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Trends in Employment Discrimination Law

by

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I. The Statistics

<u>Twelve-Month Period</u>	<u>Number of Employment Discrimination Cases Filed in These 12 Months</u>
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 14, 2010, from the EEOC web site, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>:

Category	FY 2007	FY 2009	Percent Change
Total charges	82,792	93,277	12.7%
Race	30,510	33,579	10.1%
Retaliation	26,663	33,613	26.1%
Sex	24,826	28,372	14.3%
Age	19,103	22,778	19.2%
Disability	17,734	21,451	21.0%
National Origin	9,396	10,601	12.8%

Category	FY 2007	FY 2009	Percent Change
Religion	2,880	3,386	17.6%
Equal Pay Act	818	942	15.2%

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running the following algorithms on WestLaw® for all appellate decisions reflected on WestLaw®, whether published or unpublished, for each calendar year and for 2009 to mid-September:

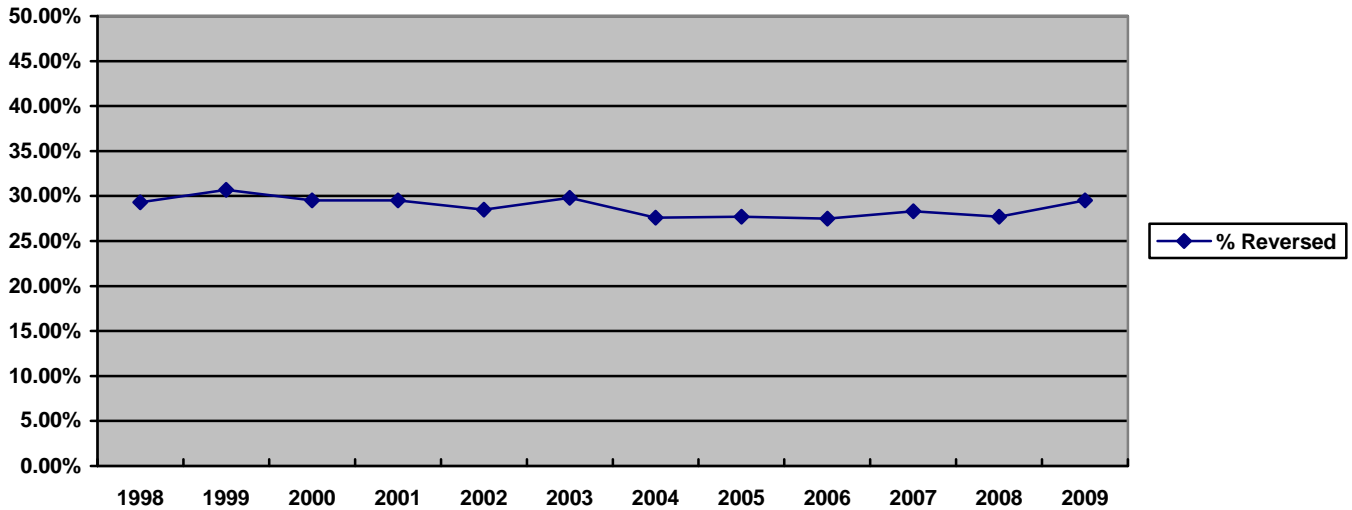
(discriminat! retaliat! harass! "hostile environment") & ("rule 56" "summary judgment") & (reversed vacated) & da(aft 01/01/2009) & da(bef 01/01/2010)

(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.

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

Calendar Year	Summary Judgments Reversed or Vacated	Summary Judgments Affirmed	Percent of Total Reversed or Vacated
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. Genetic Information Nondiscrimination Act of 2008

GINA, Public Law 110-233, 122 Stat. 881 (2008), effect on November 21, 2009. 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.

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.”

B. 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.

V. The Constitution and Statutes

A. The First Amendment

Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez, ___ U.S. ___, 130 S.Ct. 2971 (2010), held that the First Amendment is not violated by requiring that a student organization applying for official recognition, and thus for a share of student activity fees, comply with the university's nondiscrimination policy. Justice Ginsburg, writing for the majority, described the issue:

In the view of petitioner Christian Legal Society (CLS), an accept-all-comers policy impairs its First Amendment rights to free speech, expressive association, and free exercise of religion by prompting it, on pain of relinquishing the advantages of recognition, to accept members who do not share the organization's core beliefs about religion and sexual orientation. From the perspective of respondent Hastings College of the Law (Hastings or the Law School), CLS seeks special dispensation from an across-the-board open-access requirement designed to further the reasonable educational purposes underpinning the school's student-organization program.

In accord with the District Court and the Court of Appeals, we reject CLS's First Amendment challenge. Compliance with Hastings' all-comers policy, we conclude, is a

reasonable, viewpoint-neutral condition on access to the student-organization forum. In requiring CLS-in common with all other student organizations-to choose between welcoming all students and forgoing the benefits of official recognition, we hold, Hastings did not transgress constitutional limitations. CLS, it bears emphasis, seeks not parity with other organizations, but a preferential exemption from Hastings' policy. The First Amendment shields CLS against state prohibition of the organization's expressive activity, however exclusionary that activity may be. But CLS enjoys no constitutional right to state subvention of its selectivity.

Id. at 2978. The school offered CLS the alternative of not being officially recognized and sharing in student activity fees, but of limiting its membership as it wanted and holding meetings and activities in Hastings facilities and having access to campus bulletin boards and other means of advertising its activities. *Id.* at 2981. The Court rejected CLS's argument challenging Hastings' policy as written, *i.e.*, that the written policy's references to nondiscrimination imposed burdens only on religious organizations with differing tenets, because the parties had stipulated below that Hastings' current policy was an "all comers" policy applicable to all student organizations, such that the campus Democratic Club could not exclude Republicans. The majority strongly emphasized the importance of stipulations:

Litigants, we have long recognized, "[a]re entitled to have [their] case tried upon the assumption that ... facts, stipulated into the record, were established." *H. Hackfeld & Co. v. United States*, 197 U.S. 442, 447, 25 S.Ct. 456, 49 L.Ed. 826 (1905). This entitlement is the bookend to a party's undertaking to be bound by the factual stipulations it submits. See *post*, at 3005 (ALITO, J., dissenting) (agreeing that "the parties must be held to their Joint Stipulation"). As a leading legal reference summarizes:

"[Factual stipulations are] binding and conclusive ..., and the facts stated are not subject to subsequent variation. So, the parties will not be permitted to deny the truth of the facts stated, ... or to maintain a contention contrary to the agreed statement, ... or to suggest, on appeal, that the facts were other than as stipulated or that any material fact was omitted. The burden is on the party seeking to recover to show his or her right from the facts actually stated." 83 *C.J.S., Stipulations* § 93 (2000) (footnotes omitted).

This Court has accordingly refused to consider a party's argument that contradicted a joint "stipulation [entered] at the outset of th[e] litigation." *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 226, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000). Time and again, the dissent races away from the facts to which CLS stipulated. See, *e.g.*, *post*, at 3001, 3002, 3003, 3005 - 3006, 3012 - 3013. But factual stipulations are "formal concessions ... that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Thus, a judicial admission ... is conclusive in the case." 2 K. Broun, McCormick on Evidence § 254, p. 181 (6th ed.2006) (footnote omitted). See also, *e.g.*, *Oscanyan v. Arms Co.*, 103 U.S. 261, 263, 26 L.Ed. 539 (1881) ("The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced.").

Id. at 2982 (footnotes omitted). The case involves a number of other fascinating issues, but the

other issues are less likely to be relevant to the litigation of employment law cases than the above. Justice Ginsburg’s majority opinion was joined by Justices Stevens, Kennedy, Breyer, and Sotomayor. Justices Stevens and Kennedy filed concurring opinions. Justice Alito dissented, joined by the Chief Justice and Justices Scalia and Thomas.

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.

Alcazar v. Corporation of Catholic Archbishop of Seattle, ___ F.3d ___, 2010 WL 917200 (9th Cir. March 16, 2009), affirmed the dismissal of a seminarian’s claim for unpaid overtime wages under the Washington Minimum Wage Act on the ground that the seminarian was covered by the ministerial exception and that enforcement of the minimum-wage law would interfere with defendant’s rights under the Free Exercise Clause and the Establishment Clause.

B. The Fourteenth Amendment

1. 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.

C. 42 U.S.C. § 1981

1. Interracial Association

Floyd v. Amite County School Dist., 581 F.3d 244, 107 FEP Cases 147 (5th Cir. 2009), affirmed the grant of summary judgment to the § 1981 and Title VII 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 250-51:

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.)

D. Title VII of the Civil Rights Act of 1964

1. Pregnancy Discrimination Prior to the PDA

AT & T Corp. v. Hulteen, ___ U.S. ___, 129 S.Ct. 1962, 173 L.Ed.2d 898 (2009), held that AT&T did not have to give pension service credit to periods of time in which plaintiffs were not working because of pregnancy discrimination occurring before the Pregnancy Discrimination Act amendment to Title VII made such discrimination unlawful, because the denial of the service credit was an aspect of a bona fide seniority system. The court held that the Lilly Ledbetter Fair Pay Act did not alter this holding. “For the reasons already discussed, AT & T's pre-PDA decision not to award Hulteen service credit for pregnancy leave was not discriminatory, with the consequence that Hulteen has not been ‘affected by application of a discriminatory compensation decision or other practice.’ § 3(A), 123 Stat. 6.” *Id.* at 1973.

2. 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.*, 581 F.3d 244, 107 FEP Cases 147 (5th Cir. 2009), in the section above on § 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 at 513: “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.

3. Sexual Orientation vs. Gender Stereotyping

Prowel v. Wise Business Forms, Inc., 579 F.3d 285, 107 FEP Cases 1 (3d Cir. 2009), 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 291-92:

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 nalgene 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. *Id.* at 292 n. 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.

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

Mikula v. Allegheny County, 583 F.3d 181, 107 FEP Cases 238 (3d Cir. 2009) (*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 186:

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.

E. The Age Discrimination in Employment Act

1. “Because of . . . Age”

See the discussion of *Gross v. FBL Financial Services, Inc.*, __ U.S. __, 129 S. Ct. 2343, 174 L.Ed.2d 119, 106 FEP Cases 833 (2009), in the section below on “Mixed Motives.”

2. Availability of McDonnell Douglas Burden-Shifting

Velez v. Thermo King de Puerto Rico, Inc., 585 F.3d 441, 446-47, 107 Fair Empl.Prac.Cas. (BNA) 769 (1st Cir. 2009), held that the *McDonnell Douglas* burden-shifting framework still remains available in ADEA claims. The court explained:

As with other kinds of employment discrimination cases, however, ADEA plaintiffs rarely possess "smoking gun" evidence to prove their employers' discriminatory motivations. . . . ADEA plaintiffs who do not have "smoking gun" evidence may nonetheless prove their cases by using the three stage burden-shifting framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

(Footnote omitted.)

Gorzynski v. Jetblue Airways Corp., 596 F.3d 93, 108 Fair Empl.Prac.Cas. (BNA) 769 (2d Cir. 2010), held that the *McDonnell Douglas* burden-shifting framework still remains available in ADEA claims. The court stated: "Accordingly, we remain bound by, and indeed see no reason to jettison, the burden-shifting framework for ADEA cases that has been consistently employed in our Circuit."

Smith v. City of Allentown, 589 F.3d 684, 691, 108 Fair Empl.Prac.Cas. (BNA) 18 (3d Cir. 2009), agreed: "Hence, *Gross*, which prohibits shifting the burden of persuasion to an ADEA defendant, does not forbid our adherence to precedent applying *McDonnell Douglas* to age discrimination claims."

Geiger v. Tower Automotive, 579 F.3d 614, 622, 107 Fair Empl.Prac.Cas. (BNA) 285 (6th Cir. 2009), also agreed: "The *McDonnell Douglas* test thus remains applicable law in this circuit . . . and we are without authority to overrule prior published decisions of our court absent an inconsistent decision of the Supreme Court or an en banc reversal. . . . Consequently, we find that the *McDonnell Douglas* framework can still be used to analyze ADEA claims based on circumstantial evidence." (Citations omitted.)

F. The Americans with Disabilities Act and Rehabilitation Act

1. Ministerial Exception

E.E.O.C. v. Hosanna-Tabor Evangelical Lutheran Church and School, 597 F.3d 769, 778-79, 22 A.D. Cases 1697 (6th Cir. 2010), reversed the grant of summary judgment to the ADA defendant. The court held that the charging party was not a ministerial employee, and thus that the defendant was not entitled to the ministerial exception. The court set forth the standards:

The question of whether a teacher at a sectarian school classifies as a ministerial employee is one of first impression for this Court. However, the overwhelming majority of courts that have considered the issue have held that parochial school teachers such as Perich, who teach primarily secular subjects, do not classify as ministerial employees for purposes of the exception. . . .

By contrast, when courts have found that teachers classify as ministerial employees for purposes of the exception, those teachers have generally taught primarily religious subjects or had a central role in the spiritual or pastoral mission of the church.

...

(Citations omitted.) The court added: “Perich spent approximately six hours and fifteen minutes of her seven hour day teaching secular subjects, using secular textbooks, without incorporating religion into the secular material.” The court held that the fact that the charging party held the title of commissioned minister was irrelevant, because her primary duties were secular.

2. Disability

Side Effects of Medication: *Sulima v. Tobyhanna Army Depot*, __ F.3d __, 2010 WL 1427542 (3d Cir. April 12, 2010) (No. 08-4684), affirmed the grant of summary judgment to the ADA and Rehabilitation Act defendants. Plaintiff took medications for obesity and sleep apnea. “Thus, we must consider whether the meaning of ‘disability’ under the ADA can encompass an impairment resulting solely from the side effects of medication, whether or not the underlying health problems are disabling.” The court held that such a claim can be viable, but was subject to substantial limitations:

We agree with the Seventh Circuit that side effects from medical treatment may themselves constitute an impairment under the ADA. However, as the Seventh Circuit noted, this category of disability claims is subject to limitation. For a treatment's side effects to constitute an impairment under the ADA, it is not enough to show just that the potentially disabling medication or course of treatment was prescribed or recommended by a licensed medical professional. Instead, following the *Christian* test, the medication or course of treatment must be required in the “prudent judgment of the medical profession,” and there must not be an available alternative that is equally efficacious that lacks similarly disabling side effects. *Christian*, 117 F.3d at 1052. The concept of “disability” connotes an involuntary condition, and if one can alter or remove the “impairment” through an equally efficacious course of treatment, it should not be considered “disabling.”

The court held that plaintiff did not meet these standards. His doctor stopped the medications because of their side effects, showing that the medications were not medically necessary, the two-month period from the onset of side effects to the discontinuance of the medications was too short to be disabling, and there was no showing of the unavailability of equally efficacious courses of treatment without such side effects.

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, 21 A.D. 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 862: “While we decide this case under the ADA, and not the ADAAA, the original congressional intent as expressed in the amendment bolsters our conclusions.”

3. “Qualified” Individuals

Kinneary v. City of New York, ___ F.3d ___, 2010 WL 986547 (**2d Cir.** March 19, 2010), reversed the judgment for the ADA plaintiff because he was not “qualified.” Plaintiff was a sludge boat captain who was subject to random drug testing. He had paruresis, or “shy bladder” syndrome, and could not pass enough urine for the drug test within the three-hour time limit. He was given an accommodation of having the unsuccessful drug test vacated if he provided within five days an adequate note from his physician, meeting stated criteria, but the physician’s note fell short of the criteria.

Comment on *Kinneary*: Too many cases founder because busy physicians are unaware of the need for a note meeting legal criteria foreign to them because the criteria are not medical. Employees should not lose their jobs because their physicians dash off something that is not adequate for the purpose. One remedy is to work with local medical societies to educate physicians, but another is for employers to use a bit more common sense when dealing with this common problem, and call the physicians to get the necessary information orally or to impress upon the physician the need to address the stated criteria.

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), *cert. denied*, ___ U.S. ___, 129 S.Ct. 180, 172 L.Ed.2d 241 (2008), 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

Reasonable Accommodation in Getting to Work: *Colwell v. Rite Aid Corp.*, ___ F.3d ___, 2010 WL 1376301 (3d Cir. April 8, 2010) (No. 08-4675), affirmed in part and reversed in part the grant of summary judgment to the ADA defendant. Plaintiff was blind in one eye, could not safely drive to work at night, had no public-transportation option available to her, and requested an accommodation of a transfer to the day shift. Defendant refused, saying it would

not be fair to other employees. The court held that defendant had a duty to accommodate plaintiff's difficulty in getting to work.

“Perks” May be a 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.

Essential Function of Job: *Gratzl v. Office of Chief Judges of 12th, 18th, 19th, and 22nd Judicial Circuits*, ___ F.3d ___, 2010 WL 1330237 (7th Cir. April 7, 2010) (No. 08-3134), affirmed the grant of summary judgment to the ADA defendant. The plaintiff court reporter had been hired for the specialist control room position, which she could perform, but the structure of the job was changed to require all court reporters to rotate through the courtrooms. Because of her incontinence problem, plaintiff could not work in courtrooms without frequent disruption of the proceedings. The court stated: “Gratzl cannot prove that she is qualified for her current job simply by citing evidence that she was qualified for a previous job, with different essential functions, that has been eliminated.” The court held: “An employer need not create a new job or strip a current job of its principal duties to accommodate a disabled employee. . . . Nor is there any duty to reassign an employee to a permanent light duty position.” The court also held that her complaint should be dismissed because she rejected the defendant's offer of accommodation which the court held exceeded the requirements of the ADA.

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.

7. The Rehabilitation Act Covers Independent Contractors

Fleming v. Yuma Regional Medical Center, 587 F.3d 938, 22 A.D. Cases 1033 (9th Cir. 2009), held that independent contractors are covered by the Rehabilitation Act. *Id.* at 941-42. The court also held that the limiting definitions in the ADA could not be carried over into the Rehabilitation Act without an express indication of Congressional intent. *Id.* at 943-44.

G. Family and Medical Leave Act

1. Evidence Showing a Serious Health Condition

Schaar v. Lehigh Valley Health Services, Inc., 598 F.3d 156, 161, 2010 WL 825257, 15 Wage & Hour Cas.2d (BNA) 1677 (3d Cir. 2010), vacated the grant of summary judgment to the FMLA defendant. The court held:

Contrary to the Fifth and Ninth Circuits, however, we do not find lay testimony, by itself, sufficient to create a genuine issue of material fact. Some medical evidence is still necessary to show that the incapacitation was "due to" the serious health condition. 29 C.F.R. § 825.114. This does not place an undue burden on employees because they must present some medical evidence anyway to establish the inability to perform the functions of the position. *Id.* § 825.115. In contrast, allowing unsupported lay testimony would place too heavy a burden on employers to inquire into an employee's eligibility for FMLA leave based solely on the employee's self-diagnosed illness. For these reasons, we hold that an employee may satisfy her burden of proving three days of incapacitation through a combination of expert medical and lay testimony.

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, 679, 14 Wage & Hour Cas.2d (BNA) 903 (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, 105 Fair Empl.Prac.Cas. (BNA) 971, 14 Wage & Hour Cas.2d (BNA) 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 1229-30 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.

6. Rejecting a "Fruit of the Poisonous Tree" Argument

Schaaf v. Smithkline Beecham Corp., ___ F.3d ___, 2010 WL 1286781 (11th Cir. April 6, 2010) (No. 09-10806), affirmed the grant of summary judgment to the FMLA defendant. Plaintiff was demoted while on maternity leave, as a result of an employer inquiry that only occurred because plaintiff was on maternity leave. The court held that the employer could rely on such information:

Essentially, Schaaf's arguments rely on one basic premise: because GSK learned of Schaaf's hostile temperament, ineffective management practices, and administrative ineptitude while she was on leave, it follows that GSK would not have discovered these derelictions had Schaaf *not* taken maternity leave. Thus, Schaaf concludes, her maternity leave *caused* her demotion because, but for the leave, GSK would have had no reason to demote her.

This argument, however, is legally incorrect and logically unsound. In an FMLA interference case, courts examine not whether the FMLA leave was the *but-for* cause of an employee's discharge or demotion, but rather whether it was the *proximate* cause.

(Emphasis in original; footnote omitted.)

H. 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.

I. Whistleblower Protections

Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson, ___ U.S. ___, ___ S.Ct. ___, 2010 WL 1189557 (March 30, 2010), held that the bar on filing *qui tam* actions under the False Claims Act where the relator's information has previously been publicly disclosed in administrative proceedings applies to State and local, as well as Federal, administrative reports, hearings, audits and investigations.

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), *cert. granted sub nom. City of Ontario, Cal. v. Quon*, ___ U.S. ___, 130 S.Ct. 1011, (U.S. Dec. 14, 2009), 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, 28-31 (1st Cir. 2009), rehearing and rehearing en banc denied, 561 F.3d 1 (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 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.* 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.* at 24. 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. Application of State Laws Against Discrimination

Schuler v. PricewaterhouseCoopers, LLP, 595 F.3d 370, 378, 108 Fair Empl.Prac.Cas. (BNA) 795 (D.C. Cir. 2010), reversed the grant of summary judgment to defendant on plaintiffs' claims under the New York Human Rights Law. In a prior appeal, the D.C. Circuit had held that, since defendant was headquartered in New York and the case involved promotions to partner, the plaintiffs were entitled to the reasonable inference that the alleged policy of promoting only younger persons to partner had been made in New York, and thus that the New York Human Rights Law covered plaintiffs, although they were not residents of New York and did not work in New York. On remand, the lower court dismissed the New York Human Rights Law claim again. In this latest decision, the court stated: "PwC says *Schuler* 'does not control' because it addressed only PwC's adoption and maintenance of a discriminatory policy, not the 'discrete decision[] not to admit [Schuler] to partnership.' To which we say: Pettifoggery and piffle!"

VII. Theories and Proof

A. The Inferential Model

1. Caution

Caution to Be Sensible: *Merritt v. Old Dominion Freight Line, Inc.*, ___ F.3d ___, 2010 WL 1427505 (4th Cir. April 9, 2010) (No. 09-1498), reversed the grant of summary judgment to the Title VII sex discrimination defendant. The court cautioned at p. *5: “Notwithstanding the intricacies of proof schemes, the core of every Title VII case remains the same, necessitating resolution of ‘the ultimate question of discrimination *vel non.*’ . . . As the Supreme Court has explained, ‘[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.’ . . . Thus, ‘[c]ourts must . . . resist the temptation to become so entwined in the intricacies of the [*McDonnell Douglas*] proof scheme that they forget that the scheme exists solely to facilitate determination of ‘the ultimate question of discrimination *vel non.*’” In holding that a jury could reasonably reject defendant’s explanation for firing plaintiff because of a fully-healed ankle injury, the court stated:

Yet Old Dominion did not allow Merritt to return to work. It did not even leave open the possibility that she could return to work at a later date, for example by providing additional time for recovery or by waiting for Merritt’s next doctor visit to resolve ongoing concerns about the injury’s effect on job performance. Instead, Old Dominion deemed it necessary to order a full-blown fitness test to assess the effects of an injury that was neither severe nor long-lasting and then used the results of that PAT to claim Merritt was physically unable to perform the job she had been physically performing for months prior to her minor injury. In doing so, Old Dominion terminated a good employee who, pre-injury, performed her job ably and without complaint and who, post-injury, was both willing and able to report to this same job for work. These facts, if believed, would allow a trier of fact to think Old Dominion was simply looking for a reason to get rid of Merritt.

The court also relied on the fact that the PAT was designed to test the entire body, not just the injured ankle. The court also found reason to doubt that the asserted policy of requiring a PAT even existed: “First, the policy’s existence is drawn into question by the conspicuous lack of evidence in the record concerning it. As both parties agree, the policy has never been memorialized in writing. And while an informal policy is no less a policy, it is curious that no one at the company seemed to be familiar with even an informal policy. Of eight Old Dominion employees asked about the matter, all eight denied ever having heard of the policy.” At a later point in the decision, the court observed: “It was only late in the game, on appeal and perhaps not until oral argument before this court, that the policy really took shape.” The court observed: “Evidence of a good employee record combines with evidence of an impermissible company attitude to form a lethal concoction.”

2. 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.

3. 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.

4. Qualifications

Velez v. Thermo King de Puerto Rico, Inc., 585 F.3d 441, 448-49, 107 Fair Empl.Prac.Cas. (BNA) 769 (1st Cir. 2009), reversed the grant of summary judgment to the ADEA defendant and held that the defendant’s nondiscriminatory explanation could not be taken into account in determining whether plaintiff was qualified. The court stated that “by concluding that Vélez was not qualified because he had not disproved the honesty of Thermo King’s belief

that he had violated company rules, the magistrate judge and the district court erroneously accepted for the purpose of the prima facie analysis Thermo King's stated reason for firing Vélez as proof that he was not qualified for the Tool Crib Attendant job.” *Id.* at 448. The court held that this manner of proceeding interfered with plaintiff’s ability to show pretext.

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.

5. Reverse Discrimination

Stockwell v. City of Harvey, 597 F.3d 895, 901, 108 Fair Empl.Prac.Cas. (BNA) 1153 (7th Cir. 2010), affirmed the grant of summary judgment to the defendant. The court explained its special articulation of the prima facie case when white plaintiffs are claiming discrimination:

The analysis of Title VII claims brought under *McDonnell Douglas* proceeds in three stages. First, the plaintiff must establish a prima facie case. Ordinarily, the four elements of the prima facie case in a failure-to-promote context are that the plaintiff (1) was a member of a protected class; (2) that he was qualified for the position; (3) that he was rejected for the position; and (4) that the position was given to a person outside the protected class who was similarly or less qualified than he. . . . In a reverse discrimination case such as this one, we have replaced the first element with a requirement that the plaintiff show “background circumstances” suggesting that the employer discriminates against the majority. . . .

(Citations omitted.)

6. Adverse Employment Actions

Pardo-Kronemann v. Donovan, __ F.3d __, 2010 WL 1508072 (D.C. Cir. April 16, 2010) (No. 08-5155), reversed in part the grant of summary judgment against the Title VII retaliation plaintiff. The court held that a lateral transfer with no loss of title, pay, status, or benefits can be an adverse employment action where the duties are different and the duties of the new position are less complex and challenging than those of the old position. Senior Judge Williams dissented.

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.”

7. 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.

8. 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.

9. 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.”

10. 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.

11. 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.

12. 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 20:

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.

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.

13. Pretext

a. Definitions

Stockwell v. City of Harvey, 597 F.3d 895, 901-02, 108 Fair Empl.Prac.Cas. (BNA) 1153 (7th Cir. 2010), affirmed the grant of summary judgment to the defendant. The court explained its articulation of the requirements of showing pretext:

In order "to show pretext, a plaintiff must show that (1) the employer's non-discriminatory reason was dishonest and (2) the employer's true reason was based on a discriminatory intent." . . . If the plaintiff uses indirect evidence to meet his burden, he must show that the employer's reason is not credible or factually baseless. . . . The plaintiff also must provide evidence that supports the inference that the real reason was discriminatory. . . . Although indirect proof of pretext is permissible, we must remember that, even if the business decision was unreasonable, pretext does not exist if the decisionmaker honestly believed the nondiscriminatory reason. . . . This is because courts are not "superpersonnel department[s]" charged with determining best business practices. . . . Subjective evaluations of each candidate are entirely consistent with Title VII. . . .

b. Shifting Explanations

Pardo-Kronemann v. Donovan, ___ F.3d ___, 2010 WL 1508072 (D.C. Cir. April 16, 2010) (No. 08-5155), reversed in part the grant of summary judgment against the Title VII retaliation plaintiff. The decision-maker first admitted knowledge of plaintiff's prior EEO complaints, and later denied knowledge of the complaints. He defended the transfer by saying that plaintiff would be happier and more productive in the new office and that the office was so important they needed "A team" people there, but also said that he would not have transferred plaintiff if he had known about the EEO complaints because he would never send a problem employee to another office. The court held that the combination of the decision-maker's deceit as to his knowledge and admission that prior EEO complaints would make a differences in his decisions, permitted a jury to infer that the decision-maker was not trying to assemble an "A team" in the new office, was not trying to make the plaintiff happier and more productive, and was retaliating. The court also relied on the defendant's failure to discuss the transfer with plaintiff, the fact that there was no position description for the new position, and the fact that plaintiff's new manager could not get an explanation for the transfer. Senior Judge Williams dissented.

Velez v. Thermo King de Puerto Rico, Inc., 585 F.3d 441, 449, 107 Fair Empl.Prac.Cas. (BNA) 769 (1st Cir. 2009), reversed the grant of summary judgment to the ADEA defendant and held that plaintiff had adequately shown pretext, in part because of defendant's shifting explanations:

Thermo King did not initially provide Vélez with any reason for firing him. One month later, Soto told the ADU and the EEOC that Vélez had been fired for violating the company's policy on receiving gifts from suppliers. It was not until over a year later that Thermo King, responding to this lawsuit, first said that Vélez had been fired for stealing and selling company property. The fact that the employer gave different reasons at different times for its action surely supports a finding that the reason it ultimately settled on was fabricated.

c. Ambiguity of Company Policy

Velez v. Thermo King de Puerto Rico, Inc., 585 F.3d 441, 449-50, 107 Fair Empl.Prac.Cas. (BNA) 769 (1st Cir. 2009), reversed the grant of summary judgment to the ADEA defendant and held that plaintiff had adequately shown pretext, in part because the ambiguity of the company policy plaintiff was charged with violating created doubt as to whether defendant thought he violated it:

A rational jury could conclude that Vélez's admitted acceptance of pens, caps, and "simple" knives was by no means a clear violation of Thermo King's Code of Conduct By its terms, this provision does not apply to items of small value or even to selling gifted items. To be sure, a company is ordinarily in the best position to assess the meaning of its own Code of Conduct. We are not suggesting otherwise. . . . Nonetheless, in light of the shifting explanations given for Veléz's dismissal, the inescapable ambiguity about whether the Code of Conduct even precludes Vélez's admitted behavior in

accepting and selling the small value gifts adds to the suspicion that the company's reliance on the policy may be pretextual.

d. 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.

e. 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.

f. 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.

g. 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.

h. 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.

i. 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)

j. 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.”).

k. 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.

l. Circumstantial Evidence

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.

14. 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.

15. Discretionary-Action Defense

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 held at 20 that the lower court erred in adopting a discretionary-action defense: “The district court also erroneously suggested that because an employer’s action falls within an area of discretion, that is an adequate justification. . . . Discretion may be exercised in ways which are discriminatory or retaliatory.” (Citation omitted.)

16. Timing

Darchak v. City of Chicago Bd. of Educ., 580 F.3d 622, 632, 107 FEP Cases 129, 29 IER Cases 1183 (**7th Cir.** 2009), reversed the grant of summary judgment to defendant on plaintiff’s national-origin discrimination claim. The court held 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: “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.”

17. 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."

18. Suddenness

Sgro v. Bloomberg L.P., 331 Fed.Appx. 932, 940-41, 2009 WL 2581402 (3d Cir. 2009) (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:

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.

19. The Most Plausible Story

Lindsay v. Yates, 578 F.3d 407, 421-22 (6th Cir. 2009), reversed the grant of summary judgment to the Fair Housing Act defendants and held 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.

B. Mixed Motives

1. The Decision in *Gross*

Gross v. FBL Financial Services, Inc., ___ U.S. ___, 129 S. Ct. 2343, 174 L. Ed. 2d 119, 106 FEP Cases 833 (2009), held that the Age Discrimination in Employment Act does not allow mixed-motives analysis. In a 5-4 decision, the Court held that an ADEA plaintiff must establish that age was the “but for” cause of the employment action at issue. The Court explained at 2350-51:

Our inquiry therefore must focus on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim. It does not. “Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” The ADEA provides, in relevant part, that “[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.” 29 U.S.C. § 623(a)(1) (emphasis added).

The words “because of” mean “by reason of: on account of.” 1 Webster's Third New International Dictionary 194 (1966); see also 1 Oxford English Dictionary 746 (1933) (defining “because of” to mean “By reason of, on account of ” (italics in original)); The Random House Dictionary of the English Language 132 (1966) (defining “because” to mean “by reason; on account”). Thus, the ordinary meaning of the ADEA's requirement that an employer took adverse action “because of” age is that age was the “reason” that the employer decided to act. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993) (explaining that the claim “cannot succeed unless the employee's protected trait actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome ” (emphasis added)). To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the “but-for” cause of the employer's adverse decision. See *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. ----, ----, 128 S.Ct. 2131, 2141-2142, 170 L.Ed.2d 1012 (2008) (recognizing that the phrase, “by reason of,” requires at least a showing of “but for” causation (internal quotation marks omitted)); *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 63-64, and n. 14, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007) (observing that “[i]n common talk, the phrase ‘based on’ indicates a but-for causal relationship and thus a necessary logical condition” and that the statutory phrase, “based on,” has the same meaning as the phrase, “because of” (internal quotation marks omitted)); cf. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 265 (5th ed. 1984) (“An act or omission is not regarded as a cause of an event if the particular event would have occurred without it”).

It follows, then, that under § 623(a)(1), the plaintiff retains the burden of persuasion to establish that age was the “but-for” cause of the employer's adverse action. Indeed, we have previously held that the burden is allocated in this manner in ADEA cases. . . . And nothing in the statute's text indicates that Congress has carved out an exception to that rule for a subset of ADEA cases. Where the statutory text is “silent on

the allocation of the burden of persuasion,” we “begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.” . . . We have no warrant to depart from the general rule in this setting.

(Footnote and citations omitted.)

2. Gross Does Not Bar ADEA “Pattern and Practice” Claims

Thompson v. Weyerhaeuser Co., 582 F.3d 1125, 1131 (10th Cir. 2009), rejected the argument that *Gross* required the overruling of the Tenth Circuit’s pattern-and-practice ADEA decision in *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001), *cert. denied*, 536 U.S. 934 (2002). *Thompson* explained:

. . . *Gross* does not involve the pattern-or-practice procedure at issue here. Moreover, the Court relied on the fact that Congress had amended Title VII to expressly adopt a "motivating factor" standard for discrimination rather than a "but for" inquiry. Here, Weyerhaeuser cannot point to an analogous difference in the language of Title VII and the ADEA that establishes that the pattern-or-practice framework is proper under one anti-discrimination statute but not the other.

As we have noted, Title VII does contain a brief reference to pattern-or-practice claims filed by the Attorney General, see 42 U.S.C. § 2000e-6(a), while the ADEA contains no similar provision. However, the pattern-or-practice burden shifting framework at issue here is mentioned in neither statute. Instead, that framework has been established by the courts. . . . Thus, in our view, the Supreme Court’s decision in *Gross* does not overrule circuit precedent that authorizes the application of the pattern-or-practice framework in ADEA cases.

(Citations omitted.)

3. Gross Requires Reversal of Summary Judgment in ADEA Case Where it was Based on the “Same Decision” Defense

Mora v. Jackson Memorial Foundation, Inc., 597 F.3d 1201, 108 Fair Empl.Prac.Cas. (BNA) 914 (11th Cir. 2010) (*per curiam*), grant of summary judgment to defendant in a mixed-motives ADEA case because of the “same decision” defense, holding that *Gross* made both the mixed-motives approach and the same-decision defense inapplicable, and holding that there was enough circumstantial evidence of discrimination to preclude summary judgment.

4. 42 U.S.C. § 1983 First Amendment Claims Cannot Involve Mixed Motives

Fairley v. Andrews, 578 F.3d 518, 525-26, 29 IER Cases 1050 (7th Cir. 2009), *petition for certiorari filed*, 78 USLW 3375 (U.S., Dec. 21, 2009) (No. 09-745), held that mixed motives treatment is not available in § 1983 cases based on the First Amendment, or in any other case under Federal law where the statute does not specifically provide for mixed-motives treatment.

5. 42 U.S.C. § 1981 Claims Can Involve Mixed Motives

Brown v. J. Kaz, Inc., 581 F.3d 175, 182, 107 Fair Empl.Prac.Cas. (BNA) 229 (3d Cir. 2009), strongly suggested in dictum that mixed-motives analysis should continue to be available in § 1981 cases:

In their written responses and at oral argument, the parties agreed that *Gross*, which rejected the application of the Price Waterhouse framework to claims under the Age Discrimination in Employment Act ("ADEA"), has no impact on this case. Accordingly, we need not decide the impact, if any, of *Gross* on section 1981 here. We note only that *Gross* focused on the statutory text of the ADEA and concluded that Congress' use of the phrase "because of ... age" meant that "the plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action." . . . Section 1981, however, does not include the "because of" language used in the ADEA. Instead, section 1981 more broadly provides that "all persons ... shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens." 42 U.S.C. § 1981(a) (emphasis added). Indeed, use of the *Price Waterhouse* framework makes sense in light of section 1981's text. If race plays any role in a challenged decision by a defendant, the plain terms of the statutory text suggest the plaintiff has made out a prima facie case that section 1981 was violated because the plaintiff has not enjoyed "the same right" as other similarly situated persons. However, if the defendant then proves that the same decision would have been made regardless of the plaintiff's race, then the plaintiff has, in effect, enjoyed "the same right" as similarly situated persons.

(Citations omitted.)

6. Pre-ADAAA ADA Claims Cannot Involve Mixed Motives

Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962, 22 A.D. Cases 1379 (7th Cir. 2010), held that under the pre-ADAAA version of the ADA, mixed-motives treatment is unavailable because the liability clause of the ADA uses the same "because of" formulation as in the ADEA, and there is no cross-reference in the body of the ADA itself to mixed-motives treatment: "Thus, in the absence of a cross-reference to Title VII's mixed-motive liability language or comparable stand-alone language in the ADA itself, a plaintiff complaining of discriminatory discharge under the ADA must show that his or her employer would not have fired him but for his actual or perceived disability; proof of mixed motives will not suffice."

7. Post-ADAAA ADA Claims Still Open for Decision

Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 n.1, 22 A.D. Cases 1379 (7th Cir. 2010), stated in dictum that it was not necessary to decide whether the "on the basis of" liability language in the ADAAA will allow mixed-motives treatment in a case subject to the ADAAA.

8. FMLA Retaliation Claims Can Involve Mixed Motives

Hunter v. Valley View Local Schools, 579 F.3d 688, 691-92, 15 Wage & Hour Cas.2d (BNA) 321 (6th Cir. 2009), held that mixed-motives treatment remains available under the

FMLA for retaliation claims, because the regulations make clear that using FMLA leave as a negative factor is enough for liability.

9. LMRDA Claims Cannot Involve Mixed Motives

Serafinn v. Local 722, 597 F.3d 908, 187 L.R.R.M. (BNA) 3594 (7th Cir. 2010), held that mixed-motive claims cannot be brought under the Labor Management Reporting and Disclosure Act.

C. Other Mixed-Motives Cases

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).

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Brown v. J. Kaz, Inc., 581 F.3d 175, 107 FEP Cases 229 (3d Cir. 2009), reversed the grant of summary judgment to the § 1981 defendant as to plaintiff's termination claim. The court held at 182 that mixed-motives analysis applies to a racial discrimination claim by an independent contractor, and held at 183 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 184:

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., 580 F.3d 622, 107 FEP Cases 129, 29 IER Cases 1183 (7th Cir. 2009), reversed the grant of summary judgment to defendant on plaintiff's national-origin discrimination claim. The court held at 633 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.

D. 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.

E. 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, 172 L. Ed. 2d 650, 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.^{FN2}

^{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

Lockridge v. The University of Maine System, ___ F.3d ___, 2010 WL 797149, 108 Fair Empl.Prac.Cas. (BNA) 1160 (1st Cir. March 10, 2010), affirmed the grant of summary judgment to the Title VII sex discrimination defendant. The court held that the denial of plaintiff's request for a change in office space could not be actionable, where plaintiff's resulting office space was the same as for many of her co-workers.

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 that 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.

F. 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.)

G. 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

Lockridge v. The University of Maine System, ___ F.3d ___, 2010 WL 797149, 108 Fair Empl.Prac.Cas. (BNA) 1160 (1st Cir. March 10, 2010), affirmed the grant of summary judgment to the Title VII sex discrimination defendant. Plaintiff was denied a pay increase because of a lack of scholarly articles. The court rejected her proposed comparator because he was not on a scholarly track like plaintiff, and thus was not expected to write as many scholarly articles as plaintiff.

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.

H. 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.

I. 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.

J. 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.”⁷

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.

⁷ 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., 580 F.3d 622, 107 FEP Cases 129, 29 IER Cases 1183 (7th Cir. 2009), reversed the grant of summary judgment to defendant on plaintiff's national-origin discrimination claim. The court held at pp. 632 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. Quanex 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.FN4 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.

FN4. 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.

Id. at 632-33.

K. Harassment

1. Hostile Housing Environment

Quigley v. Winter, ___ F.3d ___, 2010 WL 909603 (8th Cir. March 16, 2010), affirmed the jury verdict under the Fair Housing Act, and held that the plaintiff tenant had established sexual

harassment by the landlord and thus a hostile housing environment. The court held that there was sufficient evidence of “quid pro quo” sexual harassment, in that the jury could reasonably infer that defendant would only give her back her deposit if she exposed her body or granted sexual favors to the landlord.

2. 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.)

3. 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.)

4. 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, 580 F.3d 73, 107 FEP Cases 277 (2d Cir. 2009), 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 84-85 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

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 314-15:

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., 556 F.3d 502, 511-13, 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.

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.

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 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. Tademy 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.)

L. 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.

VIII. 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 Fair Empl.Prac.Cas. (BNA) 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. Promotional Rosters

Lewis v. City of Chicago, __ U.S. __, 130 S. Ct. 2191, 109 Fair Empl.Prac.Cas. (BNA) 449, 93 Empl. Prac. Dec. ¶ 43,888 (2010), involved the timeliness of a disparate-impact challenge to a hiring test. Twenty-six thousand candidates took the July 1995 test. Based on scores, in January 1996 the City separated the candidates into a "well-qualified" group, a "qualified" group, and an "unqualified" group. The latter were sent immediate rejection letters. The "qualified" group were sent letters telling them that the City planned to make hires from the "well-qualified" group until that group was exhausted and that it was unlikely that they would be hired, but that they would be kept on the eligibility list in case they could be reached. The City made ten batches of hires from this list from 1996 through 2002. The plaintiffs filed their EEOC charges starting in March 1997, more than 300 days after the City established the lists and sent the letters. The Seventh Circuit held that the claims were untimely, because the City's adoption of the lists was the relevant employment practice. The Supreme Court reversed. Justice Scalia, writing for a unanimous Court, quoted the language of § 703(k)(1)(a)(i) of Title VII, 42 U.S.C. § 2000e-2(k)(1)(a)(i), stated at 2197-98:

Thus, a plaintiff establishes a prima facie disparate-impact claim by showing that the employer “uses a particular employment practice that causes a disparate impact” on one of the prohibited bases. *Ibid.* (emphasis added). See *Ricci v. DeStefano*, 557 U.S. ----, ----, 129 S.Ct. 2658, 2672-2673, 174 L.Ed.2d 490 (2009).

Petitioners' claim satisfies that requirement. Title VII does not define “employment practice,” but we think it clear that the term encompasses the conduct of which petitioners complain: the exclusion of passing applicants who scored below 89 (until the supply of scores 89 or above was exhausted) when selecting those who would advance. The City “use[d]” that practice in each round of selection. Although the City had adopted the eligibility list (embodying the score cutoffs) earlier and announced its intention to draw from that list, it made use of the practice of excluding those who scored 88 or below each time it filled a new class of firefighters. Petitioners alleged that this exclusion caused a disparate impact. Whether they adequately proved that is not before us. What matters is that their allegations, based on the City's actual implementation of its policy, stated a cognizable claim.

(Emphasis in original.) The Court rejected the City’s argument that the only time to challenge the test was at the outset:

The City's premise is sound, but its conclusion does not follow. It may be true that the City's January 1996 decision to adopt the cutoff score (and to create a list of the applicants above it) gave rise to a freestanding disparate-impact claim. *Cf. Connecticut v. Teal*, 457 U.S. 440, 445-451, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982). If that is so, the City is correct that since no timely charge was filed attacking it, the City is now “entitled to treat that past act as lawful.” *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). But it does not follow that no new violation occurred—and no new claims could arise—when the City implemented that decision down the road. If petitioners could prove that the City “use[d]” the “practice” that “causes a disparate impact,” they could prevail.

Id. at 2198-99. The Court distinguished cases involving discriminatory intent, and held that implementation is a triggering act for a disparate-impact claim. The Court rejected the Seventh Circuit’s reasoning that there were only superficial differences between a disparate-treatment claim and a disparate-impact claim. “If the effect of applying Title VII's text is that some claims that would be doomed under one theory will survive under the other, that is the product of the law Congress has written. It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.” *Id.* at 2199-2200.

2. Present Effects of Past Discrimination Under the Ledbetter Fair Pay Act

Schuler v. PricewaterhouseCoopers, LLP, 595 F.3d 370, 375, 108 Fair Empl.Prac.Cas. (BNA) 795 (D.C. Cir. 2010), affirmed the grant of summary judgment to defendant on the ADEA claim involving failure to promote to partner. The time to challenge the promotion decision had expired, and the court held that the time was not revived by the phrase “or other practice” in the Lilly Ledbetter Fair Pay Act despite its effect on compensation. The court held

that the phrase “other practice” was limited to the type of practice in the *Ledbetter* case itself, where a discriminatory performance appraisal was responsible for the challenged compensation decision. The court concluded: “For these reasons, we conclude the decision whether to promote an employee to a higher paying position is not a ‘compensation decision or other practice within the meaning of that phrase in the LLA and Schuler’s failure-to-promote claim is not a claim of ‘discrimination in compensation.’ The LLA therefore does not revive his claims under the ADEA.” (Footnote omitted.)

3. EEOC

Duron v. Albertson’s LLC, 560 F.3d 288, 105 Fair Empl.Prac.Cas. (BNA) 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 p. *2 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.* at 291. 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.

4. 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 1161:

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 1161. The court held that the same principle applies to § 1981 claims of racial harassment. *Id.* at pp. 1171-72.

5. 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, 433-35, 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 at pp. 433-35 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

Mendiondo 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. Class Actions and Collective Actions

Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., __ U.S. __, 130 S. Ct. 1431 (2010), held that New York’s statutory limit on class actions—that they cannot be maintained for suits seeking penalties or statutory minimum damages—is preempted in a diversity case in Federal court. The decision means that the New York Labor Law provision allowing for 25% liquidated damages—which has not been enforced in most class actions in State or Federal court for several decades—can now be enforced. The judicial line-up is extraordinary: “SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II-A, in which ROBERTS, C.J., and STEVENS, THOMAS, and SOTO-MAYOR, JJ., joined, an opinion with respect to Parts II-B and II-D, in which ROBERTS, C.J., and THOMAS, and SOTOMAYOR, JJ., joined, and an opinion with respect to Part II-C, in which ROBERTS,

C.J., and, THOMAS, J., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment. GINSBURG, J., filed a dissenting opinion, in which KENNEDY, BREYER, and ALITO, JJ., joined.”

Hohider v. United Parcel Service, Inc., 574 F.3d 169, 185-86, 22 A.D. Cases 133 (3d Cir. 2009), reversed the certification of a nationwide ADA class, because “establishing the unlawful discrimination alleged by plaintiffs would require determining whether class members are ‘qualified’ under the ADA, an assessment that encompasses inquiries acknowledged by the District Court to be too individualized and divergent with respect to this class to warrant certification under Rule 23(a) and (b)(2). Contrary to the court's determination otherwise, the *Teamsters* framework cannot, by its own force, cure this flaw in the class. Accordingly, the court's grant of class certification was an abuse of discretion.” The court further explained at 190-91:

The ADA and Title VII, by their plain language, do not treat the qualification inquiry equivalently in their respective statutory schemes, a substantive distinction the District Court failed to incorporate into its certification analysis. Title VII prohibits covered employers from discriminating against "any individual ... because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). This statutory provision does not speak to qualification, but protects all individuals from discrimination motivated by the immutable characteristics specified in the statute. Courts have undertaken inquiry into whether a plaintiff is qualified in the Title VII context to evaluate "the reason for a particular employment decision" in an individual discrimination case, *Cooper*, 467 U.S. at 876, 104 S.Ct. 2794--namely, to assess, under the *McDonnell Douglas* framework, whether a plaintiff has offered sufficient evidence to raise an inference of discriminatory treatment and to shift onto the defendant the burden of producing a legitimate, nondiscriminatory reason for its conduct. . . . Thus, inquiry into an individual's employment qualifications may be integral to a court's assessment of whether discrimination on the basis of race, color, religion, sex, or national origin has occurred; it is not likewise necessary to a determination of whether such discrimination against that individual, once proven to have occurred, is unlawful under the statute.

(Citations omitted.) The court rejected plaintiffs’ theories that a policy of refusing to engage in the interactive process, and that a “100% healed” policy, could be challenged on a classwide basis, because the mere existence of such policies does not mean there was unlawful discrimination, and individualized inquiries would still have to be made. *Id.* at 192-95.

Acevedo v. Allsup's Convenience Stores Inc., ___ F.3d ___, 2010 WL 908678 (5th Cir. March 15, 2010), held that the lower court did not abuse its discretion in denying mass joinder of the former members of an FLSA collective action after the de-certification of the collective action. The court held that circumstances differed at different stores, and that employees at any one store could join together in the same action. However, about a thousand employees at three hundred stores were too many to join.

Dukes v. Wal-Mart Stores, Inc., ___ F.3d ___, 2010 WL 1644259 (9th Cir. April 26, 2010) (Nos. 04-16688, 04-16720) (*en banc*), stated the outcome succinctly at p. *1:

Plaintiffs allege that Wal-Mart, Inc., discriminates against women in violation of Title VII of the Civil Rights Act of 1964. After detailed briefing and hearing, the district court certified a class encompassing all women employed by Wal-Mart at any time after December 26, 1998, and encompassing all Plaintiffs' claims for injunctive relief, declaratory relief, and back pay, while creating a separate opt-out class encompassing the same employees for punitive damages. We affirm the district court's certification of a Federal Rule of Civil Procedure 23(b)(2) class of current employees with respect to their claims for injunctive relief, declaratory relief, and back pay. With respect to the claims for punitive damages, we remand so that the district court may consider whether to certify the class under Rule 23(b)(2) or (b)(3). We also remand with respect to the claims of putative class members who no longer worked for Wal-Mart when the complaint was filed so that the district court may consider whether to certify an additional class or classes under Rule 23(b)(3).

The court clarified at p. *16 the extent to which a court considering class certification should make an inquiry into the merits of the claims:

In short, these observations, which include the Supreme Court's direction, long-standing precedent in this court, and treatment from other circuits, lead us to the following explanation of the proper standards governing a district court's adjudication of a Rule 23 motion for class certification. First, when considering class certification under Rule 23, district courts are not only at liberty to, but must, perform a rigorous analysis to ensure that the prerequisites of Rule 23 have been satisfied, and this analysis will often, though not always, require looking behind the pleadings to issues overlapping with the merits of the underlying claims. It is important to note that the district court is not bound by these determinations as the litigation progresses. Second, district courts may not analyze any portion of the merits of a claim that do not overlap with the Rule 23 requirements. Relatedly, a district court performs this analysis for the purpose of determining that each of the Rule 23 requirements has been satisfied. Third, courts must keep in mind that different parts of Rule 23 require different inquiries. For example, what must be satisfied for the commonality inquiry under Rule 23(a)(2) is that plaintiffs establish common *questions* of law and fact, and answering those questions is the purpose of the merits inquiry, which can be addressed at trial and at summary judgment. Fourth, district courts retain wide discretion in class certification decisions, including the ability to cut off discovery to avoid a mini-trial on the merits at the certification stage. Fifth, different types of cases will result in diverging frequencies with which the district court will properly invoke its discretion to abrogate discovery. As just one example, we would expect a district court to circumscribe discovery more often in a Title VII case than in a securities class action resting on a fraud-on-the-market theory, because the statistical disputes typical to Title VII cases often encompass the basic merits inquiry and need not be proved to raise common questions and demonstrate the appropriateness of class resolution. Plaintiffs pleading fraud-on-the-market, on the other hand, may have to establish an efficient market to even raise common questions or show predominance.

(Emphasis in original.) The court rejected the dissent's reading of *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 159 n.15 (1982), as requiring "significant proof" of classwide discrimination before a class can be certified: "Contrary to the dissent, *Falcon* does not say that

Plaintiffs must show a common policy of proven *discrimination* at the class action stage, rather than just a common policy *alleged* to be discriminatory.” *Id.* at p. *17 (footnote omitted; emphasis in original). The court rejected defendant’s argument that the claim for back pay meant that monetary relief predominated over injunctive relief, but did hold that the lower court abused its discretion by certifying a separate Rule 23(b)(2) class for punitive damages without considering the predominance question. *Id.* at pp. *37-*40.

F. Arbitration

Rent-a-Center West v. Jackson, __ U.S. __, 130 S. Ct. 2772, 109 Fair Empl.Prac.Cas. (BNA) 897, 93 Empl. Prac. Dec. ¶ 43,916 (2010), a § 1981 case, involved an arbitration agreement that delegated to the arbitrator any question of the validity of the arbitration agreement. The Court stated: “The Agreement provided for arbitration of all ‘past, present or future’ disputes arising out of Jackson’s employment with Rent-A-Center, including ‘claims for discrimination’ and ‘claims for violation of any federal ... law.’ . . . It also provided that ‘[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.’” *Id.* at 2775. Plaintiff challenged the agreement as unconscionable under Nevada law because of the requirement that he pay half the fees. The Court held that the agreement met the heightened standard of clear and unmistakable evidence that the parties intended to delegate to the arbitrator the issue of arbitrability, but that the heightened showing did not mean that the party seeking to enforce arbitration had to show by clear and unmistakable evidence that the agreement was not unconscionable. *Id.* at 2778 n.1. The Court held that the agreement to arbitrate is enforceable under 2 of the FAA without regard to the enforceability of the underlying contract, and that a court must therefore determine the enforceability of the agreement to arbitrate even if all other questions under the agreement are to be resolved by the arbitrator. The Court held that it made no difference that the agreement to arbitrate here involved the delegation provision as to arbitrability, and that the remainder of the agreement was the broad arbitration agreement. “Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator.” *Id.* at 2779. Justice Scalia wrote the opinion of the Court, joined by the Chief Justice and Justices Kennedy, Thomas, and Alito. Justice Stevens dissented, joined by Justices Ginsburg, Breyer, and Sotomayor.

Stolt-Nielsen S.A. v. AnimalFeeds International Corp., __ U.S. __, 130 S.Ct. 1758, 176 L.Ed.2d 605, 93 Empl. Prac. Dec. ¶ 43,878 (2010), held that an interim arbitration award ordering classwide arbitration must be vacated under the F.A.A. where the arbitral panel exceeded its powers by failing to base its decision on New York law or maritime law as to the proper construction of an arbitration agreement that is silent as to class arbitration, and instead donning the mantle of a common-law court in deciding what is the best public policy in such situations. The Court stated at 1768-69:

Rather than inquiring whether the FAA, maritime law, or New York law contains a “default rule” under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a

situation. Perceiving a post-*Bazze* consensus among arbitrators that class arbitration is beneficial in “a wide variety of settings,” the panel considered only whether there was any good reason not to follow that consensus in this case. . . . The panel was not persuaded by “court cases denying consolidation of arbitrations,”FN5 by undisputed evidence that the Vegoilvoy charter party had “never been the basis of a class action,” or by expert opinion that “sophisticated, multinational commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses would permit a class arbitration.”FN6 . . . Accordingly, finding no convincing ground for departing from the post-*Bazze* arbitral consensus, the panel held that class arbitration was permitted in this case. . . . The conclusion is inescapable that the panel simply imposed its own conception of sound policy.FN7

(Footnotes omitted.) The Court held at 1775-76:

From these principles, it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached “no agreement” on that issue The critical point, in the view of the arbitration panel, was that petitioners did not “establish that the parties to the charter agreements intended to preclude class arbitration.” . . . Even though the parties are sophisticated business entities, even though there is no tradition of class arbitration under maritime law, and even though AnimalFeeds does not dispute that it is customary for the shipper to choose the charter party that is used for a particular shipment, the panel regarded the agreement's silence on the question of class arbitration as dispositive. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.

In certain contexts, it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement. Thus, we have said that “‘procedural’ questions which grow out of the dispute and bear on its final disposition’ are presumptively not for the judge, but for an arbitrator, to decide.” . . . This recognition is grounded in the background principle that “[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.” *Restatement (Second) of Contracts* § 204 (1979).

An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. . . . But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration. . . . *Cf. First Options, supra*, at 945

(noting that “one can understand why courts might hesitate to interpret silence or ambiguity on the ‘who should decide arbitrability’ point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate” contrary to their expectations).

Justice Alito wrote the majority opinion, joined by the Chief Justice and Justices Scalia, Kennedy, and Thomas. Justice Ginsburg dissented, joined by Stevens and Breyer. Justice Sotomayor did not participate.

Vaden v. Discover Bank, __ U.S. __, 129 S. Ct. 1262 (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, at 1268:

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.)

G. 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”

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. 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)

H. Evidence

1. 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.

Quigley v. Winter, ___ F.3d ___, 2010 WL 909603 (8th Cir. March 16, 2010), affirmed the jury verdict under the Fair Housing Act, and held that the plaintiff tenant had established sexual harassment by the landlord and thus a hostile housing environment. The court held that the lower court did not abuse its discretion by admitting the evidence of three other female tenants. The trial court had excluded the evidence of the fourth tenant as too remote, since the incident in question occurred in 1999.

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).

2. 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.

3. 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.

4. 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.

5. 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.

6. The Use of Racial Slurs by Defendant's Top Officials

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.

7. 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 him “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.)

8. 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.

9. 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.)

10. 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.

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. 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.)

K. 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.

L. 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

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

M. 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, Monteagudo 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 a_ _ es 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 award of compensatory damages 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.”

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.

3. Lower Court Chopped Too Much from the Award

Quigley v. Winter, ___ F.3d ___, 2010 WL 909603 (8th Cir. March 16, 2010), affirmed the jury verdict under the Fair Housing Act, and held that the plaintiff tenant had established sexual harassment by the landlord and thus a hostile housing environment. The jury awarded \$250,000 in punitive damages, and the lower court reduced the award to \$20,527.50. The court explained the lower court’s reduction: “The district court noted the punitive damages award was more than eighteen times the compensatory damages award (\$13,685.00) and found the award was excessive and did not comport with due process. The district court reduced the award to \$20,527.50, which amounted to one and a half times the compensatory damages award, ‘for the simple reason that [Winter’s] conduct ... can be considered only as to what he said and did directly to [Quigley].’” *Id.* at p. *10. The Eighth Circuit held that the jury should be presumed to follow the instruction that its award should be based only on defendant’s conduct towards Quigley, and held that the conduct was reprehensible but a single-digit multiplier was appropriate. Relying on the penalty structure of \$55,000 for first-time violations in cases brought by the Attorney General, the court stated:

While we agree with the district court that the jury’s punitive damage award was excessive, we disagree with the district court’s assessment that \$20,527.50, which is one and a half times the compensatory award, sufficiently reflects the reprehensibility of Winter’s conduct. We conclude an appropriate punitive damages award in this case is \$54,750. This amount is four times greater than Quigley’s compensatory damages (\$13,685.00), which we find is an appropriate ratio under the circumstances of this case. This amount comports with due process, while achieving the statutory and regulatory goals of retribution and deterrence. *See Campbell*, 538 U.S. at 425.

Id. at p. *13.

N. 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:

O. Attorneys’ Fees

1. Enhancements

Perdue v. Kenny A. ex rel. Winn, ___ U.S. ___, 130 S.Ct. 1662, 176 L.Ed.2d 494, 109 Fair Empl.Prac.Cas. (BNA) 1, 93 Empl. Prac. Dec. ¶ 43,877 (2010) (Alito, J.), reversed the enhancement of a fee award in a § 1983 class action involving a challenge to foster child services in two Georgia counties, on behalf of 3,000 children. The Court set forth the issues at 1670:

Respondents submitted a request for more than \$14 million in attorney's fees. Half of that amount was based on their calculation of the lodestar—roughly 30,000 hours multiplied by hourly rates of \$200 to \$495 for attorneys and \$75 to \$150 for non-attorneys. In support of their fee request, respondents submitted affidavits asserting that these rates were within the range of prevailing market rates for legal services in the relevant market.

The other half of the amount that respondents sought represented a fee enhancement for superior work and results. Affidavits submitted in support of this request claimed that the lodestar amount “would be generally insufficient to induce lawyers of comparable skill, judgment, professional representation and experience” to litigate this case. . . . Petitioners objected to the fee request, contending that some of the proposed hourly rates were too high, that the hours claimed were excessive, and that the enhancement would duplicate factors that were reflected in the lodestar amount.

The District Court awarded fees of approximately \$10.5 million. . . . The District Court found that the hourly rates proposed by respondents were “fair and reasonable” . . . but that some of the entries on counsel's billing records were vague and that the hours claimed for many of the billing categories were excessive. The court therefore cut the non-travel hours by 15% and halved the hourly rate for travel hours. This resulted in a lodestar calculation of approximately \$6 million.

The court then enhanced this award by 75%, concluding that the lodestar calculation did not take into account “(1) the fact that class counsel were required to advance case expenses of \$1.7 million over a three-year period with no ongoing reimbursement, (2) the fact that class counsel were not paid on an on-going basis as the work was being performed, and (3) the fact that class counsel's ability to recover a fee and expense reimbursement were completely contingent on the outcome of the case.” . . . The court stated that respondents' attorneys had exhibited “a higher degree of skill, commitment, dedication, and professionalism . . . than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench.” . . . The court also commented that the results obtained were “ ‘extraordinary’ ” and added that “[a]fter 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale.” . . . The enhancement resulted in an additional \$4.5 million fee award.

The Eleventh Circuit affirmed. The 5-Justice majority strongly endorsed the lodestar approach as providing a more objective basis for awarding and reviewing fees than the old standard of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). The Court described the virtues of the lodestar approach at 1672:

Although the lodestar method is not perfect, it has several important virtues. First, in accordance with our understanding of the aim of fee-shifting statutes, the lodestar looks to “the prevailing market rates in the relevant community.” . . . Developed after the practice of hourly billing had become widespread . . . the lodestar method produces an award that *roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the

hour in a comparable case. Second, the lodestar method is readily administrable . . . ; and unlike the *Johnson* approach, the lodestar calculation is “objective” . . . and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results.

(Emphasis in original.) The Court described, at 1672-73, six rules that it gleaned from prior decisions:

Our prior decisions concerning the federal fee-shifting statutes have established six important rules that lead to our decision in this case.

First, a “reasonable” fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case. *See Delaware Valley I*, 478 U.S., at 565, 106 S.Ct. 3088 (“[I]f plaintiffs . . . find it possible to engage a lawyer based on the statutory assurance that he will be paid a ‘reasonable fee,’ the purpose behind the fee-shifting statute has been satisfied”); *Blum, supra*, at 897, 104 S.Ct. 1541 (“[A] reasonable attorney’s fee is one that is adequate to attract competent counsel, but that does not produce windfalls to attorneys” (ellipsis, brackets, and internal quotation marks omitted)). Section 1988’s aim is to enforce the covered civil rights statutes, not to provide “a form of economic relief to improve the financial lot of attorneys.” *Delaware Valley I, supra*, at 565, 106 S.Ct. 3088.

Second, the lodestar method yields a fee that is presumptively sufficient to achieve this objective. *See Dague, supra*, at 562, 112 S.Ct. 2638; *Delaware Valley I, supra*, at 565, 106 S.Ct. 3088; *Blum, supra*, at 897, 104 S.Ct. 1541; *see also Gisbrecht, supra*, at 801-802, 122 S.Ct. 1817. Indeed, we have said that the presumption is a “strong” one. *Dague, supra*, at 562, 112 S.Ct. 2638; *Delaware Valley I, supra*, at 565, 106 S.Ct. 3088.

Third, although we have never sustained an enhancement of a lodestar amount for performance, *see* Brief for United States as Amicus Curiae 12, 17, we have repeatedly said that enhancements may be awarded in “‘rare’” and “‘exceptional’” circumstances. *Delaware Valley I, supra*, at 565, 106 S.Ct. 3088; *Blum, supra*, at 897, 104 S.Ct. 1541; *Hensley*, 461 U.S., at 435, 103 S.Ct. 1933.

Fourth, we have noted that “the lodestar figure includes most, if not all, of the relevant factors constituting a ‘reasonable’ attorney’s fee,” *Delaware Valley I, supra*, at 566, 106 S.Ct. 3088, and have held that an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation, *see Dague, supra*, at 562-563, 112 S.Ct. 2638; *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 483 U.S. 711, 726-727, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987) (*Delaware Valley II*) (plurality opinion); *Blum*, 465 U.S., at 898, 104 S.Ct. 1541. We have thus held that the novelty and complexity of a case generally may not be used as a ground for an enhancement because these factors “presumably [are] fully reflected in the number of billable hours recorded by counsel.” *Ibid.* We have also held that the quality of an attorney’s performance generally should not be used to adjust the lodestar “[b]ecause considerations concerning

the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate.” *Delaware Valley I, supra*, at 566, 106 S.Ct. 3088.

Fifth, the burden of proving that an enhancement is necessary must be borne by the fee applicant. *Dague, supra*, at 561, 112 S.Ct. 2638; *Blum*, 465 U.S., at 901-902, 104 S.Ct. 1541.

Finally, a fee applicant seeking an enhancement must produce “specific evidence” that supports the award. *Id.*, at 899, 901, 104 S.Ct. 1541 (An enhancement must be based on “evidence that enhancement was necessary to provide fair and reasonable compensation”). This requirement is essential if the lodestar method is to realize one of its chief virtues, *i.e.*, providing a calculation that is objective and capable of being reviewed on appeal.

The Court said at 1674 that enhancements are possible but rare: “In light of what we have said in prior cases, we reject any contention that a fee determined by the lodestar method may not be enhanced in any situation. The lodestar method was never intended to be conclusive in all circumstances. Instead, there is a ‘strong presumption’ that the lodestar figure is reasonable, but that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee.” The Court held that the first inquiry is whether the superior results are attributable to the attorneys’ superior performance and commitment of resources, which alone might justify an enhancement, or to factors that cannot justify an enhancement, such as “inferior performance by defense counsel, unanticipated defense concessions, unexpectedly favorable rulings by the court, an unexpectedly sympathetic jury, or simple luck.” *Id.* The Court held that the next inquiry is “whether there are circumstances in which superior attorney performance is not adequately taken into account in the lodestar calculation.” It did not shut the door entirely on such a possibility, but was limiting: “We conclude that there are a few such circumstances but that these circumstances are indeed ‘rare’ and ‘exceptional,’ and require specific evidence that the lodestar fee would not have been ‘adequate to attract competent counsel,’ *Blum, supra*, at 897, 104 S.Ct. 1541 (internal quotation marks omitted).” *Id.* The Court described those circumstances:

First, an enhancement may be appropriate where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation.FN5 This may occur if the hourly rate is determined by a formula that takes into account only a single factor (such as years since admission to the bar) FN6 or perhaps only a few similar factors. In such a case, an enhancement may be appropriate so that an attorney is compensated at the rate that the attorney would receive in cases not governed by the federal fee-shifting statutes. But in order to provide a calculation that is objective and reviewable, the trial judge should adjust the attorney's hourly rate in accordance with specific proof linking the attorney's ability to a prevailing market rate.

Respondents correctly note that an attorney's “brilliant insights and critical maneuvers sometimes matter far more than hours worked or years of experience.” . . . But as we said in *Blum v. Stenson*, 465 U.S. 886, 898, 104 S.Ct. 1541, 79 L.Ed.2d 891

(1984), “[i]n those cases, the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates.”

FN6. *See, e.g., Salazar v. District of Columbia*, 123 F.Supp.2d 8 (D.D.C.2000); *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C.1983), *aff'd in part, rev'd in part*, 746 F.2d 4 (C.A.D.C.1984).

Second, an enhancement may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted. As Judge Carnes noted below, when an attorney agrees to represent a civil rights plaintiff who cannot afford to pay the attorney, the attorney presumably understands that no reimbursement is likely to be received until the successful resolution of the case, 532 F.3d, at 1227, and therefore enhancements to compensate for delay in reimbursement for expenses must be reserved for unusual cases. In such exceptional cases, however, an enhancement may be allowed, but the amount of the enhancement must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard rate of interest to the qualifying outlays of expenses.

Third, there may be extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees. An attorney who expects to be compensated under § 1988 presumably understands that payment of fees will generally not come until the end of the case, if at all. . . . Compensation for this delay is generally made “either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value.” *Missouri v. Jenkins*, 491 U.S. 274, 282, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) (internal quotation marks omitted). But we do not rule out the possibility that an enhancement may be appropriate where an attorney assumes these costs in the face of unanticipated delay, particularly where the delay is unjustifiably caused by the defense. In such a case, however, the enhancement should be calculated by applying a method similar to that described above in connection with exceptional delay in obtaining reimbursement for expenses.

We reject the suggestion that it is appropriate to grant performance enhancements on the ground that departures from hourly billing are becoming more common. As we have noted, the lodestar was adopted in part because it provides a rough approximation of general billing practices, and accordingly, if hourly billing becomes unusual, an alternative to the lodestar method may have to be found. However, neither respondents nor their amici contend that that day has arrived. Nor have they shown that permitting the award of enhancements on top of the lodestar figure corresponds to prevailing practice in the general run of cases.

We are told that, under an increasingly popular arrangement, attorneys are paid at a reduced hourly rate but receive a bonus if certain specified results are obtained, and this practice is analogized to the award of an enhancement such as the one in this case. . . . The analogy, however, is flawed. An attorney who agrees, at the outset of the representation, to a *reduced hourly rate* in exchange for the opportunity to earn a performance bonus is in a position far different from an attorney in a § 1988 case who is compensated at the *full prevailing rate* and then seeks a performance enhancement in

addition to the lodestar amount after the litigation has concluded. Reliance on these comparisons for the purposes of administering enhancements, therefore, is not appropriate.

Id. at 1674-75. True to past form, the Court ignored utterly the difference between being paid, win or lose, and being paid only in the event one prevails. The Court rejected the 75% enhancement as essentially arbitrary. It noted that the enhancement would bring the top hourly rate to \$866 an hour and there was no evidence that this was an appropriate rate in the relevant legal market. It rejected Justice Breyer's suggestion that the average rate of all counsel was below the market average hourly rate, since this merely reflected that a disproportionate share of the work was done by counsel at a lower hourly rate. The Court held that the enhancement could not be based on the extraordinary outlays of counsel, since there was no calculation of the amount of the enhancement attributable to this factor. The Court's war with economic reality is shown in the following paragraph at 1676:

The District Court pointed to the fact that respondents' counsel had to make extraordinary outlays for expenses and had to wait for reimbursement . . . but the court did not calculate the amount of the enhancement that is attributable to this factor. Similarly, the District Court noted that respondents' counsel did not receive fees on an ongoing basis while the case was pending, but the court did not sufficiently link this factor to proof in the record that the delay here was outside the normal range expected by attorneys who rely on § 1988 for the payment of their fees or quantify the disparity. Nor did the court provide a calculation of the cost to counsel of any extraordinary and unwarranted delay. And the court's reliance on the contingency of the outcome contravenes our holding in *Dague*. . . .

The Court rejected the trial court's comparison of the performance of counsel to that of counsel in other, unnamed cases, since such an impressionistic basis undermined objectivity and the ability of an appellate court to review the award. *Id.* at 1676. "In addition, in future cases, defendants contemplating the possibility of settlement will have no way to estimate the likelihood of having to pay a potentially huge enhancement." *Id.* The Court then again expressed its rejection of economic reality, at 1676-77:

Section 1988 serves an important public purpose by making it possible for persons without means to bring suit to vindicate their rights. But unjustified enhancements that serve only to enrich attorneys are not consistent with the statute's aim.FN8 In many cases, attorney's fees awarded under § 1988 are not paid by the individuals responsible for the constitutional or statutory violations on which the judgment is based. Instead, the fees are paid in effect by state and local taxpayers, and because state and local governments have limited budgets, money that is used to pay attorney's fees is money that cannot be used for programs that provide vital public services. *Cf. Horne v. Flores*, 557 U.S. ----, ----, 129 S.Ct. 2579, 2593-2594, 174 L.Ed.2d 406 (2009) (payment of money pursuant to a federal-court order diverts funds from other state or local programs).

FN8 Justice BREYER's opinion dramatically illustrates the danger of allowing a trial judge to award a huge enhancement not supported by any discernible methodology.

That approach would retain the \$4.5 million enhancement here so that respondents' attorneys would earn as much as the attorneys at some of the richest law firms in the country. *Post*, at ---- - ----. These fees would be paid by the taxpayers of Georgia, where the annual per capita income is less than \$34,000, *see* Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2010, p. 437 (2009) (Table 665) (figures for 2008), and the annual salaries of attorneys employed by the State range from \$48,000 for entry-level lawyers to \$118,000 for the highest paid division chief, *see* Brief for State of Alabama et al. as Amici Curiae, 10, and n. 3 (citing National Association of Attorneys General, Statistics on the Office of the Attorney General, Fiscal Year 2006, pp. 37-39). Section 1988 was enacted to ensure that civil rights plaintiffs are adequately represented, not to provide such a windfall.

The Court remanded the case for further proceedings. Justice Alito wrote the majority opinion, joined by the Chief Justice and Justices Scalia, Kennedy, and Thomas. Justices Kennedy and Thomas also wrote separate concurring opinions. Justice Breyer concurred in part and dissented in part, joined by Justices Stevens, Ginsburg, and Sotomayor.

2. 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.)

3. Fee Recoveries

Quigley v. Winter, ___ F.3d ___, 2010 WL 909603 (8th Cir. March 16, 2010), affirmed the jury verdict under the Fair Housing Act, and held that the plaintiff tenant had established sexual harassment by the landlord and thus a hostile housing environment. The court held that the lower court erred in failing to conduct a lodestar analysis and in limiting the fee award to

\$20,000 because of concerns about defendant's ability to pay. Rather than remand the case, it awarded fees itself. The court accepted counsel's hourly rates but cut their hours by a third because the case was too heavily lawyered and too many attorneys moved in and out of the case. Judge Gruender dissented from the failure to remand the fee issue.

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.

P. 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.

Q. 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.

R. 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.

III. 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.

IV. Appellate Tips for Effective Advocacy

The D.C. Circuit Plays "Gotcha": *Schuler v. PricewaterhouseCoopers, LLP*, 595 F.3d 370, 375 n.*, 108 Fair Empl.Prac.Cas. (BNA) 795 (**D.C. Cir.** 2010), affirmed the grant of summary judgment to defendant on the ADEA claim involving failure to promote to partner. The court held that plaintiff-appellant did not preserve his challenge to the lower court's rejection of his "piggybacking" argument as to the timeliness of his charge of discrimination: "In his opening brief, however, Schuler refers to piggybacking only in a footnote . . . in which he makes no affirmative argument that he should be allowed to piggyback, contending only the reasons the district court gave for denying piggybacking were wrong. Because he first makes his affirmative argument in his reply brief, we do not consider it."

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.”