordings**

*Fischer v. Forestwood Co.*, 525 F.3d 972, 983-84, 103 FEP Cases 353 (10th Cir. 2008), reversed in part the grant of summary judgment to the Title VII defendant, and held that the lower court erred in ruling that plaintiff's secret tape-recordings of conversations with his father, who was CEO of the company at the time and who stated that plaintiff would not be rehired unless he returned to the Latter Day Saints. The court held that the tapes were not hearsay, but admissions of a party-opponent who had been authorized to speak on the subject. Because the CEO discussed the company's position, the court rejected the lower court's view that he was speaking as a father and not as a CEO.

#### **15. Settlement Notes**

*EEOC v. UMB Bank Financial Corp.*, 558 F.3d 784, 792, 21 AD Cases 1157 (8th Cir. 2009), affirmed the judgment on a jury verdict for the ADA defendant. The plaintiff-intervenor had been denied an \$11 an hour job. He argued that the lower court erred in admitting a handwritten note of a \$ 7 million to \$ 8 million settlement discussion with a job counselor and the EEOC investigator, saying that it made the intervenor look greedy. The court held it was error, but harmless in light of the intervenor's explicitly asking the jury for \$ 3 million at trial. The court stated: "Any time a plaintiff makes a request for a substantial award before the question of liability is resolved, there is a risk the jury may find that the size of the request provides insight as to the plaintiff's reasonableness and credibility. We believe that risk existed in this case based on the overt \$3 million request just as it may have based on the possible \$7-8 million estimate."

#### **16. Suddenness**

*Sgro v. Bloomberg L.P.*, 2009 WL 2581402 (3d Cir. Aug. 20, 2009) (No. 08-2333) (unpublished), reversed the grant of summary judgment to defendant on only the plaintiff's New Jersey Law Against Discrimination claim of retaliation for making age discrimination claims. Defendant required plaintiff to increase his work days from three days to five days per week, without increased compensation. The court held that plaintiff could not show that this was a pretext for age discrimination, since everyone else in his group worked five days a week, but the timing and suddenness of the requirement raised a triable question whether it was a pretext for retaliation. The court explained at p. \*6:

The District Court concluded that Bloomberg asked Sgro to increase his work schedule "since every other member of the Global Data group was working full time" and therefore held that Sgro could not demonstrate pretext. Sgro, however, had been working in Global Data since 2001, and it was only when he was transferred to PROS, a workgroup within Global Data, that Bloomberg demanded he work five days per week. While that increased work requirement might have been entirely justifiable for business reasons, a reasonable jury could conclude that its suddenness points to retaliation by Bloomberg. See, e.g., *Delli Santi v. CNA Ins. Companies*, 88 F.3d 192, 200 (3d Cir.1996) (holding that, under the NJLAD's retaliation provision, the employer's sudden investigation of employee's low gas mileage reports after years of employee submitting these suspicious reports without incident indicated a retaliatory motive). Accordingly,

Sgro raised a material issue of fact about whether or not his termination was retaliatory, and the court should not have granted summary judgment on this issue for Bloomberg.

### 17. The Most Plausible Story

*Lindsay v. Yates*, \_\_\_ F.3d \_\_\_, 2009 WL 2568196 (6th Cir. Aug. 21, 2009) (No. 08-3633), reversed the grant of summary judgment to the Fair Housing Act defendants and held at pp. \*9-\*10 that plaintiffs' explanation of the facts was sufficiently plausible to warrant trial:

The Lindsays seek to prove pretext by showing the Yateses' explanation for cancelling the purchase agreement is not credible. Although the Yateses claim the record does not include any evidence that could establish that the proffered reason for terminating the purchase agreement was factually untrue, the timing of the termination of the purchase agreement itself casts doubt on the veracity of the Yateses' explanation. *See Asmo*, 471 F.3d at 593 (while temporal proximity “cannot alone prove pretext ... [it] can be used as [sic] ‘indirect evidence’ to support an employee's claim of pretext”). Moreover, notable inconsistencies in the record further raise suspicion as to the validity of the Yateses' non-discriminatory reason. Specifically, Carol Eicher, the Yateses' realtor, testified that Brent explained to her that his mother's motivation for not selling the property was that “the closer we got to closing the more emotional [JoAnn] became.” . . . (Brent's affirmation of this statement to Eicher). A reasonable juror could infer from this testimony that JoAnn gradually arrived at a decision not to sell the home for sentimental reasons after learning of the agreement with the Lindsays. But this notion is at odds with Brent's separate allegation that JoAnn instructed him to terminate the purchasing agreement as soon as she found out that he had contracted to sell the property. . . . The possibility that JoAnn was aware of the contract on the house for several days prior to cancelling the deal, with Brent and Douglas Lindsay's meeting occurring in the intervening period, undermines the Yateses' fundamental allegation that JoAnn had already made up her mind not to sell the property before the Lindsays' offer and that she ordered Brent to cancel the deal when she first learned of it.

In addition, despite JoAnn's expressed desire to keep the home “in the family,” she acknowledged that nobody in the family actually wanted the residence. . . . She also maintained that she was emotionally attached to the property. Yet she admitted that she had agreed, even if reluctantly, to list 2268 Eckert before her husband's death and that she never took the property off the market nor did she advise her realtor not to sell the property before the Lindsays contracted to buy the property. . . . These disconnects between motivation and conduct also cast doubt on the proffered explanation.

Finally, Brent claimed he first learned that his mother did not want to sell 2268 Eckert over the phone, three to five days after the purchase agreement was signed on May 13, 2005. . . . He stated that he informed Eicher of JoAnn's decision that same day over the phone. . . . But Eicher testified that Brent first notified her of JoAnn's decision in person at Brent's office, not over the phone. . . . Eicher also indicated that this meeting did not occur on May 18th but rather on May 24th—the date the agreement was cancelled. . . . A reasonable juror could find that the conflicts in the record over when and

how Brent actually communicated the cancellation to Eicher provide a reason to disbelieve the Yateses' version of the events as they suggest a fabrication of the facts.

A discrimination case is submittable to a jury on the credibility of the defendants' explanation if the plaintiff offers evidence that could establish by a preponderance of the evidence that the proffered reasons had no basis in fact or did not actually motivate the adverse housing decision. *See Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir.1994). We find the evidence discussed above could permit a fact-finder to reasonably conclude that the non-discriminatory explanation of seeking to keep the home “in the family” did not actually motivate the cancellation of the purchasing agreement. Therefore, a genuine issue of material fact exists as to whether the Yateses' proffered reason is a pretext for unlawful discrimination.

#### **H. The Jury Verdict**

*Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1287, 102 FEP Cases 716 (11th Cir. 2008), affirmed the judgment on a jury verdict for the Title VII and § 1981 retaliation plaintiff. In connection with the court’s holding on the permissibility of admitting evidence of other instances of discrimination, the court stated: “The jury reached a split verdict that discharged Bagby Elevator from liability for Goldsmith's claim of a hostile work environment and his claim about a failure to promote. A split verdict suggests that the jury reached a ‘reasoned conclusion free of undue influence.’” (Citation omitted.)

#### **I. Judgment as a Matter of Law, Before Plaintiff Rests**

*Greene v. Potter*, 557 F.3d 765, 768, 105 FEP Cases 1089 (7th Cir. 2009), affirmed the grant of judgment as a matter of law to the Title VII defendant. Defendant moved for and obtained JMOL before plaintiff rested, arguing that the evidence received to date and the expected evidence from plaintiff’s remaining witnesses could not establish pretext. The court of appeals affirmed, stating: “Common practice may be to wait until a party has concluded her case-in-chief to ensure that she has been ‘fully heard’ on the issue, but the Rule provides that ‘[a] motion for judgment as a matter of law may be made at any time before the case is submitted to the jury.’ Fed.R.Civ.P. 50(a)(2). It would be a foolish rule that guaranteed a party the right to present all of its evidence when the effort would clearly be futile. It is proper to enter judgment as a matter of law prior to the close of a plaintiff’s case-in-chief so long as it has become apparent that the party cannot prove her case with the evidence already submitted or with that which she still plans to submit.” (Citations omitted.)

#### **J. Front Pay**

*Tobin v. Liberty Mutual Insurance Co.*, 553 F.3d 121, 137, 21 AD Cases 769 (1st Cir. 2009), affirmed the judgment on a jury verdict for the ADA and Massachusetts-law plaintiff. The court of appeals upheld the jury’s award of \$440,000 in back pay and in front pay running to the date of plaintiff’s planned retirement at age 62, a year and a half after the verdict. The court held that a plaintiff’s duty to mitigate was not absolute:

A victim of employment discrimination ordinarily has the duty to mitigate damages by seeking alternative employment. . . . However, the employer may be held

responsible for the entire amount of lost salary notwithstanding the employee's failure to obtain another job “[i]f the employer's unlawful conduct caused the employee's inability to mitigate damages.” . . . In other words, if an employee is unable to work because of a disability “caused” by the employer, the employee may obtain compensation for the resulting lost pay.

*Id.* at 141 (citations and footnote omitted). The court held that plaintiff made a sufficient showing for a rational jury to accept, particularly because of the devastating psychological consequences of being placed on probationary status each time plaintiff returned from disability leave:

This evidence allowed the jury to find that the lack of support reflected in the company's final denial of accommodations further exacerbated Tobin's stress and precipitated his total inability to function in the workplace. Although the company points to other stressors in Tobin's life that could have contributed to his disability-including family conflicts and additional medical issues-the jury was free to credit the evidence showing a link between Tobin's status at work and his mental condition. Based on that evidence, the jury could have concluded that Liberty Mutual's refusal to accommodate Tobin's disability in early 2001 denied him a last chance to avoid the termination with which he had been threatened, increasing the stress that, in turn, exacerbated his functional difficulties. Losing the job predictably resulted in more anguish, and the jury could have found that it caused further deterioration of his functional abilities.

*Id.* at 143.

*Wilson v. Phoenix Specialty Mfg. Co., Inc.*, 513 F.3d 378, 388, 20 AD Cases 193 (4th Cir. 2008), affirmed the judgment for the ADA plaintiff on his claim that defendant discriminated against him because it regarded him as disabled. The court affirmed the denial of front pay because plaintiff's neurologist testified that “Wilson was competitively unemployable by the end of 2005, which was six months before the entry of judgment.” Judge Niemeyer dissented. *Id.* at 388–95.

#### **K. Compensatory Damages**

*Monteagudo v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 554 F.3d 164, 174-75, 105 FEP Cases 494 (1st Cir. 2009), affirmed the judgment on a jury verdict for the Title VII and Puerto Rican law sexual harassment plaintiff, and held that the lower court did not abuse its discretion in denying remittitur of the compensatory damages. “Here, the jury awarded Monteagudo \$333,000 in compensatory damages without apportioning the award between the Puerto Rico and the Title VII claims. The jury also awarded Monteagudo \$300,000 in punitive damages under Title VII. Upon Monteagudo's motion, the district court issued an order allocating \$1 of the compensatory damages award to the Title VII claims and the remaining \$332,999 to the claims under Puerto Rico laws 17, 69, and 100. The district court then doubled the amount awarded pursuant to the Puerto Rico claims as required by Puerto Rico law, resulting in a total award amount of \$965,999.” *Id.* at 174 (footnote omitted). The court upheld the compensatory damages at 174-75:

With respect to compensatory damages, we hold that the jury's award here of \$333,000 was neither “grossly excessive” to “shock the conscience” of this court, nor was it “exaggeratedly high.” Admittedly the jury was generous in awarding this amount; however, the district court did not abuse its discretion in deciding that the award was proportionate to harm suffered by Monteagudo. As we expressed above, as a result of the sexual harassment she endured for several months, Monteagudo felt “like a piece of meat” and wept every evening. After her constructive discharge, she testified that she suffered from depression and an inability to sleep.

(Footnote omitted.)

*Tobin v. Liberty Mutual Insurance Co.*, 553 F.3d 121, 144-45, 21 AD Cases 769 (1st Cir. 2009), affirmed the judgment on a jury verdict for the ADA and Massachusetts-law plaintiff. The court of appeals upheld the jury’s award of \$500,000 in emotional-distress damages:

The district court did not abuse its discretion in allowing the jury's verdict to stand. Although Liberty Mutual argues that Tobin “failed to present any evidence even hinting that his psychological condition was worsened by Liberty Mutual's failure to accommodate his disability,” other than his “own, self-serving testimony,” we already have explained why the jury permissibly could conclude that the company's denial of accommodations caused his total disability. As recounted above, both Tobin and Kantar testified that at the time of trial-five years after he left the company-Tobin continued to suffer severe emotional distress from Liberty Mutual's failure to provide reasonable accommodations that the jury found would have enabled him to successfully perform his job. Moreover, Tobin had spent thirty-seven years at the company-his entire working life. Kantar observed that “his identity has been connected with Liberty Mutual” and that being “a sales rep for Liberty Mutual [is] ... part of who he is.” Kantar reported that Tobin was “devastated” by the way the termination occurred, perceiving it as a betrayal. Tobin also was told incorrectly on the day of his termination that he and his family no longer had health insurance coverage, information that was particularly alarming in light of his wife's ongoing treatment for breast cancer.FN33

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FN33. Tobin was told two days later that his coverage would, in fact, continue. He described the intervening period as “two days of turmoil.”

## **L. Punitive Damages**

### **1. Upholding Entitlement**

*Monteagudo v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 554 F.3d 164, 175-76, 105 FEP Cases 494 (1st Cir. 2009), affirmed the judgment on a jury verdict for the Title VII and Puerto Rican law sexual harassment plaintiff. The court held that defendant did not preserve its argument that plaintiff had failed to show entitlement to the \$300,000 in punitive damages awarded under Title VII, because its Rule 59 motion and its motion for judgment as a matter of law did not present any developed argument on this point. “In its new trial and remittitur motion, AEELA did not provide any developed argumentation as to why Monteagudo should not be entitled to punitive damages. Further, AEELA did not cite any cases

for its proposition that punitive damages are unwarranted. “[T]heories not raised squarely in the district court cannot be surfaced for the first time on appeal.” *Id.* at 176 (citations omitted). The court held that the lower court did not commit plain error in failing to grant remittitur:

From our review of the record, AEELA has not provided sufficient proof that it had in place an “active mechanism for renewing employees' awareness of the policies through either specific education programs or periodic re-dissemination or revision of their written materials”; FN13 “testimony by appellants' witnesses that indicated that supervisors were trained to prevent discrimination from occurring;” or “examples in which their anti-discrimination policies were successfully followed.” FN14 *Id.* (providing a non-exhaustive list of ways an employer could demonstrate good faith compliance). While having all of these factors is not necessary to qualify for the defense, see *id.*, AEELA has not provided sufficient evidence that it fulfilled any of these factors. Thus, the district court did not commit plain error in upholding the punitive damages award and denying a new trial on damages.

FN13. Notably, Montegudo testified that she had never been offered a seminar on sexual harassment and that she was unaware if any sexual harassment seminars had been given to her supervisors.

FN14. We acknowledge that AEELA was rebuffed by the district court in its attempt to show how its policy was successfully implemented in 2005. However, as we noted in assessing AEELA's evidentiary claim above, this evidence was not proffered to show that AEELA should not have been liable for punitive damages. Rather, AEELA attempted to introduce Medina's testimony in order to bolster its *Faragher-Ellerth* defense. This was evidence which the district court was within its discretion to exclude. Even if the district court had considered the 2005 corrective measure AEELA had employed pursuant to its policy, the district court still did not commit plain error in upholding the punitive damages award. This is because AEELA failed to provide sufficient evidence of other indicators of good faith compliance and because the 2005 corrective measure occurred three years after the sexual harassment in this case. *See id.*

*Id.* at 176.

*EEOC v. Federal Express Corp.*, 513 F.3d 360, 20 AD Cases 204 (4th Cir. 2008), affirmed the award of \$100,000 in punitive damages for a failure to accommodate the charging party's profound deafness by providing a certified ASL translator for meetings and important documents. The court described the four *Lowery* factors relevant to entitlement to punitive damages:

- (1) That the employer's decision maker discriminated in the face of a perceived risk that the decision would violate federal law;
- (2) That the decision maker was a principal or served the employer in a managerial capacity;
- (3) That the decision maker acted within the scope of his employment in making the challenged decision; and
- (4) That the employer failed to engage in good-faith efforts to comply with the

law.

*Id.* at 372. The court noted that defendant admitted the second and third factors were met, and challenged only the first and fourth factors. The court continued:

Here, the instructions (to which FedEx did not object) did not specify who—for example, Hanratty, Cofield, Thompson, or someone else—could be considered as a relevant FedEx managerial official. Therefore, if the jury could have found that any one of them perceived the risk that their failure to accommodate Lockhart would violate the ADA, we are not entitled to vacate the punitive damages award for lack of sufficient evidence to support the first *Lowery* finding.

*Id.* at 373. The court held that Hanratty was aware of defendant’s ADA compliance policy, and that Cofield had contacted other FedEx supervisors seeking clarification on ADA reasonable accommodations. *Id.* at 373–74. The court held that the jury could find that the first factor was met. The court also rejected defendant’s argument that the mere existence of its ADA policy required a finding that it engaged in good-faith compliance efforts. “Unfortunately for FedEx, the mere existence of an ADA compliance policy will not alone insulate an employer from punitive damages liability. Rather, in order to avoid liability for the discriminatory acts of one of its management officials, an employer maintaining such a compliance policy must also take affirmative steps to ensure its implementation.” *Id.* at 374. The court held that higher-level officials were aware of the problem:

On the evidence, the jury was entitled to find that FedEx failed to sufficiently take affirmative steps to ensure the implementation of its ADA compliance policy with respect to Lockhart. In this case, FedEx managerial officials shared responsibility for the failed implementation of the policy with the company’s managerial agents at the FedEx-BWI Ramp. For example, through Cofield, at least three higher FedEx officials received notice that a deaf package handler had requested or was in need of ADA accommodations at the FedEx-BWI Ramp. As noted, Cofield initiated contact in 2001 with an official in FedEx’s legal department to clarify FedEx’s ADA obligations with respect to Lockhart. In 2002, he contacted Connors at “corporate headquarters” twice, and he contacted Arrington, the Senior Personnel Representative for the FedEx-BWI Ramp, at least once, concerning the need to provide ADA accommodations for Lockhart. Furthermore, Connors—as well as Hanratty—was placed on notice of ADA compliance problems at the FedEx-BWI Ramp when Lockhart filed his charge of discrimination with the EEOC in October 2001.

*Id.* at 375. The court noted that defendant did not even provide the charging party with a copy of its ADA reasonable-accommodation request form until three years after he started work, the same month he was fired.

*Abner v. Kansas City Southern R. Co.*, 513 F.3d 154, 102 FEP Cases 616 (5th Cir. 2008), affirmed the award of \$125,000 in punitive damages to the Title VII and § 1981 racial harassment plaintiffs, although the jury did not award compensatory damages and no back pay was involved. The court stated at 160: “We agree with the conclusion of several of our sister circuits that a punitive damages award under Title VII and § 1981 need not be accompanied by

compensatory damages. We base our holding on the language of the statute, its provision of a cap, and the purpose of punitive damages under Title VII.” The court relied in part on the provisions of the Civil Rights Act of 1991 treating compensatory and punitive damages as independent. It continued:

The grounding of punitive damages between the high threshold of culpability for an award and a cap of the amount in any event upholds Congress's purpose in enacting the 1991 amendments to Title VII—to provide “additional remedies,” in the form of damages, to prevent discrimination in the workplace while mitigating the risk of disproportionate awards. Injury that results from discrimination under Title VII is often difficult to quantify in physical terms; preventing juries from awarding punitive damages when an employer engaged in reprehensible discrimination without inflicting easily quantifiable physical and monetary harm would quell the deterrence that Congress intended in the most egregious discrimination cases under Title VII. Indeed, there is some unseemliness for a defendant who engages in malicious or reckless violations of legal duty to escape either the punitive or deterrent goal of punitive damages merely because either good fortune or a plaintiff's unusual strength or resilience protected the plaintiff from suffering harm.

*Id.* at 163–64 (footnotes omitted). The court rejected defendant's argument that the result violated *BMW v. Gore* and was unconstitutional:

As we see it, the combination of the statutory cap and high threshold of culpability for any award confines the amount of the award to a level tolerated by due process. Given that Congress has effectively set the tolerable proportion, the three-factor *Gore* analysis is relevant only if the statutory cap itself offends due process. It does not and, as we have found in punitive damages cases with accompanying nominal damages, a ratio-based inquiry becomes irrelevant. Accepting this analysis makes the sufficiency of evidence to support the statutory threshold a determinant of constitutional validity.

*Id.* at 164 (footnote omitted). The court then described the racial harassment that had occurred over the ten-year period from 1995 to 2005, and held that it was enough to support punitive damages:

Here, Plaintiffs, supervisors, and other witnesses testified to incidents of racially discriminatory behavior that occurred within the ten-year time frame of evidence permitted by the court. Elgie Abner testified about picking up a toolbox on which someone had written, “You lazy ni\_ \_ \_s” and that, when he presented the box to a supervisor, the supervisor laughed. He also testified that a cement pillar in the workshop contained a large marking of “KKK” for a number of years, as did the fuel tanks and roofs of many locomotives in the shop, and that in May of 2005, “Abner is a lazy racist” was written on the walls in the bathroom of the workshop. “Ni\_ \_ \_r go home” and “Lazy ni\_ \_ \_s” were also written on the walls. Harry Brooks testified that foreman Gary Moore would, on the night shift, wait until a large thunderstorm came and then, laughing, send the workers out in the storm. He also testified that an electrical wire in the form of a noose was hanging outside of the workshop, that there was graffiti in the workshop bathrooms that said, “Ni\_ \_ \_s stink” and “Ni\_ \_ \_s go home,” and that supervisors

“knew” of the graffiti and the noose. Napoleon Player testified that a supervisor called him “boy” in 1995 and that Gary Moore referred to him as a “rice-eating Ethiopian” and said that he was going to run two “black asses off.” In 1995, Moore also allegedly referred to Napoleon Player's shift as the “c\_n shift.” Napoleon Player also testified that he did not recall receiving any racial harassment training prior to retiring in June of 2003. Mr. Odom similarly testified that “the first [racial harassment policy] I got was ... if I'm not mistaken, August 2003.” Donald Harville testified that a company surgeon told him, when he arrived late for work in November of 2001, “That's it for you and your ni\_ \_ \_ \_ buddies.” This and other evidence supports the jury's conclusion that KCSR supervisors caused and/or failed to properly respond to numerous instances of racially derogatory behavior in the workplace.

*Id.* at 164–65 (footnotes omitted). The court then held that no award of nominal damages was required in order to support the award of punitive damages:

With respect to the district court's award of nominal damages of \$1 to each Plaintiff, we find such formalities to be unnecessary. We have required a district court to grant a plaintiff \$1 in nominal damages when her constitutional rights were violated. Other circuits, however, have found that a jury verdict of liability under Title VII did not require a court to award a nominal damages award in the absence of a request that the jury determine nominal damages or a request for additur by the judge. Because the award of actual or punitive damages is capped under Title VII, we do not require a ceremonial anchor of nominal damages to tie to a punitive damages award.

*Id.* at 165 (footnotes omitted).

*Morgan v. New York Life Insurance Co.*, 559 F.3d 425, 440-41, 105 FEP Cases 1217 (**6th Cir.** 2009), affirmed the judgment of age discrimination liability and the \$ 6 million compensatory-damages award under the Ohio Civil Rights Act, and held that plaintiff had shown entitlement to punitive damages under Ohio law. Its description appears quite similar to Federal law. The court relied on comparators to show entitlement to punitive damages:

The record includes evidence that New York Life consciously disregarded Morgan's right to be free from age discrimination. While New York Life correctly argues that courts should not second guess a company's business decisions, the record establishes quite clearly that the company found extenuating circumstances in certain instances when a younger managing partner had performance issues. This was not the case with Morgan (or other older managing partners).

*Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1280–82, 102 FEP Cases 716 (**11th Cir.** 2008), affirmed the judgment on a jury verdict for the Title VII and § 1981 retaliation plaintiff. Plaintiff was fired immediately after he refused to sign an agreement to arbitrate his pending charge. Because he was willing to arbitrate future claims, the dispute was only about arbitration of his pending employment discrimination claim. The court held that there was sufficient evidence that Bagby was recklessly indifferent to plaintiff's Federally guaranteed rights in requiring him to sign the arbitration agreement and refusing to allow a modification that would have excluded his pending claim. The court held that the evidence on plaintiff's

underlying racial harassment case also showed recklessness. *Id.* at 1280–81. The court rejected defendant’s argument that its policy on harassment barred the imposition of punitive damages, because the policy existed in name only:

Bagby Elevator contends that it attempted in good faith to comply with the civil rights laws because it adhered to an antidiscrimination policy, but the record supports the finding of the jury that the antidiscrimination policy of Bagby Elevator was totally ineffective. Goldsmith introduced evidence that managers at Bagby Elevator, namely, Steber and Bowden, had actual notice that white employees had uttered racial slurs in the workplace but did not discipline those employees. Goldsmith offered proof that other employees who had filed EEOC charges and complained of racial slurs were soon afterward terminated. Goldsmith testified that the policy was ineffective and that it did not stop Farley from making racial comments because supervisors did not follow the policy. Arthur Bagby, president and owner of Bagby Elevator, testified that he was not “that good on the [antidiscrimination] policy,” and he admitted that he did not know how he would discipline a supervisor for using racial slurs or failing to discipline an employee for using racial slurs. Both Bowden and Steber acknowledged that the policy did not prevent Farley from making a racial slur, and Steber testified that Farley could have been, but was not, terminated for making one racial slur. Goldsmith testified that Bagby Elevator did not provide training regarding discrimination in the workplace.

*Id.* at 1281–82.

## 2. Amounts

*Exxon Shipping Co. v. Baker*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2605, 2634 (2008), a Federal maritime law case, held that in light of the substantial compensatory damages awarded, a 1:1 punitive damages ratio was appropriate:

Applying this standard to the present case, we take for granted the District Court's calculation of the total relevant compensatory damages at \$507.5 million. . . . A punitive-to-compensatory ratio of 1:1 thus yields maximum punitive damages in that amount.

Justice Scalia, joined by Justice Thomas, concurred. *Id.* at 2634. Justice Stevens concurred in part and dissented in part. *Id.* at 2634-38. Justice Ginsburg concurred in part and dissented in part. *Id.* at 2639-40. Justice Breyer concurred in part and dissented in part. *Id.* at 2640-41.

*Monteagudo v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 554 F.3d 164, 175, 105 FEP Cases 494 (1st Cir. 2009), affirmed the judgment on a jury verdict for the Title VII and Puerto Rican law sexual harassment plaintiff, and held that the lower court did not abuse its discretion in denying remittitur of the punitive damages.

*EEOC v. Federal Express Corp.*, 513 F.3d 360, 376, 20 AD Cases 204 (4th Cir. 2008), affirmed the award of \$8,000 in compensatory damages and \$100,000 in punitive damages for a failure to accommodate the charging party’s profound deafness by providing a certified ASL translator for meetings and important documents. The court rejected defendant’s challenge to the reprehensibility factor:

Although Lockhart suffered no physical harm from the actions complained of, his supervisors at FedEx were plainly indifferent to the fact that their failure to accommodate his disability could jeopardize his safety, and potentially implicate the safety of others. Because Lockhart was denied the ADA accommodations necessary for him to understand and participate in employee meetings and training sessions, he consistently missed updates about important subjects such as workplace safety, handling dangerous goods, interpreting hazardous labels, and potential anthrax exposure. Finally, Lockhart's supervisors were familiar with the mandate of the ADA and perceived the risk that their conduct was unlawful. Under the evidence, the jury was thus entitled to find that FedEx higher management officials, including Cofield and Hanratty, had acted reprehensibly with respect to Lockhart's need for ADA accommodations.

*Id.* at 377. The court also rejected defendant's argument that the 12.5 ratio of punitive to compensatory damages was unconstitutionally excessive, holding that such ratios are merely instructive and do not establish bright lines. *Id.* at 377–78. Moreover, the court held that the fact the total award was well below the \$300,000 statutory cap showed it was reasonable.

*Abner v. Kansas City Southern R. Co.*, 513 F.3d 154, 165, 102 FEP Cases 616 (**5th Cir.** 2008), affirmed the award of \$125,000 in punitive damages to the Title VII and § 1981 racial harassment plaintiffs, although the jury did not award compensatory damages and no back pay was involved. The court reviewed recent decisions, and stated: “We similarly refuse to strike down the jury award here, as it fell well below the cap, and there is no indication that it resulted from jury bias or insufficient evidence of malice.”

*Morgan v. New York Life Insurance Co.*, 559 F.3d 425, 441-43, 105 FEP Cases 1217 (**6th Cir.** 2009), affirmed the judgment of age discrimination liability and the \$ 6 million compensatory-damages award under the Ohio Civil Rights Act, and held that plaintiff had shown entitlement to punitive damages under Ohio law. The court remanded the award of \$10 million in punitive damages and held that the lower court should not award more in punitive damages than the \$6 million awarded in compensatory damages.

*Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1282–85, 102 FEP Cases 716 (**11th Cir.** 2008), affirmed the lower court's refusal to order a remittitur on the jury award of \$500,000 in punitive damages, on top of the award of \$27,160.59 in back pay and \$27,160.59 in damages for mental anguish for the Title VII and § 1981 retaliation plaintiff.

One factor that suggests that the misconduct of Bagby Elevator was reprehensible is that Goldsmith suffered both economic harm and emotional and psychological harm. Goldsmith's relationships with his family suffered, he attended counseling after his termination, and his termination made him feel “hurt” and “upset.” . . . The record also establishes that Goldsmith was financially vulnerable and had to borrow money after he was terminated.

Another factor that suggests that the misconduct of Bagby Elevator was reprehensible is that Bagby Elevator engaged in a pattern of retaliatory and discriminatory misconduct. Three other employees who had filed EEOC charges or complained about racial slurs were terminated before Goldsmith. There also was

substantial evidence, as discussed above, that Bagby Elevator engaged in a pattern of reckless indifference to its employees' federal rights.

*Id.* at 1283. The court also rejected defendant's argument that the 9.2-to-1 ratio of punitive to compensatory damages (including back pay) was excessive. The court stated that a higher ratio could also have been upheld. It noted that Bagby had 150 employees, and a Title VII damages cap of \$100,000. It held that "an award of five times that amount is not excessive." *Id.* at 1284.

**M. Allocation of the Award**

*Monteagudo v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 554 F.3d 164, 172, 105 FEP Cases 494 (1st Cir. 2009), affirmed the judgment on a jury verdict for the Title VII and Puerto Rican law sexual harassment plaintiff. The court affirmed the lower court's allocation of the award between Title VII and Puerto Rican law so as to maximize plaintiff's recovery:

**N. Attorneys' Fees**

**1. FLSA Plaintiff Denied Fees for Lack of Collegiality**

*Sahyers v. Prugh, Holliday & Karatinos, P.L.*, 560 F.3d 1241, 14 WH Cases 2d 1000 (11th Cir. 2009), affirmed the complete denial of attorneys' fees in an FLSA case that settled when plaintiff accepted an offer of judgment for \$3,500 plus fees and expenses. Plaintiff's demand in settlement discussions had been in the \$25,000 to \$35,000 range, and she had refused to provide discovery to set forth the amount of time on which she claimed unpaid overtime was due. The court stated at 1245-46:

The district court's inherent powers support its decision here. Defendants are lawyers and their law firm. And the lawyer for Plaintiff made absolutely no effort—no phone call; no email; no letter—to inform them of Plaintiff's impending claim much less to resolve this dispute before filing suit. Plaintiff's lawyer slavishly followed his client's instructions and—without a word to Defendants in advance—just sued his fellow lawyers. As the district court saw it, this conscious disregard for lawyer-to-lawyer collegiality and civility caused (among other things) the judiciary to waste significant time and resources on unnecessary litigation and stood in stark contrast to the behavior expected of an officer of the court. The district court refused to reward—and thereby to encourage—uncivil conduct by awarding Plaintiff attorney's fees or costs. Given the district court's power of oversight for the bar, we cannot say that this decision was outside of the bounds of the district court's discretion.

(Footnotes omitted.)

**2. Fee Recoveries**

*Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1291–92, 102 FEP Cases 716 (11th Cir. 2008), affirmed the lower court's award of approximately \$160,000 in fees to the successful Title VII and § 1981 retaliation plaintiff, who recovered \$500,000 in punitive damages, \$27,160.59 in back pay, and \$27,160.59 in damages for mental anguish. The court

held that the lower court did not abuse its discretion in declining to reduce the award because plaintiff had lost approximately half the issues. The court stated at 1292:

The district court did not abuse its discretion. A review of the record establishes that evidence supporting Goldsmith's successful claim of retaliation was inextricably intertwined with evidence supporting his unsuccessful claims, and the punitive damages award was supported by evidence underlying the unsuccessful claims. The "me too" evidence was admissible both as evidence of the intent of Bagby Elevator to retaliate against Goldsmith and as evidence of Goldsmith's hostile work environment claim. The evidence regarding Goldsmith's failure to promote claim provided the basis for Goldsmith's first EEOC charge, which was in turn necessary for Goldsmith to prove his claim of retaliation. The evidence regarding the EEOC investigation and cause determination supported all of Goldsmith's claims. Because Goldsmith's successful claim of retaliation was related to his unsuccessful claims and he "won substantial relief," we conclude that the refusal of the district court to reduce the amount of attorney's fees and costs was not an abuse of discretion.

**O. Costs**

*Little v. Mitsubishi Motors North America, Inc.*, 514 F.3d 699, 102 FEP Cases 977 (7th Cir. 2008) (*per curiam*), affirmed the lower court's award under 28 U.S.C. § 1920 of the costs of both video-taping and stenographically transcribing depositions. The court also held that the costs of computerized research were recoverable under § 1920.

**P. Sanctions**

*Agiwal v. Mid Island Mortgage Corp.*, 555 F.3d 298, 105 FEP Cases 873 (2d Cir. 2009), affirmed the dismissal with prejudice of the pro se plaintiff's Complaint as a sanction for willful and repeated failures to comply with discovery requests despite numerous warnings from the court.

*EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 468, 21 AD Cases 788(5th Cir. 2009), affirmed the award of \$225,000 in attorneys' fees against the EEOC in favor of the ADA defendant. The court held that the EEOC had not engaged in reasonable efforts to conciliate the case. It stated: "By repeatedly failing to communicate with Agro, the EEOC failed to respond in a reasonable and flexible manner to the reasonable attitudes of the employer. The EEOC abandoned its role as a neutral investigator and compounded its arbitrary assessment that Agro violated the ADA with an insupportable demand for compensatory damages as a weapon to force settlement." The district court awarded fees for the period of time after the charging party's deposition revealed that he was not significantly limited in any major life activity.

*Garner v. Cuyahoga County Juvenile Court*, 554 F.3d 624, 646-47, 105 FEP Cases 507 (6th Cir. 2009), said it all in its Conclusion:

For all of the reasons set forth above, we **AFFIRM** the portion of the district court's judgment (1) finding that the employees' claims were frivolous under 42 U.S.C. § 1988, and (2) finding that Attorney Frost engaged in conduct sanctionable under 28 U.S.C. § 1927. On the other hand, we **REVERSE** the portion of the district court's

judgment (1) holding the employees jointly and severally liable for \$660,103.49 in attorney fees awarded under 42 U.S.C. § 1988, and (2) holding Attorney Frost jointly and severally liable for the same fees as a sanction under 28 U.S.C. § 1927.

With respect to the attorney fees to be imposed on the employees under 42 U.S.C. § 1988, we **REMAND** with instructions to (1) determine the point in time when each employee's claim clearly became frivolous (which might simply be at the close of discovery), (2) calculate, on an individual basis, the attorney fees owed by each employee after that point in time, and (3) consider any new information proffered by the employees regarding their inability to pay, as well as relevant evidence on this issue that already exists in the record.

With respect to the attorney fees to be imposed on Attorney Frost under 28 U.S.C. § 1927, we **REMAND** with instructions to (1) determine the point in time when the pursuit of each of her clients' claims became unreasonable and vexatious, (2) calculate the attorney fees owed by her after that point in time, (3) decide whether that liability should be joint and several with each of her clients, and (4) consider any proof that she may wish to present regarding her inability to pay.

In summary, we **AFFIRM** in part and **REVERSE** in part the judgment of the district court, and **REMAND** the case for further proceedings consistent with this opinion.

#### **Q. Taxes**

*Eshelman v. Agere Systems, Inc.*, 554 F.3d 426, 441-42, 21 AD Cases 865 (3d Cir. 2009), affirmed the award of an additional amount to compensate the ADA plaintiff for the additional taxes due on her lump-sum recovery, stating:

We hold that a district court may, pursuant to its broad equitable powers granted by the ADA, award a prevailing employee an additional sum of money to compensate for the increased tax burden a back pay award may create. Our conclusion is driven by the “make whole” remedial purpose of the antidiscrimination statutes. Without this type of equitable relief in appropriate cases, it would not be possible “to restore the employee to the economic status quo that would exist but for the employer's conduct.”

(Citation omitted.) The court accepted the uncontradicted evidence of plaintiff's economics expert and upheld the \$6,893.00 award “to compensate her for the negative tax consequences of receiving a lump sum back pay award.” *Id.* at 442-43.

#### **VIII. Federal-Sector Particularities**

*Grosdidier v. Chairman, Broadcasting Bd. of Governors*, 560 F.3d 495 (D.C. Cir. 2009), held that Federal employees challenging the employment of noncitizens, pursuant to a finding that qualified citizens were not available, may not challenge their non-selection for promotions under the Administrative Procedures Act, and that their exclusive remedy is under the Civil Service Reform Act.

## **IX. Appellate Tips for Effective Advocacy**

*Garg v. Potter*, 521 F.3d 731, 736-37, 20 AD Cases 705 (7th Cir. 2008), affirmed the grant of summary judgment to the Rehabilitation Act defendant U.S. Postal Service because plaintiff did not perform the essential functions of her job even with reasonable accommodation. The court held that plaintiff waived any argument that the accommodations afforded her were not reasonable, because her entire brief on appeal was devoted to arguing that she was disabled, and she did not address the reasonableness of the accommodations.

*Burnett v. Southwestern Bell Telephone, L.P.*, 555 F.3d 906, 14 WH Cases 2d 811 (10th Cir. 2009), affirmed the grant of summary judgment to the FMLA and ERISA defendant because plaintiff had not filed an appendix adequate to allow her arguments to be considered. For example, she failed to include the papers on the motion for summary judgment, and many of the exhibits. The court stated at 909-10:

While we could access fairly readily the motions, responses, and replies discussed above on the district court's electronic filing system or otherwise, should we choose to do so . . . the essential supporting exhibits were filed under seal in the district court. The sealed nature of the exhibits means that even this Court is precluded from accessing them absent a specific request to the district court clerk's office. Although the parties do not specifically dispute the contents of the missing exhibits, we are not inclined to consider reversing the district court based upon the parties' tacit assurances that we have before us all of the relevant matter—for example, the language from the missing exhibits that the district court quoted in its orders.

The court added at 910: “This Court is not obligated to remedy these failures by counsel to designate an adequate record. . . . Our procedural rules should not be considered ‘empty gestures,’ as ‘[w]e have repeatedly enforced them.’ . . . Appellate review of the issues raised by Ms. Burnett is not possible without reference to the absent materials. . . . As we have warned parties many times, we regularly decline to hear claims predicated upon record evidence not included in the appendix. We likewise decline to do so here and, therefore, are constrained to affirm.”