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Trends in Employment Discrimination Law

by

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My web site, www.rickseymourlaw.com, will be on-line in a few weeks. This paper and other CLE papers will be downloadable from it.

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I. The Statistics

The number of new employment discrimination cases filed in Federal district courts in 2003 decreased 3.7% from the year before:

New EEO Cases Filed in 12 months ending Sept. 30, 2003: 20,507
New EEO Cases Filed in 12 months ending Sept. 30, 2004: 19,746

The striking figure is that the *increase* in civil filings in U.S. District Courts from calendar 2003 to FY 2004 was 10.1% at a time when EEO filings *decreased* by 3.7%.

The number of EEO cases initially filed as class actions declined a third from 2000 to 2002, has rebounded, but is not yet up to its old figure. Once again, the striking factor is that the number of FLSA collective actions has increased by more than 87% since 2000:

New EEO Class Action Filings in 12 months ending Dec. 31, 2000: 89
New EEO Class Action Filings in 12 months ending Dec. 31, 2001: 77
New EEO Class Action Filings in 12 months ending Dec. 31, 2002: 60
New EEO Class Action Filings in 12 months ending Dec. 31, 2003: 82
New EEO Class Action Filings in 12 months ending Sept. 30, 2004: 96

New FLSA Collective-Action Filings in 12 months ending Dec. 31, 2000: 71
New FLSA Collective-Action Filings in 12 months ending Dec. 31, 2001: 79
New FLSA Collective-Action Filings in 12 months ending Dec. 31, 2002: 91
New FLSA Collective-Action Filings in 12 months ending Dec. 31, 2003: 121
New FLSA Collective-Action Filings in 12 months ending Sept. 30, 2004: 133

Trials in civil and criminal cases are vanishing. According to the Administrative Office of the U.S. Courts, the average U.S. District Judge conducted just 19 trials from Oct. 1, 2003, through Sept. 30, 2004, down from 25 trials in FY 1998. That is for civil and criminal trials combined. Nineteen trials represent 4% of the average 478 matters terminated. These data were downloaded on March 23, 2005, from http://www.uscourts.gov/cgi-bin/cmsd2004pl.

583 Federal-question EEO cases were decided after oral argument in the twelve months ending September 30, 2004; this is the category of cases most likely to result in published opinions. EEO cases were 17.5% of all civil Federal-question cases decided after oral argument, or one in every 5.7 civil Federal-question cases decided after oral argument.

Federal-question fair-employment cases are substantially more likely than other federal-question civil cases to reach oral argument: 30.6% of EEO federal-question appeals filed during this period made it to oral argument, compared with only 23.0% of all civil Federal-question cases filed during this period.

II. Legislative and Regulatory Action, and Related Judicial Action

A. The Class Action "Fairness" Act

On February 18, 2005, the President signed into law a statute named in Orwellian doublespeak the "Class Action Fairness Act," a provision that contains new rules applicable to class actions in Federal courts, that expands the original jurisdiction of Federal courts over class actions under State law with more than $5 million at stake and any diversity, that expands the removal jurisdiction of the Federal courts, and that treats State-law "mass actions" as class actions for some purposes. The legislation was supported by major business groups proclaiming their concern that class members be treated fairly, and was opposed by national consumer, civil rights, and labor organizations. The statute is effective as to cases commenced on or after February 18, 2005.

For purposes of labor and employment law cases, practitioners should be aware of the substantial duties imposed on defendants to notify Federal and State officials of detailed information with respect to proposed settlements, the 90-day delay starting with the provision of the notice, and the ability of class members to escape being bound by the settlement if the notice is later held to be inadequate.

The legislation expands original and removal jurisdiction in Federal courts to state-law cases in which an aggregate of more than $5 million is at stake, and in which there is any diversity between any defendant and any member of the plaintiff class. The single-state exception, new provision for appeal of orders remanding cases, and other provisions are too complex to be included within the scope of this paper. They are explored further in Chapter 33 of the upcoming Spring 2005 edition of Equal Employment Law Update (BNA), copyright American Bar Association, 2005, and are explored at length in ELIZABETH J. CABRASER AND RICHARD T. SEYMOUR, ANALYSIS, IMPLICATIONS, AND TEXT OF THE CLASS ACTION FAIRNESS ACT 2005, SPECIAL ALERT TO CALIFORNIA CLASS ACTIONS PRACTICE AND PROCEDURE, CALIFORNIA FORMS OF PLEADING AND PRACTICE (LexisNexis, 2005).

Sec. 9 of the bill states: "The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act." The House version of the bill, H.R. 1115 in the 108th Congress, would have applied the statute retroactively to cases in state court as of the date of enactment on which no ruling had yet been made as to class certification. The Senate bill that was enacted was described in debate as an improvement because it was not retroactive.

The first test of the retroactivity provision has already occurred. *Pritchett v. Office Depot*, 360 F.Supp.2d 1176, 1181 (D. Colo. 2005), *aff'd*, 404 F.3d 1232, 1238 (**10th Cir.** 2005), remanded to the Colorado State court a certified wage and hour class action under Colorado law, holding that the term "commenced" referred to the original commencement of the action, whether in State or Federal court, and rejected Office Depot's argument that the filing of the removal petition "commenced" the action in Federal court. The court of appeals observed that Office Depot sought to remove the case just two weeks before trial, and stated:

> As the facts of this case demonstrate, Defendant's interpretation of the Act would allow cases to be plucked from state court on the eve of trial. Such practices are disruptive to federal-state comity and the settled expectations of the litigants. Permitting removal of this case would effectively apply new rules to a game in the final minutes of the last quarter, and we find it ironic that Defendant seeks countenance for its position from a statute that was designed, in the first place, to curtail jurisdictional gaming and forum-shopping. S. REP. NO. 109–14, at 4–5. The consequences of Defendant's argument are sufficiently dramatic that we are not eager to ascribe those motivations to Congress without a clearer expression than we find here.

B. Civil Rights Tax Relief

1. The Bad News

Commissioner v. Banks, __ **U.S.** __, 125 S. Ct. 826, 160 L. Ed. 2d 859, 94 FEP Cases 1793 (2005), held that, when a client's recovery constitutes gross income, the client must pay income tax on the part of the recovery paid directly to the attorney as a contingent fee for services performed in obtaining the taxable income, under a contingent fee arrangement. The Court left some issues open, such as the tax effect of a court-awarded fee. It is important to keep in mind that this rule does not apply to the fees that generated nontaxable income or other nontaxable relief, such as an injunction.

2. The Good News

Part of the CRTRA—the provision preventing double taxation of attorneys' fees to the plaintiff as well as counsel—went into effect on Oct. 26, 2004. Pub. L. No. 108–357.

This creates an above-the-line deduction for attorneys' fees and costs. It is not subject to the Alternative Minimum Tax or the 2%-of-adjusted-gross-income exclusion. The client must report the fees in order to be able to take advantage of the Act.

The bill applies to a wide variety of civil rights and employment statutes, including Title VII, the ADA, the ADEA, the NLRA, the FLSA, the Rehab Act, sec. 510 of ERISA, Title IX, the Employee Polygraph Protection Act, WARN, the FMLA, USERRA, secs 1981, 1983, and 1985, the Fair Housing Act of 1968, Federal whistleblower claims, and a beautiful catch-all: "Any provision of Federal, State, or local law, or common law claims permitted under Federal, state, or local law—(i) providing for the enforcement of civil rights, or (ii) regulating any aspect of the employment relationship . . . ."

It is doubly prospective: "The amendments made by this section shall apply to fees and costs paid after the date of enactment of this Act with respect to any judgment or settlement occurring after such date."

C. The ABA Task Force on Attorney-Client Privilege

It appears that the Task Force will recommend to the ABA House of Delegates that it ask Congress to allow selective waivers of attorney-client and work-product privilege, to allow companies to waive privilege to the government, without waiving it as to third parties. Contact

me if you would like a copy of my firm's testimony to the Task Force opposing selective waivers.

D. Electronic Discovery

At its mid-April meeting, the Advisory Committee on the Civil Rules voted to approve changes in the discovery rules to make special provisions for the discovery of electronic information. One change will be to relieve companies from presumptively having to provide such discovery as to data they have decided to make "reasonably inaccessible," without requiring the courts to explore whether those decisions were themselves reasonable. The practical effect will be to allow companies to park critical data in ways difficult to retrieve, and to demand that people seeking discovery pay the cost of undoing the company's decision. The text of the changes and the Advisory Committee's Notes were not yet available at the time this paper was written, but will be available by the time of the Conference.

The Advisory Committee sends its recommendations to the U.S. Judicial Conference's Standing Committee on Rules of Practice and Procedure. From there it goes to the Supreme Court, and from there to Congress. The Standing Committee rarely makes changes, but does make changes. There is no comment procedure, but comments can still be made.

ATLA has been very active in opposing these changes.

E. The "Lawsuit Abuse Reduction" Bill, H.R. 420

This is yet another effort to re-write the law and make it more difficult for injured persons to obtain counsel. The bill would amend Rule 11 by (a) eliminating the 21-day "safe harbor" to withdrawn an improper filing, (b) making monetary sanctions mandatory, (c) requiring the other side's loss to be compensated, so that attorneys' fees and costs are just the starting point of the monetary compensation; (c) extend Rule 11 to discovery; (d) require all state courts to follow Rule 11 in cases affecting interstate commerce; (e) limit the choices of forum in personal-injury litigation, and (f) require at least a one-year suspension from the practice of law of any attorney against whom three Rule 11 orders have been entered. Further information is available at http://www.abanet.org/poladv/priorities/lara.html.

This bill passed the House of Representatives within two weeks of its introduction in 2004. It has been re-introduced in 2005.

III. The Constitution and Statutes

A. The First Amendment

Warnock v. Archer, 380 F.3d 1076, 1082, 21 IER Cases 1203 (**8th Cir.** 2004), affirmed in part, and reversed in part, the remedial order below in this Establishment Clause religious harassment case. The court held that the plaintiff teacher could not complain of harassment arising from the personal religious effects in the Superintendent's office. "But people do not give up their free-exercise or free-speech rights when they become government employees. . . . When their speech and acts can reasonably be attributed to the government itself, of course, the restrictions of the establishment clause apply. But when such activity is clearly personal and

does not convey the impression that the government is endorsing it, the mere fact that it occurs in a government setting does not render it unconstitutional." (Citations omitted.) The court held that the school district took prompt and effective remedial action with respect to each incident of religious harassment by students and a teacher, and was therefore not liable. Plaintiff had objected to compulsory-prayer requirements on work time, and a student placed a wooden cross outside his classroom. The court held that the removal of the cross before plaintiff had even seen it, and the suspension of the student for a few hours, was sufficient. "Certainly, their response was not so perfunctory as to constitute official endorsement of or indifference to the student's action." *Id.* at 1083. Plaintiff also complained that a mother had insisted that her children leave an art class he was teaching, and they did so The court held that defendants were not required to force the children to return, and pointed out that the parents of schoolchildren also have free-exercise rights.

B. 42 U.S.C. § 1981

Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 190–91, 94 FEP Cases 577 (**4th Cir.** 2004)w, applied the standards of *Faragher* and *Ellerth* to a racial harassment claim under § 1981. See the discussion of this case in the section below on "What Plaintiff Experienced."

Bains LLC v. Arco Products Co., __ F.3d __, 2005 WL 894657 (**9th Cir.** April 19, 2005), affirmed the judgment of liability and the award of compensatory damages, but held that the award of $5 million in punitive damages to the Sikh-owned plaintiff was excessive and that the most that could be allowed was between $300,000 and $450,000. The court held at *4 that "a corporation has standing to bring a § 1981 claim against a defendant that employs the corporation as a contractor, but imposes ethnic discrimination against the corporation's employees." The court continued at *6:

> Even if ARCO terminated Flying B entirely for good, legitimate reasons, with no mixed motives at all, it would not have a defense to the entirety of Flying B's § 1981 claim, if, for racially discriminatory reasons, ARCO imposed delays (slow pumps, extra security checks, etc.) on Flying B that reduced the amount of profits it could earn. There can, of course, be no legitimate reason for disparate treatment that imposes costly delays on account of the race of Flying B's owners and drivers. A § 1981 claim lies on behalf of a corporation that is harmed economically in the performance of its contract because of race, even if neither the hiring nor the firing of the corporation was affected by race.

C. Title VII of the Civil Rights Act of 1964

1. Coverage

Smith v. City of Salem, 378 F.3d 566, 94 FEP Cases 273 (**6th Cir.** 2004), reversed the Rule 12(c) dismissal of plaintiff's Title VII claim, holding that discrimination against a transgender plaintiff because of failure to conform to gender stereotypes is actionable under Title VII.

2. Favoritism

Preston v. Wisconsin Health Fund, 397 F.3d 539, 95 FEP Cases 234 (**7th Cir.** 2005), affirmed the grant of summary judgment to the Title VII defendant. The male plaintiff was fired and replaced with a woman who he alleged had no qualifications for his position, but was assertedly involved in a platonic ("according to their not terribly credible deposition testimony," *id.* at 541) or non-platonic (he asserted) relationship. The court held that such favoritism is not sex discrimination forbidden by Title VII. "A male executive's romantically motivated favoritism toward a female subordinate is not sex discrimination even when it disadvantages a male competitor of the woman. . . . Neither in purpose nor in consequence can favoritism resulting from a personal relationship be equated to sex discrimination." *Id.* (citations omitted).

3. Union Liability

Eliserio v. United Steelworkers of America Local 310, 398 F.3d 1071, 95 FEP Cases 421 (**8th Cir.** 2005), reversed the grant of summary judgment to the Title VII and § 1981 harassment and retaliation claims. The Hispanic plaintiff crossed a picket line during a strike, and resigned from Local 310. He thereafter became the target of graffiti referring to him as a "rat" and using racial slurs such as "Taco Bob" and "Ratserio." Six years after the crossing, Local 310 purchased "No Rat" stickers in support of the graffiti campaign. The court held that the local could not be held liable simply because its members were engaging in the graffiti campaign, but that the union was potentially liable for its encouragement of a campaign of harassment including racial slurs that was intended to affect the terms and conditions of plaintiff's employment. It held that "the stickers need not have a direct racial connotation to be perceived as supportive of the racially offensive graffiti campaign," and that the stickers were a "broad endorsement" of the graffiti. *Id.* at 1077. Local 301 divisional chairman Steve Vonk asked Firestone to remove plaintiff from his work area, and the company demoted plaintiff. The court stated that the nature of the *prima facie* case is different when the defendant is a union: "Because unions often do not have the authority to subject a represented employee to an adverse *employment* action, we have held that any meaningful adverse action is sufficient when the retaliation defendant is a union." *Id.* at 1079 (emphasis in original; citation omitted). The court held that Vonk's complaint to Firestone was "a meaningful adverse action." *Id.* The court also held that Local 301 could not escape an inference of retaliation by its prosecution of plaintiff's grievance, resulting in his getting his job back:

> Local 310 contends that because Vonk immediately filed a grievance on Eliserio's behalf and gained Eliserio reinstatement with full back pay, no jury could conclude that Vonk's original goal was to retaliate against Eliserio. However, Vonk was bound by union policies to file the grievance, and Firestone had to reinstate Eliserio because the reasons cited for his demotion were not listed in the collective bargaining agreement as permissible grounds.

Id. at 1080.

4. Adverse Employment Actions

Gillis v. Georgia Department of Corrections, 400 F.3d 883, 95 FEP Cases 427 (**11th Cir.** 2005), reversed the grant of summary judgment to the Title VII defendant. The court held that an annual performance evaluation was actionable when it resulted in plaintiff's receiving a 3%

annual raise, rather than a 5% raise. "The Supreme Court has written so much about the Civil Rights Act of 1964, and Title VII of that Act, that it is easy to overlook the language of the statute itself. . . . We note at the outset that the statute itself mentions compensation; according to the statute's plain language, it is unlawful for an employer to discriminate against an individual with respect to her compensation on the basis of her race." *Id.* at 887. The court stated its holding: "We hold that an evaluation that directly disentitles an employee to a raise of any significance is an adverse employment action under Title VII. We note that this case does not involve disentitlement to a de minimus raise; rather, the denial of the raise at issue here was an employment decision that significantly affected Gillis's compensation." *Id.* at 888.

D. The Age Discrimination in Employment Act

Smith v. City of Jackson, __ **U.S.** __, 125 S. Ct. 1536, 95 FEP Cases 641 (2005), held in Part III of the opinion that disparate-impact claims may be brought under the ADEA. There is no opinion of the Court on this topic, because the holding depends on a four-Justice plurality of Justices Stevens, Souter, Ginsburg, and Breyer, and a concurrence by Justice Scalia deferring to the EEOC guidelines. In a passage that is part of the opinion of the Court, it held that the employer's standard of justification is lower than it is under Title VII because of the ADEA's defense that there is no violation where the employer's action is based on "reasonable factors other than age discrimination." The Court stated:

> Two textual differences between the ADEA and Title VII make it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under ADEA is narrower than under Title VII. The first is the RFOA provision, which we have already identified. The second is the amendment to Title VII contained in the Civil Rights Act of 1991, 105 Stat. 1071. One of the purposes of that amendment was to modify the Court's holding in *Wards Cove Packing Co. v. Atonio*, 490 **U.S.** 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989), a case in which we narrowly construed the employer's exposure to liability on a disparate-impact theory. See Civil Rights Act of 1991, § 2, 105 Stat. 1071. While the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination. Hence, *Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA.
>
> Congress' decision to limit the coverage of the ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment. To be sure, Congress recognized that this is not always the case, and that society may perceive those differences to be larger or more consequential than they are in fact. However, as Secretary Wirtz noted in his report, "certain circumstances . . . unquestionably affect older workers more strongly, as a group, than they do younger workers." Wirtz Report 28. Thus, it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group. Moreover, intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII. While the ADEA reflects Congress' intent to give older workers employment opportunities whenever possible, the RFOA provision reflects this historical difference.

Id. at 1544–45. The Court affirmed judgment for defendant, however, because plaintiffs did not identify the factor causing adverse impact. It stated: "Thus, the disparate impact is attributable to the City's decision to give raises based on seniority and position. Reliance on seniority and rank is unquestionably reasonable given the City's goal of raising employees' salaries to match those in surrounding communities." *Id.* at 1546. The Court held that that was an RFOA. The court then distinguished an employer's Title VII obligations from those under the ADEA:

> While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.

Id. Plaintiffs' attorneys should not concede reasonableness if a case clearly demonstrates that the employer chose between two options, either of which would have been reasonable if it had been the only option, and chose the option with a markedly greater disparate impact. At some point, the term "reasonable" must have meaning. Justices O'Connor, Kennedy, and Thomas dissented. Chief Justice Rehnquist did not participate.

Rachid v. Jack In The Box, Inc., 376 F.3d 305, 313, 93 FEP Cases 1761 (**5th Cir.** 2004), reversed the grant of summary judgment to the ADEA defendant. The court held that it was not necessary to determine whether a five-year difference in ages was presumptively material, because defendant's age-related comments showed that the difference was important to defendant.

Kriescher v. Fox Hills Golf Resort and Conference Center, 384 F.3d 912, 94 FEP Cases 1007 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII sexual harassment and ADEA age harassment defendant but raised no question as to the availability of a harassment cause of action under the ADEA.

E. The Americans with Disabilities Act and Rehabilitation Act

1. Coverage

Emory v. Astranzeneca Pharmaceuticals LP, 401 F.3d 174, 16 AD Cases 905 (**3d Cir.** 2005), reversed the grant of summary judgment to the ADA defendant, holding that plaintiff had shown a genuine issue of material fact as to whether his cerebral palsy was disabling. Plaintiff had great difficulty performing basic life tasks, but had found ways to accomplish many of them by virtue of hard work to bypass his limitations. The district court held that his accomplishments showed he was not disabled. The court of appeals disagreed, stating at 180–81

> The District Court's focus on what Emory has managed to achieve misses the mark. While evidence of tasks he has mastered might seem to serve as a natural counterpoint when evaluating disability, the paramount inquiry remains—does Emory "have an impairment that prevents or severely restricts [him] from doing activities that are of central importance to most people's daily lives"? . . . If so, then he is substantially limited in the performance of manual tasks and has established disability under the ADA.

> The record is replete with references to the severe restrictions imposed by Emory's impairments. Emory has been, since childhood, either unable to perform, or only able to perform with significant difficulty, a range of manual tasks central to daily life. physically, Emory suffers from weakness and partial paralysis in his right arm. He lacks grip, strength and dexterity in his right hand which, as detailed by physicians and therapists, has seriously affected his ability to perform without accommodation manual tasks required for promotion at AstraZeneca. As he cannot perform activities that require him to grasp and hold with two hands, he is also unable to perform a number of more personal manual tasks involving dressing, eating and maintaining personal hygiene. These limitations have interfered with Emory's ability to care for his children and prevent him from performing many ordinary household tasks central to the lives of most people.
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> So, while the District Court stressed that Emory could "operate a cleaning business, perform as a clown, counsel families as a mediator, and assist his community as a firefighter," it ignored evidence that Emory cannot tie his shoes or necktie, open a jar, cut his nails, perform various household chores and repairs, remove heavy dishes from the oven, change a diaper, carry his children up the stairs, or cut his own meat with a knife and fork. These latter activities, which are but a few examples demonstrative of how very manually impaired Emory is, are "of central importance to people's daily lives," and Emory is either completely without ability or severely restricted in his ability to perform them.
>
> The crux of the inquiry lies in comparing the way in which Emory is able to perform activities, if at all, with the way in which an average member of the general population performs the same activities. An average person, for example, thinks nothing of getting dressed, whether or not the task includes buttons, zippers, laces or sleeves. For Emory, the act of dressing presents huge hurdles, some of which he can overcome through accommodations or the help of another person, and many of which he cannot. "That [a plaintiff], through sheer force of will, learned accommodations, and careful planning, is able to perform a wide variety of activities despite his physical impairments does not mean that those activities are not substantially more difficult for him than they would be for an unimpaired individual." . . . What a plaintiff confronts, not overcomes, is the measure of substantial limitation under the ADA.

(Citations omitted.) The court reached the same conclusions as to plaintiff's learning disability.

2. <u>Adverse Employment Actions</u>

Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011, 1019 n.8, 16 AD Cases 801 (**8th Cir.** 2005), reversed the grant of summary judgment to the ADA defendant. While plaintiff—an Executive Vice-President of defendant—was on maternity leave, she enrolled her Down's Syndrome baby in defendant's health-care plan. Before she returned, she was fired. The court held that her termination was an adverse employment action notwithstanding defendant's statement that she could apply for a position as Vice-President in the reorganized structure. "As a general matter, such a gesture is materially different from a change in position or reappointment in which the same terms and conditions of employment are retained. Moreover, in this particular case, the evidence indicates that this was an empty gesture—at the same time that

Ziegler told her she could apply for the VP of Customer Support position, he also told her that she was not considered to be a viable candidate for the job."

3. Harassment

Mannie v. Potter, 394 F.3d 977, 982, 16 AD Cases 641 (**7th Cir.** 2005), affirmed the grant of summary judgment to the Rehabilitation Act harassment defendant, the U.S. Postal Service. The court stated: "Although we have not yet decided whether a claim for hostile work environment is cognizable under the ADA or the Rehabilitation Act, we have assumed the existence of such claims where resolution of the issue has not been necessary. . . . We have further assumed that the standards for proving such a claim would mirror those we have established for claims of hostile work environment under Title VII." (Citations omitted.)

Shaver v. Independent Stave Co., 350 F.3d 716, 719, 14 AD Cases 1889 (**8th Cir.** 2003), held that the ADA prohibits harassment because of disability. "Today, for the reasons that follow, we join the other circuits that have decided the issue by holding that such claims are in fact actionable. *Cf. Flowers v. Southern Reg'l Physician Servs., Inc.*, 247 F.3d 229, 232–35 (**5th Cir.** 2001), *Fox v. General Motors Corp.*, 247 F.3d 169, 175–77 (**4th Cir.** 2001)."

Lanman v. Johnson County, 393 F.3d 1151, 1154–56, 16 AD Cases 449 (**10th Cir.** 2004), affirmed the grant of summary judgment to the ADA harassment defendant, but held that harassment claims under the ADA are actionable. The court stated: "We think it doubtful that comments by non-supervisory co-workers about Ms. Lanman's mental health establish that the County mistakenly perceived her as mentally impaired. . . . Personality conflicts among coworkers (even those expressed through the use (or misuse) of mental health terminology) generally do not establish a perceived impairment on the part of the employer." *Id.* at 1157.

4. Causation

Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011, 1019–20, 16 AD Cases 801 (**8th Cir.** 2005), reversed the grant of summary judgment to the ADA defendant. While plaintiff—an Executive Vice-President of defendant—was on maternity leave, she enrolled her Down's Syndrome baby in defendant's health-care plan. Before she returned, she was fired. The court held that temporal proximity helped to raise an inference of causation. It explained:

> The evidence establishes that Strate gave birth to her disabled child on April 20, 2001, enrolled the child in the Bank's group healthcare plan on April 24, 2001, and was notified that her job had been eliminated on July 2, 2001, approximately two months later. It is undisputed that Ziegler knew about the child's disability when he made the decision to eliminate her job. On rare occasions, a close temporal connection between a protected activity and an adverse employment action may be sufficient to create an inference of retaliation. . . . It follows that close temporal proximity between an employer's discovery of a protected characteristic and an adverse employment action may, on rare occasions, suffice to create an inference of discrimination. However, "[g]enerally, more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue." . . .

> In the present case, there is more than mere temporal proximity between the birth of Strate's disabled child (and Ziegler's knowledge thereof) and the decision to eliminate her position within the Bank. In the present case, Strate had an eleven-year employment history with the Bank, during which she was promoted several times and received numerous salary increases. She received consistently favorable evaluations over the years, showing no employment problems whatsoever. Ziegler admitted in his deposition that, shortly before Strate went on leave in April 2001, he indicated to her that he was pleased with her work for the Bank and that she had no reason to worry about her job security. . . . Ziegler also testified in his deposition that, at the time he made the decision to eliminate Strate's position, he had no job performance issues related strictly to Strate. . . .
>
> We recognize that evidence of a strong employment history will not alone create a genuine issue of fact regarding pretext and discrimination. However, such circumstantial evidence can be relevant when considering whether the record as a whole establishes a genuine issue of material fact. . . . In the present case, Strate's apparently unblemished employment history with the Bank, spanning more than a decade of work, casts genuine doubt upon the Bank's stated reason for terminating her.
>
> Moreover, evidence concerning Strate's objective qualifications for the VP of Customer Support position and the manner in which the Bank filled that new position is also relevant to our analysis. According to the Bank itself, the reorganization on which it justifies the elimination of Strate's job as Executive VP of Consumer Services simultaneously involved the creation of the new VP of Customer Support position. Strate admittedly did not apply for the new position, but the evidence indicates that, when Ziegler informed her that she could apply, he also told her that she was considered not to be a viable candidate. Strate's evidence further establishes that, while she may not have been viewed as the best candidate for the VP of Customer Support position, she certainly was qualified for the job, having already performed all or most of the very same tasks that the new position entailed. Nevertheless, she was told that she was viewed as a non-viable candidate, and no explanation for that view was given.

The court summarized its holding at 1021:

> In view of the evidence establishing a close temporal proximity between the birth of Strate's disabled child and her termination, combined with the evidence indicating that she maintained a stellar employment record at the Bank over an eleven-year period leading up to the child's birth and was objectively qualified for the new the VP of Customer Support position but was dismissed from the start as a non-viable candidate, we hold that a reasonable fact finder could conclude that Strate's association with her disabled newborn child was a motivating factor in the decision to terminate her. [FN9] Insofar as the district court's summary judgment order is contrary to our holding, it is reversed.
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> FN9. We do not base this holding on evidence in the record merely showing that decision makers at the Bank were aware of the child's disability or that they desired to handle Strate's termination carefully.

F. Title IX of the Higher Education Amendments of 1972

Jackson v. Birmingham Board of Education, __ **U.S.** __, 125 S. Ct. 1497, 95 FEP Cases 669 (2005), held that Title IX provides a private right of action for retaliation against a teacher and coach complaining of sex discrimination in violation of the statute. The Court held that it made no difference that plaintiff was not one of the victims of the discrimination: "The statute is broadly worded; it does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint." *Id.* at 1507. The Court held that the defendant had had ample notice of its potential liability.

> Indeed, retaliation presents an even easier case than deliberate indifference. It is easily attributable to the funding recipient, and it is always—by definition—intentional. We therefore conclude that retaliation against individuals because they complain of sex discrimination is "intentional conduct that violates the clear terms of the statute," *Davis*, 526 **U.S.**, at 642, 119 S. Ct. 1661, and that Title IX itself therefore supplied sufficient notice to the Board that it could not retaliate against Jackson after he complained of discrimination against the girls' basketball team.

Id. at 1509–10. Justice Thomas, the Chief Justice, and Justices Kennedy and Scalia, dissented.

IV. Theories and Proof

A. The Inferential Model

Miller-El v. Dretke, __ **U.S.** __, 125 S. Ct. 2317 (2005), reversed the denial of *habeas corpus* and held that petitioner had shown racial discrimination in the prosecutor's peremptory challenges by clear and convincing evidence. The court stated: "The rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected." *Id.* at 2324. The Court cited *Reeves v. Sanderson Plumbing Products*, *id.* at 2325, underscoring the relevance of this decision to employment law.

> As for law, the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it. . . . It is true that peremptories are often the subjects of instinct . . . and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals's and the dissent's substitution of a reason for eliminating Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.

Id. at 2331–32 (citations omitted). The Court also held that evidence of the prosecution's manipulation of procedures, through jury shuffles that re-order the venire, supported the inference of discrimination. *Id.* at 2332–33. The Court rejected the defendant's speculation that

there mighthave been innocent reasons for its jury shuffles, and rejected the Fifth Circuit's "see no evil" approach:

> The State notes in its brief that there might be racially neutral reasons for shuffling the jury, Brief for Respondent 36-37, and we suppose there might be. But no racially neutral reason has ever been offered in this case, and nothing stops the suspicion of discriminatory intent from rising to an inference.[14]
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> [14] The Court of Appeals declined to give much weight to the evidence of racially motivated jury shuffles because "Miller-El shuffled the jury five times and the prosecutors shuffled the jury only twice." 361 F.3d, at 855. But Miller-El's shuffles are flatly irrelevant to the question whether prosecutors' shuffles revealed a desire to exclude blacks. . . .

Id. at 2333. The Court emphasized a common-sense "best fit" approach to the determination of motivation:

> The State's attempt at a race-neutral rationalization thus simply fails to explain what the prosecutors did. But if we posit instead that the prosecutors' first object was to use the graphic script to make a case for excluding black panel members opposed to or ambivalent about the death penalty, there is a much tighter fit of fact and explanation.[29] Of the 10 nonblacks whose questionnaires expressed ambivalence or opposition, only 30% received the graphic treatment. But of the seven blacks who expressed ambivalence or opposition, 86% heard the graphic script. As between the State's ambivalence explanation and Miller-El's racial one, race is much the better, and the reasonable inference is that race was the major consideration when the prosecution chose to follow the graphic script.
>
> The same is true for another kind of disparate questioning, which might fairly be called trickery. The prosecutors asked members of the panel how low a sentence they would consider imposing for murder. Most potential jurors were first told that Texas law provided for a minimum term of five years, but some members of the panel were not, and if a panel member then insisted on a minimum above five years, the prosecutor would suppress his normal preference for tough jurors and claim cause to strike. Two Terms ago, we described how this disparate questioning was correlated with race . . . .
>
> The State concedes that the manipulative minimum punishment questioning was used to create cause to strike . . . but now it offers the extenuation that prosecutors omitted the 5-year information not on the basis of race, but on stated opposition to the death penalty, or ambivalence about it, on the questionnaires and in the *voir dire* testimony. *Id.*, at 34–35. On the State's identification of black panel members opposed or ambivalent, all were asked the trick question. But the State's rationale flatly fails to explain why most white panel members who expressed similar opposition or ambivalence were not subjected to it. It is entirely true, as the State argues, *id.*, at 35, that prosecutors struck a number of nonblack members of the panel (as well as black members) for cause or by agreement before they reached the point in the standard *voir dire* sequence to question about minimum punishment. But this is no answer; 8 of the 11 nonblack

individuals who voiced opposition or ambivalence were asked about the acceptable minimum only after being told what state law required. Hence, only 27% of nonblacks questioned on the subject who expressed these views were subjected to the trick question, as against 100% of black members. Once again, the implication of race in the prosecutors' choice of questioning cannot be explained away.

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[29] The dissent posits that prosecutors did not use the graphic script with panel members opposed to the death penalty because it would only have antagonized them. See *post,* at 2359. No answer is offered to the question why a prosecutor would take care with the feelings of a panel member he would excuse for cause or strike yet would antagonize an ambivalent member whose feelings he wanted to smoke out, but who might turn out to be an acceptable juror.

Id. at 2336–38 (footnotes omitted). There was a great deal of evidence of discrimination. See the discussion of this case below. The Court sharply criticized the Fifth Circuit's unwillingness to see the discrimination so plainly laid before it:

> The Court of Appeals concluded that Miller-El failed to show by clear and convincing evidence that the state court's finding of no discrimination was wrong, whether his evidence was viewed collectively or separately. . . . We find this conclusion as unsupportable as the "dismissive and strained interpretation" of his evidence that we disapproved when we decided Miller-El was entitled to a certificate of appealability. . . . It is true, of course, that at some points the significance of Miller-El's evidence is open to judgment calls, but when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination.
>
> In the course of drawing a jury to try a black defendant, 10 of the 11 qualified black venire panel members were peremptorily struck. At least two of them, Fields and Warren, were ostensibly acceptable to prosecutors seeking a death verdict, and Fields was ideal. The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny.
>
> The strikes that drew these incredible explanations occurred in a selection process replete with evidence that the prosecutors were selecting and rejecting potential jurors because of race. At least two of the jury shuffles conducted by the State make no sense except as efforts to delay consideration of black jury panelists to the end of the week, when they might not even be reached. The State has in fact never offered any other explanation. Nor has the State denied that disparate lines of questioning were pursued: 53% of black panelists but only 3% of nonblacks were questioned with a graphic script meant to induce qualms about applying the death penalty (and thus explain a strike), and 100% of blacks but only 27% of nonblacks were subjected to a trick question about the minimum acceptable penalty for murder, meant to induce a disqualifying answer. The State's attempts to explain the prosecutors' questioning of particular witnesses on nonracial grounds fit the evidence less well than the racially discriminatory hypothesis.

> If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year old manual of tips on jury selection, as shown by their notes of the race of each potential juror. By the time a jury was chosen, the State had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones.
>
> It blinks reality to deny that the State struck Fields and Warren, included in that 91%, because they were black. The strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State. The State's pretextual positions confirm Miller-El's claim, and the prosecutors' own notes proclaim that the Sparling Manual's emphasis on race was on their minds when they considered every potential juror.
>
> The state court's conclusion that the prosecutors' strikes of Fields and Warren were not racially determined is shown up as wrong to a clear and convincing degree; the state court's conclusion was unreasonable as well as erroneous.

Id. at 2339–40. The Court also drew the inference of racial discrimination from prosecutor James Nelson's offering of a pretextual reason:

> The unlikelihood that his position on rehabilitation had anything to do with the peremptory strike of Fields is underscored by the prosecution's response after Miller-El's lawyer pointed out that the prosecutor had misrepresented Fields's responses on the subject. A moment earlier the prosecutor had finished his misdescription of Fields's views on potential rehabilitation with the words, "Those are our reasons for exercising our ... strike at this time." *Id.*, at 197. When defense counsel called him on his misstatement, he neither defended what he said nor withdrew the strike. *Id.*, at 198. Instead, he suddenly came up with Fields's brother's prior conviction as another reason for the strike. *Id.*, at 199.
>
> It would be difficult to credit the State's new explanation, which reeks of afterthought. While the Court of Appeals tried to bolster it with the observation that no seated juror was in Fields's position with respect to his brother . . . the court's readiness to accept the State's substitute reason ignores not only its pretextual timing but the other reasons rendering it implausible. Fields's testimony indicated he was not close to his brother, App. 190 ("I don't really know too much about it"), and the prosecution asked nothing further about the influence his brother's history might have had on Fields, as it probably would have done if the family history had actually mattered. . . . There is no good reason to doubt that the State's afterthought about Fields's brother was anything but makeweight.

Id. at 2328. The Court criticized the Fifth Circuit for its failure to appreciate the importance of the prosecutor's effort to advance an untruthful explanation:

> The Court of Appeals's judgment on the Fields strike is unsupportable for the same reason the State's first explanation is itself unsupportable. The Appeals Court's

> description of Fields's *voir dire* testimony mentioned only his statements that everyone could be rehabilitated, failing to note that Fields affirmed that he could give the death penalty if the law and evidence called for it, regardless of the possibility of divine grace. The Court of Appeals made no mention of the fact that the prosecution mischaracterized Fields as saying he could not give death if rehabilitation were possible.

Id. at 2329. The Court also held that evidence of the manipulation of procedures supported the inference of discrimination:

> The first clue to the prosecutors' intentions, distinct from the peremptory challenges themselves, is their resort during *voir dire* to a procedure known in Texas as the jury shuffle. In the State's criminal practice, either side may literally reshuffle the cards bearing panel members' names, thus rearranging the order in which members of a venire panel are seated and reached for questioning. Once the order is established, the panel members seated at the back are likely to escape *voir dire* altogether, for those not questioned by the end of the week are dismissed. As we previously explained, "the prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury. Our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney's Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past."

Id. at 2332–33. The Court rejected the defendant's speculation that there mighthave been innocent reasons for its jury shuffles, and rejected the Fifth Circuit's "see no evil" approach:

> The State notes in its brief that there might be racially neutral reasons for shuffling the jury, Brief for Respondent 36-37, and we suppose there might be. But no racially neutral reason has ever been offered in this case, and nothing stops the suspicion of discriminatory intent from rising to an inference.[14]
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> [14] The Court of Appeals declined to give much weight to the evidence of racially motivated jury shuffles because "Miller-El shuffled the jury five times and the prosecutors shuffled the jury only twice." 361 F.3d, at 855. But Miller-El's shuffles are flatly irrelevant to the question whether prosecutors' shuffles revealed a desire to exclude blacks. (The Appeals Court's statement was also inaccurate: the prosecution shuffled the jury three times.)

Id. at 2333. The Court also held that the State manipulated the process by the type of questions it asked different venire members about their feelings on the death penalty. 94% of white venire members were given an abstract description of the death penalty and were then asked about their feelings on it. A "graphic script" describing the death penalty—intended to motivate venire members into expressing misgivings about the death penalty and providing an occasion to strike them for cause—was given to 6% of white venire members and 53% of black venire members before they were asked about their feelings on the death penalty. *Id.* at 2333–34. The court

discussed each of the State's professed reasons for disparate use of the graphic script, and found that the facts did not support the reasons. It continued:

> The State's attempt at a race-neutral rationalization thus simply fails to explain what the prosecutors did. But if we posit instead that the prosecutors' first object was to use the graphic script to make a case for excluding black panel members opposed to or ambivalent about the death penalty, there is a much tighter fit of fact and explanation. Of the 10 nonblacks whose questionnaires expressed ambivalence or opposition, only 30% received the graphic treatment. But of the seven blacks who expressed ambivalence or opposition, 86% heard the graphic script. As between the State's ambivalence explanation and Miller-El's racial one, race is much the better, and the reasonable inference is that race was the major consideration when the prosecution chose to follow the graphic script.

Id. at 2336–37 (footnotes omitted). The Court next turned to a form of manipulation it termed "trickery."

> The same is true for another kind of disparate questioning, which might fairly be called trickery. The prosecutors asked members of the panel how low a sentence they would consider imposing for murder. Most potential jurors were first told that Texas law provided for a minimum term of five years, but some members of the panel were not, and if a panel member then insisted on a minimum above five years, the prosecutor would suppress his normal preference for tough jurors and claim cause to strike.

Id. at 2337. The State informed 94% of white venire members, and only 12.5^ of blacks, about the minimum sentence for murder, allowing them to engage in the trickery questions with 87.5% of blacks, and only 6% of whites. *Id.* The Justice Breyer concurred. *Id.* at 2340–44. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissented. *Id.* at 2344–63.

Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011, 1017–18, 16 AD Cases 801 (**8th Cir.** 2005), reversed the grant of summary judgment to the ADA defendant. While plaintiff—an Executive Vice-President of defendant—was on maternity leave, she enrolled her Down's Syndrome baby in defendant's health-care plan. Before she returned, she was fired. The court held that *Desert Palace* made no difference to Eighth Circuit summary-judgment practice, because Circuit case law already allowed a plaintiff to prevail "notwithstanding the plaintiff's inability to directly disprove the defendant's proffered reason for the adverse employment action." (Citations omitted.) The court further explained:

> Contrary to the Bank's argument, which is based upon Seventh Circuit case law, the applicable standard in our circuit on summary judgment (as discussed above) "require[s] only that [the] plaintiff adduce enough admissible evidence to raise a genuine doubt as to the legitimacy of the defendant's motive, *even if that evidence [does] not directly contradict or disprove [the] defendant's articulated reasons for its actions.*" . . . In the present case, the evidence showing that Strate was objectively qualified for the new VP of Customer Support position, but was written off from the start as a non-viable candidate for the job, certainly adds doubt regarding the legitimacy of the Bank's motives for its actions.

Id. at 1021 (emphasis in original).

Plotke v. White, 405 F.3d 1092 (**10th Cir.** 2005), reversed the grant of summary judgment to the Title VII defendant, holding that the lower court erred in holding that plaintiff's claim could not survive the elimination of her position: "Requiring Dr. Plotke to present evidence that her position remained open subsequent to her discharge when her employer never even asserted she was terminated because her position was eliminated is especially problematic. Indeed, where an employer contends the actual reason for termination in a discriminatory firing case is not elimination of the employee's position but, rather, unsatisfactory conduct, the status of the employee's former position after his or her termination is irrelevant." (Footnote omitted.) The court also stated: "It is not the purpose of a motion for summary judgment to force the judge to conduct a 'mini-trial' to determine the defendant's true state of mind. So long as the plaintiff has presented evidence of pretext (by demonstrating that the defendant's proffered non-discriminatory reason is unworthy of belief) upon which a jury could infer discriminatory motive, the case should go to trial. Judgments about intent are best left for trial and are within the province of the jury." Judge Tymkovich concurred.

B. Curing an Adverse Employment Action

Ezell v. Potter, 400 F.3d 1041, 95 FEP Cases 689 (**7th Cir.** 2005), reversed the grant of summary judgment to the race, sex, and age discrimination defendant on plaintiff's claim of disparate treatment. The court held that the Notice of Termination issued to plaintiff was an adverse employment action even though it was withdrawn after plaintiff filed a grievance. The court explained that "to hold otherwise would allow harassing supervisors to demote employees who rejected their advances with impunity, so long as they later reversed the demotion and restored the employees to their former positions." *Id.* at 1049 (citation omitted.) The court held that plaintiff was damaged "from the time it was issued until it was reversed through the union grievance process." *Id.* at 1049.

C. Mixed Motives

1. *Desert Palace v. Costa*

Desert Palace, Inc. v. Costa, 539 **U.S.** 90, 123 S. Ct. 2148, 91 FEP Cases 1569 (2003), unanimously affirmed the Ninth Circuit, cited *Reeves*, and held that § 703(m) of the Civil Rights Act of 1964, added by the Civil Rights Act of 1991, allows plaintiffs to obtain mixed-motives analysis if they show that race, color, national origin, sex, or religion was one of the factors motivating the challenged decision. The Court held that circumstantial evidence is sufficient, and is not disfavored in employment discrimination cases. This decision will make mixed-motives analysis available generally in intentional-discrimination cases, and will eliminate the requirement that plaintiffs show pretext as to each nondiscriminatory reason proffered by a defendant. It will make it harder for defendants to obtain summary judgment, but may give defendants two bites at the apple in the minds of jurors. It is critical for plaintiffs to emphasize deceit, in cases in which defendant has misrepresented its reasons to the plaintiff, to co-workers, to enforcement agencies, or to the courts. The Court did not address the critical question whether defendants as well as plaintiffs can trigger mixed-motives analysis.

2. Application of *Desert Palace* to Summary Judgment Practice

Machinchick v. PB Power, Inc., 398 F.3d 345, 352, 95 FEP Cases 152 (**5th Cir.** 2005), reversed the grant of summary judgment to the ADEA defendant. The court stated: "Under this integrated approach, a plaintiff relying on circumstantial evidence has two options for surviving summary judgment in an ADEA case: (1) the plaintiff may offer evidence showing that the defendant's proffered nondiscriminatory reasons are false; or (2) the plaintiff may offer evidence showing that his age was a motivating factor for the defendant's adverse employment decision."

Rachid v. Jack In The Box, Inc., 376 F.3d 305, 312, 93 FEP Cases 1761 (**5th Cir.** 2004), reversed the grant of summary judgment to the ADEA defendant, held that *Costa* applies to ADEA cases, and described the difference *Costa* makes:

> Our holding today that the mixed-motives analysis used in Title VII cases post-Desert Palace is equally applicable in ADEA represents a merging of the McDonnell Douglas and Price Waterhouse approaches. Under this integrated approach, called, for simplicity, the modified McDonnell Douglas approach: the plaintiff must still demonstrate a prima facie case of discrimination; the defendant then must articulate a legitimate, non-discriminatory reason for its decision to terminate the plaintiff; and, if the defendant meets its burden of production, "the plaintiff must then offer sufficient evidence to create a genuine issue of material fact 'either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic (mixed-motive[s] alternative).'"

(Citations omitted.)

Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011, 1017–18, 16 AD Cases 801 (**8th Cir.** 2005), reversed the grant of summary judgment to the ADA defendant. While plaintiff—an Executive Vice-President of defendant—was on maternity leave, she enrolled her Down's Syndrome baby in defendant's health-care plan. Before she returned, she was fired. The court held that *Desert Palace* made no difference to Eighth Circuit summary-judgment practice, because Circuit case law already allowed a plaintiff to prevail "notwithstanding the plaintiff's inability to directly disprove the defendant's proffered reason for the adverse employment action." (Citations omitted.) The court continued: "Thus, the Supreme Court's decision in Desert Palace, to the extent relevant, merely reaffirms our prior holdings by indicating that a plaintiff bringing an employment discrimination claim may succeed in resisting a motion for summary judgment where the evidence, direct or circumstantial, establishes a genuine issue of fact regarding an unlawful motivation for the adverse employment action (i.e., a motivation based upon a protected characteristic), even though the plaintiff may not be able to create genuine doubt as to the truthfulness of a different, yet lawful, motivation." *Id.* at 1018 (footnote omitted).

Griffith v. City of Des Moines, 387 F.3d 733, 735, 94 FEP Cases 993 (**8th Cir.** 2004), affirmed the grant of summary judgment to the Title VII and Iowa Human Rights Act defendant on plaintiff's claim of discriminatory discipline. The court held that *Costa* did not affect

summary-judgment practice: "At the summary judgment stage, the issue is whether the plaintiff has sufficient evidence that unlawful discrimination was a motivating factor in the defendant's adverse employment action. If so, the presence of additional legitimate motives will not entitle the defendant to summary judgment. Therefore, evidence of additional motives, and the question whether the presence of mixed motives defeats all or some part of plaintiff's claim, are trial issues, not summary judgment issues. Thus, *Desert Palace*, a decision in which the Supreme Court decided only a mixed motive jury instruction issue, is an inherently unreliable basis for district courts to begin ignoring this Circuit's controlling summary judgment precedents." The court continued:

> We have long recognized and followed this principle in applying *McDonnell Douglas* by holding that a plaintiff may survive the defendant's motion for summary judgment in one of two ways. The first is by proof of "direct evidence" of discrimination. Direct evidence in this context is not the converse of circumstantial evidence, as many seem to assume. Rather, direct evidence is evidence "showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" the adverse employment action. . . . Thus, "direct" refers to the causal strength of the proof, not whether it is "circumstantial" evidence. A plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action does not need the three-part McDonnell Douglas analysis to get to the jury, regardless of whether his strong evidence is circumstantial. But if the plaintiff lacks evidence that clearly points to the presence of an illegal motive, he must avoid summary judgment by creating the requisite inference of unlawful discrimination through the *McDonnell Douglas* analysis, including sufficient evidence of pretext. . . . This formulation is entirely consistent with *Desert Palace*. Thus, we conclude that *Desert Palace* had no impact on prior Eighth Circuit summary judgment decisions.

Id. at 736 (footnote and citations omitted). Judge Magnuson concurred specially. *Id.* at 739–48.

Cooper v. Southern Co., 390 F.3d 695, 725 n.17, 94 FEP Cases 1854 (**11th Cir.** 2004), affirmed the grant of summary judgment to the Title VII and § 1981 racial discrimination defendants. The court rejected plaintiffs' argument that *Desert Palace* overruled *McDonnell Douglas*.

3. Application of *Desert Palace* Outside of Title VII

Rachid v. Jack In The Box, Inc., 376 F.3d 305, 311, 93 FEP Cases 1761 (**5th Cir.** 2004), reversed the grant of summary judgment to the ADEA defendant, and held that the standards of *Desert Palace* apply to ADEA mixed-motives claims. "Given that the language of the relevant provision of the ADEA is similarly silent as to the heightened direct evidence standard, and the presence of heightened pleading requirements in other statutes, we hold that direct evidence of discrimination is not necessary to receive a mixed-motives analysis for an ADEA claim." (Footnotes and citations omitted.) The court added: "Unlike Title VII which explicitly permits mixed-motives cases, the ADEA neither countenances nor prohibits the mixed-motives analysis. Because we base our holding on the absence of a heightened direct evidence requirement in the

ADEA, we do not find the statute's silence on the mixed-motives analysis to be dispositive." *Id.* at 311 n.8.

Calmat Co. v. U.S. Department of Labor, 364 F.3d 1117, 1123 n.4 (**9th Cir.** 2004), denied the employer's petition for review in a whistleblower case, citing *Costa* for the proposition that direct evidence of retaliation is not required to invoke mixed-motives analysis in whistleblower cases.

4. Meaning of "Motivating Factor"

Boyd v. Illinois State Police, 384 F.3d 888, 894–95, 94 FEP Cases 839 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII defendants. The court disapproved of the lower court's supplemental instruction defining "motivating factor" as a "catalyst" without which something different would have happened. The court held that term was not used in Title VII, and imposed a burden on plaintiffs higher than it should have been. In the circumstances of the case, however, it was harmless error.

5. No Need for Corroboration

EEOC v. Warfield-Rohr Casket Co., Inc., 364 F.3d 160, 163–64, 93 FEP Cases 952 (**4th Cir.** 2004), reversed the grant of summary judgment to the ADEA defendant, citing *Costa* and holding that there was no need for corroboration before invoking mixed-motives analysis.

6. Elevation of Weight of Circumstantial Evidence

Harvey v. Office of Banks and Real Estate, 377 F.3d 698, 707, 94 FEP Cases 550 (**7th Cir.** 2004), affirmed the judgment on a jury verdict for plaintiffs. Citing *Costa*, the court stated: "Most of the evidence that Harvey and King presented was circumstantial in nature, but that fact alone says nothing about the soundness of the jury's verdict."

D. Retaliation

1. Retaliation for Complaints Against Others

Flowers v. Columbia College Chicago, 397 F.3d 532, 533–34, 95 FEP Cases 237 (**7th Cir.** 2005), reversed the Rule 12(b)(6) dismissal of plaintiff's Title VII retaliation claim, holding that Title VII protects an employee who complains of discrimination by a third party. Here, plaintiff was employed by defendant but was assigned to work with the Chicago School System under a contract between it and defendant. The court rejected defendant's argument that Title VII protects only employees who file a complaint against their employers:

> If the College were right, then any firm could opt out of Title VII by adopting a holding-company structure. Suppose that Acme Industries were to create two subsidiaries: Acme Personnel and Acme Operations. Acme Personnel would hire and pay all employees; Acme Operations would carry on the firm's production using employees from Acme Personnel. On the College's legal view, Acme Operations could engage in religious (and other) discrimination with impunity, because it would not be the "employer," while Acme Personnel could fire anyone who complained about

discrimination at Acme Operations, because the complaint would not concern Acme Personnel's conduct. That *reductio ad absurdum* can be avoided by reading § 2000e–3(a) to mean what it says. No employer may retaliate against someone who makes or supports a charge of discrimination against any employer.

2. Retaliatory Harassment

Noviello v. City of Boston, 398 F.3d 76, 89 (**1st Cir.** 2005), reversed the grant of summary judgment to the Title VII defendant on plaintiff's claim of retaliatory harassment. Recognizing the split among the Circuits, the court held: "The weight of authority supports the view that, under Title VII, the creation and perpetuation of a hostile work environment can comprise a retaliatory adverse employment action under 42 U.S.C. § 2000e-3(a)." (Citations omitted.)

Smith v. Northeastern Illinois University, 388 F.3d 559, 567 n.5, 94 FEP Cases 1295 (**7th Cir.** 2004), affirmed the grant of summary judgment and the judgment on a jury verdict for the Title VII racial harassment defendants. The court stated: "The creation of a hostile work environment can be a form of retaliation."

Baker v. John Morrell & Co., 382 F.3d 816, 830 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Iowa Human Rights Act sexual harassment and retaliation plaintiff, including the awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys' fees and costs, a total of $1,386,632. The court upheld the jury's finding that plaintiff's female supervisor, Kathi Brown, retaliated against her for having filed her complaint with the Iowa Civil Rights Commission by creating a retaliatory hostile environment severe enough to qualify as an adverse employment action: "Here, Baker presented evidence showing Brown became antagonistic towards her because the ICRA complaint reflected badly on Brown's job performance. In response, Brown limited Baker's bathroom and other breaks, added to her job duties, refused to provide her necessary job assistance, repeatedly yelled at her for making mistakes, withheld privileges allowed to other employees, and attempted to dissuade her from making further complaints. We are satisfied these retaliatory changes in working conditions constituted significant and material disadvantages sufficient to support the retaliation claim."

3. Determinations of Actionable Conduct

Eliserio v. United Steelworkers of America Local 310, 398 F.3d 1071, 95 FEP Cases 421 (**8th Cir.** 2005), reversed the grant of summary judgment to the Title VII and § 1981 harassment and retaliation claims. The Hispanic plaintiff crossed a picket line during a strike, and resigned from Local 310. He thereafter became the target of graffiti referring to him as a "rat" and using racial slurs such as "Taco Bob" and "Ratserio." Divisional chairman Steve Vonk asked Firestone to remove plaintiff from his work area, and the company demoted plaintiff. The court stated that the nature of the *prima facie* case is different when the defendant is a union: "Because unions often do not have the authority to subject a represented employee to an adverse *employment* action, we have held that any meaningful adverse action is sufficient when the retaliation defendant is a union." *Id.* at 1079 (emphasis in original; citation omitted). The court held that Vonk's complaint to Firestone was "a meaningful adverse action." *Id.*

4. Causation

Eliserio v. United Steelworkers of America Local 310, 398 F.3d 1071, 1079, 95 FEP Cases 421 (**8th Cir.** 2005), reversed the grant of summary judgment to the Title VII and § 1981 harassment and retaliation claims. The Hispanic plaintiff crossed a picket line during a strike, and resigned from Local 310. He thereafter became the target of graffiti referring to him as a "rat" and using racial slurs such as "Taco Bob" and "Ratserio." Local 301 Divisional chairman Steve Vonk asked Firestone to remove plaintiff from his work area, and the company demoted plaintiff. The court stated that a temporal connection can establish a causal link, although generally this is not sufficient by itself. It continued:

> Eliserio repeatedly complained of racial harassment from early 2001, when the graffiti began to appear, until Vonk's complaint in September 2001. This temporal connection supports an initial inference of causation. In addition, Vonk admitted that as a result of Eliserio's complaints of racial harassment to Firestone, he was forced to devote significant time to investigating and attempting to remedy the ongoing graffiti situation. Vonk stated that as a result of his uncompensated overtime work on union business, he often was forced to forgo opportunities for paid overtime. A reasonable jury could infer that Vonk's attempt to have Eliserio removed from his area was motivated by Vonk's desire to avoid the drain on his time caused by Eliserio's continuing complaints of racial harassment. This inference would provide the necessary causal link between Eliserio's complaints of racial harassment and Vonk's complaint to Firestone. Therefore, we conclude that Eliserio presents a prima facie case of retaliation.

E. Comparators

Miller-El v. Dretke, __ **U.S.** __, 125 S. Ct. 2317, 2325–28 (2005), reversed the denial of *habeas corpus* and held that petitioner had shown racial discrimination in the prosecutor's peremptory challenges by clear and convincing evidence. The Court cited *Reeves v. Sanderson Plumbing Products, id.* at 2325, underscoring the relevance of this decision to employment law. The Court relied heavily on comparators:

> More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step. *Cf. Reeves v. Sanderson Plumbing Products, Inc.*, 530 **U.S.** 133, 147, 82 FEP Cases 1748 (2000) (in employment discrimination cases, "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive"). While we did not develop a comparative juror analysis last time, we did note that the prosecution's reasons for exercising peremptory strikes against some black panel members appeared equally on point as to some white jurors who served.

The Court then discussed in detail two sets of comparisons. "The prosecution used its second peremptory strike to exclude Billy Jean Fields, a black man who on *voir dire* expressed

unwavering support for the death penalty," *id.* at 2326, and who stated that the possibility of rehabilitation would not lead him to vote against the death penalty. The Court focused not only on comparisons of the substance of the responses of Fields and of white venire members who were not struck, but also on differences in prosecutor James Nelson's questioning of Fields, and his questioning of white venire members

> Fields was struck peremptorily by the prosecution, with prosecutor James Nelson offering a race-neutral reason:
>
> > "[W]e . . . have concern with reference to some of his statements as to the death penalty in that he said that he could only give death if he thought a person could not be rehabilitated and he later made the comment that any person could be rehabilitated if they find God or are introduced to God and the fact that we have a concern that his religious feelings may affect his jury service in this case." *Id.,* at 197 (alteration omitted).
>
> Thus, Nelson simply mischaracterized Fields's testimony. He represented that Fields said he would not vote for death if rehabilitation was possible, whereas Fields unequivocally stated that he could impose the death penalty regardless of the possibility of rehabilitation. Perhaps Nelson misunderstood, but unless he had an ulterior reason for keeping Fields off the jury we think he would have proceeded differently. In light of Fields's outspoken support for the death penalty, we expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike.
>
> If, indeed, Fields's thoughts on rehabilitation did make the prosecutor uneasy, he should have worried about a number of white panel members he accepted with no evident reservations. Sandra Hearn said that she believed in the death penalty "if a criminal cannot be rehabilitated and continues to commit the same type of crime." *Id.,* at 429. Hearn went so far as to express doubt that at the penalty phase of a capital case she could conclude that a convicted murderer "would probably commit some criminal acts of violence in the future." *Id.,* at 440. "People change," she said, making it hard to assess the risk of someone's future dangerousness. "[T]he evidence would have to be awful strong." *Ibid.* But the prosecution did not respond to Hearn the way it did to Fields, and without delving into her views about rehabilitation with any further question, it raised no objection to her serving on the jury. White panelist Mary Witt said she would take the possibility of rehabilitation into account in deciding at the penalty phase of the trial about a defendant's probability of future dangerousness, 6 Record of *Voir Dire* 2433 (hereinafter Record), but the prosecutors asked her no further question about her views on reformation, and they accepted her as a juror. *Id.,* at 2464–2465. Latino venireman Fernando Gutierrez, who served on the jury, said that he would consider the death penalty for someone who could not be rehabilitated, App. 777, but the prosecutors did not question him further about this view. In sum, nonblack jurors whose remarks on rehabilitation could well have signaled a limit on their willingness to impose a death sentence were not questioned further and drew no objection, but the prosecution expressed apprehension about a black juror's belief in the possibility of reformation even though he repeatedly stated his approval of the death penalty and testified that he could

> impose it according to state legal standards even when the alternative sentence of life imprisonment would give a defendant (like everyone else in the world) the opportunity to reform.

Id. at 2327–28 (footnotes omitted).

> The unlikelihood that his position on rehabilitation had anything to do with the peremptory strike of Fields is underscored by the prosecution's response after Miller-El's lawyer pointed out that the prosecutor had misrepresented Fields's responses on the subject. A moment earlier the prosecutor had finished his misdescription of Fields's views on potential rehabilitation with the words, "Those are our reasons for exercising our ... strike at this time." *Id.*, at 197. When defense counsel called him on his misstatement, he neither defended what he said nor withdrew the strike. *Id.*, at 198. Instead, he suddenly came up with Fields's brother's prior conviction as another reason for the strike. *Id.*, at 199.

Id. at 2328. The Court continued, emphasizing that comparators need not be identical for the comparison to have probative force:

> In sum, when we look for nonblack jurors similarly situated to Fields, we find strong similarities as well as some differences.[6] But the differences seem far from significant, particularly when we read Fields's *voir dire* testimony in its entirety. Upon that reading, Fields should have been an ideal juror in the eyes of a prosecutor seeking a death sentence, and the prosecutors' explanations for the strike cannot reasonably be accepted. . . .
>
> ———————
>
> [6] The dissent contends that there are no white panelists similarly situated to Fields and to panel member Joe Warren because "'"[s]imilarly situated" does not mean matching any one of several reasons the prosecution gave for striking a potential juror—it means matching all of them.'" . . . None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. Nothing in the combination of Fields's statements about rehabilitation and his brother's history discredits our grounds for inferring that these purported reasons were pretextual. A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.

Id. at 2329. The Court next addressed the prosecution's strike of Joe Warren, a black venire member. The State did not strike white venire members who expressed the same views as Warren. *Id.* at 2329–30. The State urged that it struck Warren when it still had a number of peremptory challenges left, and did not strike whites with similar views because it then had fewer peremptory challenges. Rejecting this argument, the Court stated:

> If that were the explanation for striking Warren and later accepting panel members who thought death would be too easy, the prosecutors should have struck Sandra Jenkins, whom they examined and accepted before Warren. Indeed, the disparate treatment is the

> more remarkable for the fact that the prosecutors repeatedly questioned Warren on his capacity and willingness to impose a sentence of death and elicited statements of his ability to do so if the evidence supported that result and the answer to each special question was yes . . . whereas the record before us discloses no attempt to determine whether Jenkins would be able to vote for death in spite of her view that it was easy on the convict . . . . Yet the prosecutors accepted the white panel member Jenkins and struck the black venireman Warren.

Id. at 2330. The Court held that the comparative evidence as to Warren was not undermined by the fact that Warren's brother-in-law had been convicted of food-stamp fraud:

> Nor is pretextual indication mitigated by Macaluso's further reason that Warren had a brother-in-law convicted of a crime having to do with food stamps for which he had to make restitution. App. 910. Macaluso never questioned Warren about his errant relative at all; as with Fields's brother, the failure to ask undermines the persuasiveness of the claimed concern. And Warren's brother's criminal history was comparable to those of relatives of other panel members not struck by prosecutors. Cheryl Davis's husband had been convicted of theft and received seven years' probation. *Id.*, at 695-696. Chatta Nix's brother was involved in white-collar fraud. *Id.*, at 613-614. Noad Vickery's sister served time in a penitentiary several decades ago. *Id.*, at 240–241.

Id. at 2330 n.8. The Court also held that the State manipulated the process by the type of questions it asked different venire members about their feelings on the death penalty. 94% of white venire members were given an abstract description of the death penalty and were then asked about their feelings on it. A "graphic script" describing the death penalty was given to 6% of white venire members and 53% of black venire members before they were asked about their feelings on the death penalty. *Id.* at 2333–34. The Court used comparative evidence to reject the State's explanation:

> The State concedes that this disparate questioning did occur but argues that use of the graphic script turned not on a panelist's race but on expressed ambivalence about the death penalty in the preliminary questionnaire. Prosecutors were trying, the argument goes, to weed out noncommittal or uncertain jurors, not black jurors. And while some white venire members expressed opposition to the death penalty on their questionnaires, they were not read the graphic script because their feelings were already clear. The State says that giving the graphic script to these panel members would only have antagonized them. Brief for Respondent 27-32.
>
> This argument, however, first advanced in dissent when the case was last here . . . and later adopted by the State and the Court of Appeals, simply does not fit the facts. Looking at the answers on the questionnaires, and at *voir dire* testimony expressly discussing answers on the questionnaires, we find that black venire members were more likely than nonblacks to receive the graphic script regardless of their expressions of certainty or ambivalence about the death penalty, and the State's chosen explanation for the graphic script fails in the cases of four out of the eight black panel members who received it.

Id. at 2334–35 (footnotes omitted). Justice Breyer concurred. *Id.* at 2340–44. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissented. *Id.* at 2344–63.

Rachid v. Jack In The Box, Inc., 376 F.3d 305, 314, 93 FEP Cases 1761 (**5th Cir.** 2004), reversed the grant of summary judgment to the ADEA defendant. The court rejected defendant's comparators—managers who were fired for unlawful alterations of time cards—because they were fired by different managers. "Furthermore, the other employees were terminated by other managers, mitigating the relevance of their terminations to the question of whether Powers unlawfully discriminated against Rachid." The policies in question were not the same, and their conduct was more serious.

Ezell v. Potter, 400 F.3d 1041, 95 FEP Cases 689 (**7th Cir.** 2005), reversed the grant of summary judgment to the race, sex, and age discrimination defendant on plaintiff's claim of disparate treatment. The old white male plaintiff was notified of his removal for asking payment for a long lunch when he was not working, and the court accepted a comparator who was not disciplined for losing a piece of certified mail. The USPS contended that plaintiff was being disciplined for serious misconduct, and that losing a piece of certified mail was too dissimilar. The court set forth the standard of Circuit case law on comparators: "This normally entails a showing that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." *Id.* at 1049–50 (citations omitted.) The court held that the lower court misconstrued this standard: "The district court took this to mean that Ezell must produce a non-Caucasian employee who committed exactly the same infraction and was treated more favorably. But the law is not this narrow; the other employees must have engaged in similar—not identical—conduct to qualify as similarly situated." *Id.* at 1050. Other serious misconduct can suffice. The court continued:

> The Postmaster characterizes Ezell's claim that losing mail is a serious offense as "self-serving" and states there is no evidence that losing certified mail is considered a serious matter. This is a curious claim from an entity whose primary business is delivering mail. Misplacing certified mail, that is, mail that has been designated as especially important by its sender, would seem to be a serious matter. Ezell points out evidence in the record that another carrier was fired for delaying mail and from this termination we may infer that losing mail would also be a serious offense, at least as serious as taking a long lunch. Ezell thus has raised a genuine issue of material fact as to whether a similarly situated employee outside his class received favorable treatment.

Id. In addition, plaintiff showed that his supervisor unlawfully doctored employees' time records to avoid paying them for work they had performed.

F. Comparative Qualifications and Evidence Bearing on Employee Performance

Salazar v. Washington Metropolitan Transit Authority, 401 F.3d 504, 95 FEP Cases 681 (**D.C. Cir.** 2005), reversed the grant of summary judgment to the Title VII defendant, in large part because plaintiff showed departures from ordinary procedures that suggested defendant weighted the process to bar plaintiff's advancement. After several promotional denials, plaintiff

complained that Superintendent of Plant Equipment Maintenance Lewis stacked promotional panels with his friends, and would not promote Latinos. The General Manager promised that Lewis would have no influence over the panel with respect to the promotion at issue. Instead, the panel was expanded, Lewis named the chair, Lewis worked with the chair to establish the weightings for various qualifications, and the weightings downplayed plaintiff's strengths. The court stated: "We agree with Salazar that a jury could infer something 'fishy' from the fact that Lewis placed himself squarely at the center of a process designed to exclude him. Specifically, a jury could conclude that WMATA failed to provide a "fairly administered selection process" and that its claim to the contrary is pretextual." *Id.* at 508–09 (citations omitted.) The court held that the inference remained even though the panel chair, Buddie Jaggie, did not vote materially differently than the other members and there was no contention that the others were disposed to discriminate. Even without Jaggie's scores, plaintiff would have come in fourth with the weightings in place. The court continued: "The possibility that the interview process for the Metro Center job may not have been fairly designed increases in light of the fact that Tucker, the successful candidate, never held that job. Instead, Lewis transferred Tucker to what Salazar described as a less difficult job in Greenbelt—a characterization not contested by WMATA. From this, we think a reasonable jury could infer that Tucker was unsuited for the Metro Center job and that the selection process was geared not to finding the best person for the position, but rather to keeping Salazar from advancing." *Id.* at 509. The court held that a reasonable jury could find defendant's explanation pretextual. Judge Williams dissented, and the panel majority criticized the dissent for raising arguments defendant never raised, and for engaging in speculation that there might be innocent reasons for the oddities, instead of drawing inferences in plaintiff's favor. *Id.* at 509–12.

G. Statistics

Obrey v. Johnson, 400 F.3d 691, 95 FEP Cases 531 (**9th Cir.** 2005), reversed the judgment on a jury verdict for the Title VII defendant. Plaintiff is an Asian-Pacific Islander who claimed that persons of his race were systematically excluded from senior management positions at the Pearl Harbor Naval Shipyard. The lower court excluded his statistical study because it did not account for the relative qualifications of the candidates, and the court held that this was an abuse of discretion:

> Obrey's statistical evidence was not rendered irrelevant under Rule 402 simply because it failed to account for the relative qualifications of the applicant pool. See Fed. R. Evid. 402 ("All relevant evidence is admissible, except as otherwise provided [by law]. Evidence which is not relevant is not admissible.") A statistical study may fall short of proving the plaintiff's case, but still remain relevant to the issues in dispute. The Dannemiller study may be relevant, and therefore admissible, even if it is not sufficient to establish Obrey's prima facie case or a claim of pretext. Thus, objections to a study's completeness generally go to "the weight, not the admissibility of the statistical evidence" . . . and should be addressed by rebuttal, not exclusion . . . .
>
> In some cases, statistical evidence may suffer from serious methodological flaws and can be excluded, consistent with the trial court's "gatekeeping" power, under Rule 702. . . . Factors which may bear on admissibility include: (1) whether the "scientific knowledge . . . can be (and has been) tested"; (2) whether "the theory or technique has

> been subjected to peer review and publication"; (3) "the known or potential rate of error"; and (4) "general acceptance." . . . The Rule 702 inquiry is a "flexible one" whose "overarching subject is the scientific validity and thus the evidentiary relevance and reliability[ ] of the principles that underlie a proposed submission." . . .

Id. at 695–96. The court stated that the study in question "is based entirely on statistical disparities," *id.* at 696, and that such evidence may not be sufficient to establish a *prima facie* case for purposes of summary judgment, but is admissible. "While, by itself, this cannot constitute proof that the Navy discriminated against Obrey . . . it should have been admitted for whatever probative value it had." *Id.* at 697 (citation omitted).

H. Discriminatory Statements

1. Statements Probative of Unlawful Motive

Miller-El v. Dretke, __ **U.S.** __, 125 S. Ct. 2317, 2338–39 (2005), reversed the denial of *habeas corpus* and held that petitioner had shown racial discrimination in the prosecutor's peremptory challenges by clear and convincing evidence. The Court cited *Reeves v. Sanderson Plumbing Products*, *id.* at 2325, underscoring the relevance of this decision to employment law. The Court relied on evidence of discriminatory statements going back to the 1950's, evidencing a policy of racial discrimination that was not shown to have ended by the time of petitioner's trial. The Court also relied on the fact that prosecutors marked the race of each prospective juror on their jury cards. *Id.* It rejected the State's argument that this was to ensure there would be no violation of the rule of *Batson v. Kentucky*, 476 **U.S.** 79 (1986), because *Batson* was not decided until a month after Miller-El was tried. *Id.* at 2339 n.38. The Court sharply criticized the Fifth Circuit's unwillingness to see the discrimination so plainly laid before it. *Id.* at 2339–40. The Court relied on evidence of discriminatory statements going back to the 1950's, evidencing a policy of racial discrimination that was not shown to have ended by the time of petitioner's trial. *Id.* at 2338–39. Justice Breyer concurred. *Id.* at 2340–44. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissented. *Id.* at 2344–63.

Machinchick v. PB Power, Inc., 398 F.3d 345, 353, 95 FEP Cases 152 (**5th Cir.** 2005), reversed the grant of summary judgment to the ADEA defendant. The court relied on statements in a business plan, some of them made at different times and for different purposes, to provide an inference of age bias:

> Machinchick presented evidence showing that weeks before he was terminated, Knowlton sent an e-mail to several PB Power employees discussing his intent to go forward with his plan to "strategically hire some younger engineers and designers." Although PB Power argues that this plan applied only to engineers and designers hired in its San Francisco office, Knowlton testified in his deposition that the hiring plan was represented in PB Power's business plan for 2002—which applied generally to all of PB Power's operations—via the goal of hiring employees whose mindsets reside in the "21st Century." Taken together, Knowlton's e-mail and PB Power's business plan provide evidence that PB Power intended to assemble a younger workforce, creating an inference that Machinchick's age was a factor in his termination.

(Footnote omitted.) The court continued:

> Second, Machinchick points to Knowlton's use of "age stereotyping remarks" as evidence that he was terminated because of his age. In his e-mail to Elizabeth Erichsen describing Machinchick's shortcomings, Knowlton claimed that Machinchick had a "[l]ow motivation to adapt" to change. Knowlton expounded upon this claim in his deposition, describing Machinchick as "inflexible," "not adaptable," and possessing a "business-as-usual attitude." We have found that purely indirect references to an employee's age, such as comments that an employee needed to look "sharp" if he were going to seek a new job, and that he was unwilling and unable to "adapt" to change, can support an inference of age discrimination. Thus, Knowlton's description of Machinchick in both his e-mail and deposition gives rise to an inference that Machinchick was terminated because of his age.

Id. (footnote omitted).

Rachid v. Jack In The Box, Inc., 376 F.3d 305, 315–16, 93 FEP Cases 1761 (**5th Cir.** 2004), reversed the grant of summary judgment to the ADEA defendant. The court relied in part on biased statements by the decisionmaker over a period of time prior to the decision:

> Rachid testified that Powers made numerous ageist comments—including one situation where Powers allegedly said: "[A]nd don't forget it, [Rachid], you're too old, too"—and Haidar supported Rachid's assertions that Powers continually made such comments. Rachid even spoke with human resources prior to his termination to express his fear that Powers would try to fire him because of his age. Despite JIB's focus on Teal-Guess's investigation and company policy, it was Powers who terminated Rachid, and it was Powers who repeatedly made ageist comments to and about Rachid. Such comments preclude summary judgment because a rational finder of fact could conclude that age played a role in Powers's decision to terminate Rachid.

Ezell v. Potter, 400 F.3d 1041, 1044, 95 FEP Cases 689 (**7th Cir.** 2005), reversed the grant of summary judgment to the race, sex, and age discrimination defendant on plaintiff's claim of disparate treatment. The court held that plaintiff showed direct evidence of discrimination:

> . . . Wright's co-supervisor, Mike Pavlides, told a new hire that their (Pavlides's and Wright's) plan was to get rid of older carriers and replace them with younger, faster carriers. Wright also frequently made disparaging remarks about older workers, referred often to Ezell's gray hair and beard, commented on his slowness and suggested that because of his speed, he should consider another line of work. Pavlides's statement that he and Wright had a plan to get rid of older workers and replace them with younger, faster workers is direct evidence of discriminatory intent and is sufficient evidence to allow Ezell to take his case to trial.

Obrey v. Johnson, 400 F.3d 691, 697, 95 FEP Cases 531 (**9th Cir.** 2005), reversed the judgment on a jury verdict for the Title VII defendant. Plaintiff is an Asian-Pacific Islander who claimed that persons of his race were systematically excluded from senior management positions

at the Pearl Harbor Naval Shipyard. The lower court excluded as irrelevant the testimony of an employee, Toyama, who "was expected to testify that Shipyard officials had informed him that off-yard employees were rotated to Pearl Harbor on a temporary basis because the 'local' workers 'were not good enough' and 'can't do a good job.'" The court held that this was an abuse of discretion because the testimony tended to show defendant's discriminatory state of mind, and Toyama's further expected testimony on the source of the funds used to pay for off-yard employees tended to show that defendant's stated explanations were pretextual.

Plotke v. White, __ F.3d __, 2005 WL 984363 (**10th Cir.** April 28, 2005), reversed the grant of summary judgment to the Title VII defendant, holding that

2. Speakers Who Were Not Formal Decisionmakers

Ezell v. Potter, 400 F.3d 1041, 1051, 95 FEP Cases 689 (**7th Cir.** 2005), reversed the grant of summary judgment to the race, sex, and age discrimination defendant on plaintiff's claim of disparate treatment. The court held that plaintiff showed direct evidence of discrimination because of the anti-white, anti-male, and anti-older worker remarks of his supervisors, who provided the information on which the decisionmaker acted:

> Direct evidence is evidence which can be interpreted as an acknowledgment of the defendant's discriminatory intent. . . . To constitute direct evidence of discrimination, a statement must relate to the motivation of the decision-maker responsible for the contested decision. . . . Again, Postmaster Dew accepted the recommendation of Wright and Pavlides in deciding to terminate Ezell and therefore the supervisors' discriminatory motive may be imputed to Dew.

(Citations omitted.)

I. Other Evidence of Unlawful Motive

Plotke v. White, __ F.3d __, 2005 WL 984363 (**10th Cir.** April 28, 2005), reversed the grant of summary judgment to the Title VII defendant, holding that the evidence of fabrication of evidence and manipulation of procedures allowed an inference of sex discrimination. The court stated at *10:

> Conflicting evidence regarding the point in time at which Dr. Morris made the decision to terminate Dr. Plotke contributes to her showing of pretext. When Dr. Morris met with Dr. Gorell and Ms. Darnell on either June 20 or June 21, 1995, Dr. Morris gave Dr. Gorell the impression that he had already made the decision to terminate Dr. Plotke and simply wanted a "rubber stamp" to support that decision. . . . The conflicting evidence concerning the timing of Dr. Morris' decision to fire Dr. Plotke coupled with the conflicting evidence regarding the reasons Dr. Morris decided to fire her raise credibility issues for the fact finder. . . . If Dr. Morris' testimony concerning his timing and reasoning for terminating Dr. Plotke is "unworthy of credence," a reasonable jury could infer from "the falsity of [his] explanation" that Dr. Morris is "dissembling to cover up a discriminatory purpose." . . . In addition, evidence of the fabrication of a June 22 memoranda and procedural irregularities regarding Dr. Plotke's termination constitute relevant evidence of pretext going to the termination decision.

J. Harassment

1. Definitions of a *Prima Facie* Case

Septimus v. University of Houston, 399 F.3d 601, 611, 95 FEP Cases 129 (**5th Cir.** 2005), stated:

> The plaintiff in a hostile work environment claim must establish that 1) she belongs to a protected class; 2) she was subjected to unwelcome sexual harassment; 3) the harassment was based on sex; 4) the harassment affected a term, condition or privilege of employment; and 5) the employer knew or should have known of the harassment and failed to take remedial action. Conduct sufficient to create a hostile working environment must be severe or pervasive. To be actionable, the alleged harassment must have created an environment that a reasonable person would find hostile or abusive. Whether an environment is hostile or abusive depends on the totality of the circumstances, including factors such as the frequency of the conduct, its severity, the degree to which the conduct is physically threatening or humiliating, and the degree to which the conduct unreasonably interferes with an employee's work performance.

(Footnotes omitted.)

Luckie v. Ameritech Corp., 389 F.3d 708, 713, 94 FEP Cases 1351 (**7th Cir.** 2004), a Title VII racial harassment case, stated: "To state a claim for a hostile work environment, Luckie must demonstrate that: (1) she was subject to unwelcome harassment; (2) the harassment was based on her race; (3) the harassment was sufficiently severe or pervasive so as to alter the conditions of her employment and create a hostile or abusive atmosphere; and (4) there is a basis for employer liability." (Citation omitted.) *Accord*, *Smith v. Northeastern Illinois University*, 388 F.3d 559, 566, 94 FEP Cases 1295 (**7th Cir.** 2004).

Herron v. DaimlerChrysler Corp., 388 F.3d 293, 302, 94 FEP Cases 1219 (**7th Cir.** 2004), a Title VII and § 1981 racial harassment case, stated: "To succeed on his racial harassment claim, Herron has to show that: '(1) he was subject to unwelcome harassment; (2) the harassment was based on his race; (3) the harassment unreasonably interfered with his work performance by creating an intimidating, hostile, or offensive working environment that seriously affected his psychological well-being; and (4) there is a basis for employer liability.'" (Citation omitted.) *Accord*, *McPherson v. City of Waukegan*, 379 F.3d 430, 437–38, 94 FEP Cases 247, 94 FEP Cases 257 (**7th Cir.** 2004) (sexual harassment).

Dandy v. United Parcel Service, Inc., 388 F.3d 263, 271, 94 FEP Cases 1156 (**7th Cir.** 2004), stated: "To be actionable under § 1981, harassment must be: (1) based on race; (2) subjectively and objectively hostile; and (3) sufficiently severe *or* pervasive to interfere with an employee's ability to perform his assigned duties. . . . Under the objective hostility analysis, courts may consider: (1) the frequency of the conduct; (2) the severity of the conduct; (3) 'whether it is physically threatening or humiliating, or a mere offensive utterance'; and (4) whether it unreasonably interferes with the employee's ability to complete his or her assigned duties." (Citations omitted.)

Okruhlik v. University of Arkansas, 395 F.3d 872, 881, 95 FEP Cases 82 (**8th Cir.** 2005), stated: "To establish a prima facie case for a hostile work environment based on sexual harassment, Okruhlik must show (1) that she belongs to a protected group; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment was based on sex; and (4) that the harassment affected a term, condition or privilege of her employment." (Citation omitted.) *Accord, LeGrand v. Area Resources for Community and Human Services*, 394 F.3d 1098, 1101, 95 FEP Cases 14 (**8th Cir.** 2005); *Baker v. John Morrell & Co.*, 382 F.3d 816, 828 (**8th Cir.** 2004).

Hesse v. Avis Rent A Car System, Inc., 394 F.3d 624, 629, 94 FEP Cases 1805 (**8th Cir.** 2005), stated: "To establish a prima face case that she was subjected to a hostile work environment, Hesse must show that (1) she is a member of a protected group; (2) unwelcome harassment occurred; (3) a causal nexus existed between the harassment and her protected group status; and (4) the harassment affected a term, condition, or privilege of employment."

Williams v. ConAgra Poultry Co., 378 F.3d 790, 794, 94 FEP Cases 266 (**8th Cir.** 2004), stated: "In order to prevail on a harassment claim, a plaintiff must show that he or she is a member of a protected group, that there was "unwelcome harassment," that there was a causal nexus between the harassment and membership in the protected group, and that the harassment affected a term, condition, or privilege of employment. . . . If the harassment comes from non-supervisory employees, the plaintiff must also show that the employer knew or should have known about the harassment but failed to take proper action." (Citations omitted.)

Porter v. California Dept. of Corrections, 383 F.3d 1018, 1027, 94 FEP Cases 928 (**9th Cir.** 2004), stated: "In order for this claim to survive summary judgment, Porter must show that: (1) she was subjected to verbal or physical conduct of a sexual nature; (2) the conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment." (Citation omitted.)

2. Who is a Supervisor?

Noviello v. City of Boston, 398 F.3d 76, 96 (**1st Cir.** 2005), affirmed the grant of summary judgment to the Title VII defendant on plaintiff's claim of sexual harassment. The court held that plaintiff's harassers were merely second-rung "supervisors" who, despite their title, were not supervisors within the meaning of *Faragher* and *Ellerth*: "Having in mind both common law agency principles and the purposes of the anti-discrimination and anti-retaliation laws, we agree with the Seventh Circuit that 'the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment.' . . . This authority 'primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee.' . . . Without some modicum of this authority, a harasser cannot qualify as a supervisor for purposes of imputing vicarious liability to the employer in a Title VII case, but, rather, should be regarded as an ordinary coworker." (Citations omitted.)

Joens v. John Morrell & Co., 354 F.3d 938, 940–41, 93 FEP Cases 72 (**8th Cir.** 2004), affirmed the grant of summary judgment to the Title VII hostile-environment defendant, holding that the alleged harasser was not plaintiff's supervisor. The court canvassed the approaches of different Circuits, stating:

> The decisions of the few circuits to address the question are not entirely consistent. The majority hold that, to be a supervisor, the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties. See *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002); *Mikels v. City of Durham*, 183 F.3d 323, 333-34 (4th Cir.1999). By contrast, the Second Circuit recently adopted a somewhat broader standard, concluding that an alleged harasser is a supervisor for these purposes if he possessed "authority to direct the employee's daily work activities," even if he otherwise lacked the power to take tangible employment action against the victim. *Mack v. Otis Elevator Co.*, 326 F.3d 116, 127 (**2d Cir.**), *cert. denied*, __ **U.S.** __, 124 S. Ct. 562, __ L. Ed. 2d __ (2003).

The court did not resolve the question, but held that the alleged harasser was a co-worker because he was only the foreman of one of the production lines that depended on plaintiff to make their boxes. He was a customer without direct authority to control plaintiff's activities. He could demand that she allocate more of her production to him, but she had discretion and the allocation did not affect her total work effort. While he could "write her up," all foremen could do so, there was no evidence that he had ever done so, and the power to discipline plaintiff lay with the Human Resource Department. *Id.* at 941.

Porter v. California Dept. of Corrections, 383 F.3d 1018, 1025–26, 94 FEP Cases 928 (**9th Cir.** 2004), reversed the grant of summary judgment to the Title VII sexual harassment defendant and held that plaintiff established a *prima facie* case of *quid pro quo* sexual harassment when she showed that a transfer to a position with significantly different responsibilities was denied because plaintiff presented evidence that she had rejected the decisionmaker's demands for sexual favors prior to his becoming a supervisor, when he was a co-worker and union official assigned to investigate her claims of sexual harassment by another supervisor, and because she showed that he was influenced in his decisions by the other supervisor she had rejected. The court explained at 1026 n.3:

> Contrary to the dissent's suggestion, we do not hold that an employer may encounter vicarious liability "based on sexual advances made by coworkers without supervisory capacity." Rather, we hold that an employer may be vicariously liable for timely personnel decisions made by one of its supervisors on the basis of an unlawful criteria. Such liability may attach if the plaintiff can show that the challenged personnel decisions were motivated by her historical refusal to submit to the decision-maker's workplace demands for sexual favors, or by her having declined the workplace demands for sexual favors urged by other supervisors who held sway over the personnel decisions in question.

Judge Tallman dissented as to this part of the decision. *Id.* at 1031–35.

Nieto v. Kapoor, 268 F.3d 1208, 1215–17, 18 IER Cases 97 (**10th Cir.** 2001), affirmed the judgment on a jury verdict for $3,750,000 in compensatory and punitive damages to five former employees of the Eastern New Mexico Medical Center, against the defendant contractor who is the Medical Director of the Radiation Oncology Department, for extreme racial and sexual harassment of them and of patients in violation of the Equal Protection Clause, First

Amendment retaliation, and intentional infliction of emotional distress. The court held that the lower court did not err in finding that Dr. Kapoor was a state actor. Because of the powers he was given to direct the Department, it did not matter that he was a contractor instead of an employee. It is the function that matters. Here, the plaintiff employees had no choice about their supervisor, and he carried out all of the managerial duties of an employee manager. There was a clear nexus between his authority and the violation.

3. What Makes an Environment Hostile?

a. What Plaintiff Experienced

Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 190–91, 94 FEP Cases 577 (**4th Cir.** 2004), affirmed the grant of summary judgment to the § 1981 racial harassment defendant. The court held that plaintiff could not establish a hostile environment because he failed to show any racially offensive conduct directed at him. Plaintiff's complaints involved the actions of one employee with whom he did not get along, but he showed no evidence of a racial motivation. "At most, the record contains a hearsay statement that Callahan once stated in reference to Honor that, 'she didn't know how to work with an African-American male.' Assuming this statement is accurate, and that Honor was aware of it prior to this litigation, it is not "sufficiently severe and pervasive" to create an objectively abusive atmosphere." *Id.* at 191.

Septimus v. University of Houston, 399 F.3d 601, 95 FEP Cases 129 (**5th Cir.** 2005), affirmed the grant of summary judgment to defendant and held at 612 that a two-hour "harangue" in her office, which frightened her and made her feel useless and incompetent, questioning her about her presentation in a "mocking tone," and a comment by her supervisor that she "was like a needy old girlfriend," did not rise to the level of a hostile environment.

Robinson v. Sappington, 351 F.3d 317, 330, 93 FEP Cases 75 (**7th Cir.** 2003), reversed the grant of summary judgment to the Title VII defendants, and held that plaintiff had met the objective test for sexual harassment:

> First, we note that there were several overtly sexual comments made by Judge Sappington to Ms. Robinson including Judge Sappington's offer to purchase Ms. Robinson a sexual device . . .; Judge Sappington's comment that the attorneys were only speaking to her because she was wearing revealing clothing . . . and the twice-repeated comment that Judge Sappington would like Ms. Robinson to "sit on his face" . . . . In addition to these comments, there is strong evidence that Judge Sappington took an inappropriate interest in Ms. Robinson's relationships with men, first inquiring as to the status of her marriage and later, on two occasions, expressing outrage at the possibility of her romantic involvement with anyone else.
>
> Second, we believe that much of Judge Sappington's conduct reasonably could be construed as intimidating and threatening. Judge Sappington monitored Ms. Robinson's actions both within the courthouse and after hours, going so far as to fly an aircraft over the farm of Ms. Robinson's mother when he knew Ms. Robinson was visiting there. Judge Sappington exhibited anger when he believed other men showed interest in Ms. Robinson. He also subjected Ms. Robinson to hearing the details of a gruesome murder

> and suggested that she might face a similar fate. Finally, on one occasion, Judge Sappington grabbed Ms. Robinson's face and told her point-blank that, if she "shacked up" with anyone else, he would kill her.
>
> Finally, Ms. Robinson was the recipient of other gestures that, although innocuous in themselves, when put in the larger context, served as constant reminders of Judge Sappington's interest in her and in exercising control over her. Specifically, Judge Sappington called her beautiful, a "blonde Demi Moore" or a golden goddess on a daily basis. He took her to lunch and became angry if Ms. Robinson did not eat lunch with him. Additionally, for a period of several weeks, he shook Ms. Robinson's hand on a daily basis to experience physical contact with her.

The court also relied on the fact that, as Judge Sappington's secretary and court clerk, plaintiff had to work closely with him. *Id.* at 331.

Ezell v. Potter, 400 F.3d 1041, 1048, 95 FEP Cases 689 (**7th Cir.** 2005), affirmed the grant of summary judgment to the race, sex, and age discrimination defendant on plaintiff's harassment claim. Plaintiff showed that his supervisor made anti-white, anti-male, and anti-older worker comments sufficiently strong that they constituted direct evidence of discrimination on his disparate-treatment claims, but that he had not shown the comments were pervasive or severe. As to severity, the court held that they simply reflected ignorant stereotypes. As to pervasiveness, the court stated: "Ezell testified by affidavit that Wright made these kinds of remarks on a regular basis. Of course, a regular basis could be daily, weekly, monthly or even yearly; Ezell provides no detail on the regularity and so we cannot consider the few comments detailed in the briefs to be pervasive." The court discussed the weight of racial and sexual slurs:

> When it comes to racial or ethnic slurs, we have stated there is no magic number that constitutes a hostile environment. . . . Certain unambiguously racial epithets fall on the more "severe" end of the spectrum. . . . And we have noted that in the case of racial and ethnic slurs, some words are so outrageous that a single incident might qualify for a hostile environment claim. . . . At the same time, "a relentless pattern of lesser harassment that extends over a long period of time also violates the statute." . . . What is alleged here is neither severe nor pervasive.

(Citations omitted.)

Cerros v. Steel Technologies, Inc., 398 F.3d 944, 951 (**7th Cir.** 2005), reversed the judgment after a bench trial for the Title VII defendant, and ordered that the case be assigned to a different judge on remand, pursuant to Circuit Rule 36. The court held: "This implied prerequisite of supervisor involvement to establish a hostile work environment finds no support in the law. As we discuss in a moment, the involvement of supervisors is pertinent to the rules for vicarious liability of the employer, but the distinction between supervisor and coworker misconduct in no way determines whether a plaintiff can state a hostile work environment claim in the first instance. Indeed, we have routinely reviewed hostile work environment claims arising exclusively from the conduct of coworkers. . . . Cerros's inability to verify the authorship of the racist graffiti poses no obstacle to his establishing that this graffiti produced or contributed to a hostile work environment."

Mannie v. Potter, 394 F.3d 977, 982–83, 16 AD Cases 641 (**7th Cir.** 2005), affirmed the grant of summary judgment to the Rehabilitation Act harassment defendant, the U.S. Postal Service because plaintiff did not show actionable conduct: "She asserts that her supervisors made derogatory statements about her, discussed her mental condition with other employees, and paged her to return from cigarette breaks. In addition, she contends that her co-workers discussed rumors about her mental stability and engaged in behavior offensive to her such as wearing tight-fitting clothing." The court held that plaintiff "barely addressed" the crucial factors, "such as 'the frequency, severity, and threatening or humiliating nature of the discriminatory conduct and whether it unreasonably interferes with [her] work performance.'" (Citation omitted.)

Luckie v. Ameritech Corp., 389 F.3d 708, 713–14, 94 FEP Cases 1351 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII racial harassment defendant, because plaintiff did not show actionable harassment. Plaintiff relied solely on three incidents: (1) Patterson's comment that she wanted to "change the complexion" of the Human Resources group; (2) Patterson calling an African-American employee a 'dunce'; and (3) an e-mail sent by James Boring which complained of the effect that Patterson's management style was having on several employees and the department as a whole." *Id.* at 713 (footnote omitted). The court explained: "None of these incidents are sufficiently connected to race so as to satisfy the second element of the hostile environment analysis. The conduct at issue must have a racial character or purpose to support a hostile work environment claim." *Id.* (citation omitted). The court held that the remark as to the department's "complexion" "was made in the context of assessing the was made in the context of discussing the department's organization and ways to increase its efficiency," and noted that "Patterson did not overtly refer to race at all during this discussion, or at any other time." *Id.* at 713–14. The court held the conduct was not racial, not severe, and not pervasive.

Smith v. Northeastern Illinois University, 388 F.3d 559, 94 FEP Cases 1295 (**7th Cir.** 2004), affirmed the grant of summary judgment and the judgment on a jury verdict for the Title VII racial harassment defendants. The court held that plaintiff Weaver was not subjected to an objectively hostile environment because she had never heard the "n" word used in her presence, and she only heard two African-American officers referred to as "black m—f—s" once in her presence over several years of employment. *Id.* at 566. "One utterance alone does not create an objectively hostile work environment." *Id.* at 567. The court held that the retaliatory threat that plaintiff might lose her home was just an empty threat, and not sufficient to create a retaliatory hostile environment. The court held that plaintiff Guerrero also failed to show objective harassment despite unusual actions. "Leyva's visit to Guerrero's home is certainly suspect, as any parent would be concerned about a police officer coming to his or her home to make inquiries about child abuse. However, Guerrero fails to explain how this curious act affected her employment conditions or her ability to do her job." *Id.* at 568.

Herron v. DaimlerChrysler Corp., 388 F.3d 293, 303, 94 FEP Cases 1219 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII and § 1981 racial harassment defendant, holding that plaintiff's problems, apart from not being related to his race, did not rise to an actionable level: "Here he complains about transfers, a late overtime payment, his salary, and difficulties with managers. This is normal workplace friction."

Dandy v. United Parcel Service, Inc., 388 F.3d 263, 271, 94 FEP Cases 1156 (**7th Cir.** 2004), affirmed the grant of summary judgment to the § 1981 racial harassment defendant. The court held that the two name-calling incidents—in which plaintiff was called "tiger," and a black employee was called "lazy," could not support a harassment claim.

McPherson v. City of Waukegan, 379 F.3d 430, 439, 94 FEP Cases 247, 94 FEP Cases 257 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII sexual harassment defendant. The court distinguished between the physical assaults on plaintiff by her supervisor and the verbal comments prior to the assaults. "While Copenharve's inquiries about what color bra McPherson was wearing, his suggestive tone of voice when asking her whether he could "make a house call" when she called in sick and the one occasion when he pulled back her tank top with his fingers were lamentably inappropriate, we agree with the district court that, due to the limited nature and frequency of the objectionable conduct, a hostile work environment did not exist until the March 21, 2001 assault." (Footnote omitted.) The court also held that plaintiff had not shown she subjectively found these "questions and remarks" offensive. *Id.* at 430 n.6.

LeGrand v. Area Resources for Community and Human Services, 394 F.3d 1098, 95 FEP Cases 14 (**8th Cir.** 2005), affirmed the grant of summary judgment to the Title VII same-sex sexual harassment defendant. The court of appeals held that repeated sexual advances on the male plaintiff by a priest on defendant's board of directors were not actionable despite the priest's admission of his demands that plaintiff watch pornographic movies with him, hugging the plaintiff, kissing the plaintiff on the mouth, touching his crotch, and making explicit sexual suggestions, all of which occurred after plaintiff had followed defendant's procedures and complained following the priest's first sexual overtures. The court sought to explain its ruling: "'Sexual harassment standards are demanding—to be actionable, conduct must be extreme and not merely rude or unpleasant.'" *Id.* at 1101 (citations and internal quotation marks omitted). It added: "Compared to other cases in which the Supreme Court and our circuit have found the harassing conduct did not constitute sexual harassment, we believe the harassment alleged in this case did not create an actionable hostile work environment." *Id.* at 1102. Finally, the court stated:

> None of the incidents was physically violent or overtly threatening. There can be no doubt Father Nutt's actions, admitted and alleged, ranged from crass to churlish and were manifestly inappropriate; however, the three isolated incidents, which occurred over a nine-month period, were not so severe or pervasive as to poison LeGrand's work environment. Therefore, we hold LeGrand failed to establish the existence of a trial-worthy question of fact on his hostile work environment claim.

Id. at 1102–03.

Hesse v. Avis Rent A Car System, Inc., 394 F.3d 624, 630, 94 FEP Cases 1805 (**8th Cir.** 2005), affirmed the grant of summary judgment to the Title VII sexual harassment defendant, holding that the loud noises and bumptious conduct of the alleged harasser were directed equally to male and female employees under his supervision, and there was no basis to say it was because of sex. The court stated: "In determining whether a hostile work environment existed, evidence concerning all circumstances of the complainant's employment must be considered,

including the frequency of the offending conduct, its severity, whether it was physically threatening or humiliating, and whether it unreasonably interfered with work performance."

Griffith v. City of Des Moines, 387 F.3d 733, 739, 94 FEP Cases 993 (**8th Cir.** 2004), affirmed the grant of summary judgment to the Title VII and Iowa Human Rights Act defendant on plaintiff's hostile environment claim, holding that three scattered incidents of derogatory comments did not rise to the level of actionable harassment. Judge Magnuson concurred specially.

Baker v. John Morrell & Co., 382 F.3d 816 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Iowa Human Rights Act sexual harassment plaintiff, including the awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys' fees and costs, a total of $1,386,632. Plaintiff and other women had unsuccessfully complained for years about severe and pervasive harassment and degradation interfering with their work and their ability to work. The harassment included a daily barrage of degrading remarks, interference with plaintiff's work, physical assaults in the form of throwing 40-pound meat boxes at plaintiff and hitting her, male employees' grinding their groins into plaintiff's rear as they passed her, threatening her by driving at her in the parking lot, preventing or delaying plaintiff in going to the bathroom even where it was medically necessary, and driving plaintiff to emotional breakdowns and suicide attempts. The court rejected defendant's argument that plaintiff had not shown an actionable environment. The court stated, "we reject out of hand Morrell's attempts to minimize the harassment and its accompanying claim it was unaware of the sexual nature of the harassment." *Id.* at 829. The court also upheld plaintiff's constructive-discharge claim, stating: "The constant barrage of harassment endured by Baker over a period of many years was objectively intolerable. Moreover, Baker's numerous attempts to resolve the problems went largely ignored by supervisors and management personnel to whom she repeatedly turned for help. In the end, Baker had little choice but to leave the position she had held for over fifteen years and seek employment elsewhere." *Id.*

Jackson v. Flint Ink North American Corp., 382 F.3d 869, 870, 94 FEP Cases 549 (**8th Cir.** 2004), on panel rehearing, reversed the grant of summary judgment to the Title VII racial harassment defendant. The court held that plaintiff's working environment was objectively hostile where "his name was written in a shower at his workplace and that there was an arrow connecting his name with a burning cross and a KKK sign." The panel stated that "an objective observer would regard this combination of figures as a threat of serious bodily harm if not death to Mr. Jackson." It had previously held that plaintiff had not shown an objectively hostile environment, but changed its mind in light of this factor. It described the case as on he ":cusp of submissibility," and continued: "But our best judgment is that an objective observer in Mr. Jackson's shoes would be justified in reacting to his situation in a way that would affect a term or condition of his employment."

Williams v. ConAgra Poultry Co., 378 F.3d 790, 795–96, 94 FEP Cases 266 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII, § 1981, and Arkansas Civil Rights Act racial harassment and termination plaintiff, including the remitted awards of $173,156 in compensatory damages and $500,000 in punitive damages on the termination claim and compensatory damages of $600,000 on the harassment claim, but ordered that the punitive-

damage award on the harassment claim be remitted to $600,000 from the jury's verdict of $6,063,750. The court rejected defendant's contention that plaintiff had not shown an actionable hostile environment because he was aware of only one racial slur, an incident in which his supervisor threatened to fire his "black ass." The court held that a jury could reasonably find an actionable environment:

> Although ConAgra stresses the fact that Mr. Williams testified to only a single racial slur directed at him by the supervisor, the plaintiff and others testified that the supervisor's non-racial profanity and abuse was nevertheless more severe when directed toward black employees. The degree of the severity of the conduct of the supervisor and other employees is a closer question, but Mr. Williams testified to racially-motivated harassment that had a direct effect on the terms and conditions of his employment, such as work assignments. In addition, he testified that workplace harassment negatively affected his relationship with his wife and children, leading to uncharacteristic exhaustion, hostility, and impatience with family members. Furthermore, Mr. Williams testified that the verbal abuse that he suffered from his supervisor was continuous and extended over several years.

Bainbridge v. Loffredo Gardens, Inc., 378 F.3d 756, 760, 94 FEP Cases 283 (**8th Cir.** 2004), affirmed the grant of summary judgment to the Title VII, § 1981, and Iowa Civil Rights Act defendant. The court held that plaintiff, whose wife was Japanese, had not shown severe or pervasive harassment arising from the repeated use of anti-Asian racial slurs. "Here, the remarks were also sporadic, no more than one per month, and were not even about Bainbridge, his wife, or their marriage. Instead, the alleged remarks were used in reference to customers, competitors, or other employees. Some of the remarks were merely overheard by Bainbridge."

Porter v. California Dept. of Corrections, 383 F.3d 1018, 1027, 94 FEP Cases 928 (**9th Cir.** 2004), reversed the grant of summary judgment to the Title VII sexual harassment defendant. The court stated that a single instance of sexual harassment may create an actionable hostile environment "if the harassing conduct is sufficiently severe." (Citation omitted.) The court added: "With the exception of sexual assault, few types of harassing conduct are more extreme than thrusting explicit sexual propositions toward an employee and then executing reprisals against her for resisting the advances." *Id.*

Chavez v. State of New Mexico, 397 F.3d 826, 95 FEP Cases 434 (**10th Cir.** 2005), affirmed the grant of summary judgment to defendant on plaintiffs' Title VII racial harassment claim, but reversed the grant of summary judgment on the sexual harassment claim. The court stated: "A plaintiff cannot meet this burden by demonstrating 'a few isolated incidents of racial enmity' or 'sporadic racial slurs.' . . . Instead, 'there must be a steady barrage of opprobrious racial comments.'" *Id.* at 832 (citations omitted). Plaintiff Contreras alleged that her supervisor called her a "clica." "Plaintiffs do not clarify whether 'clica' is a derogatory term for a clique of Hispanic individuals or simply the Spanish translation of 'clique.' Second, Mr. Bochenek called one of Ms. Lucero's Caucasian friends and coworkers a 'spic lover' in Ms. Lucero's presence." *Id.* As to the claims of sexual harassment, the court held that plaintiffs' showings of persistent demands for sexual favors, and persistent gender-based abuse, coupled with threatening and physically hostile behavior and interference with plaintiffs' work, were enough to raise a material question of fact. *Id.* at 832–38.

Lanman v. Johnson County, 393 F.3d 1151, 1157, 16 AD Cases 449 (**10th Cir.** 2004), affirmed the grant of summary judgment to the ADA defendant on plaintiff's harassment claim. The court stated: "We think it doubtful that comments by non-supervisory co-workers about Ms. Lanman's mental health establish that the County mistakenly perceived her as mentally impaired. . . . Personality conflicts among coworkers (even those expressed through the use (or misuse) of mental health terminology) generally do not establish a perceived impairment on the part of the employer." The court held that, in light of the plaintiff's extensive good work experience and recent altercations with co-workers, no inference could be drawn from defendant's order that she submit to an examination of her fitness for duty. "Nor does the County's order that Ms. Lanman take a fitness for duty exam show that Ms. Lanman was perceived as mentally impaired." *Id.* (citation omitted).

Sandoval v. City of Boulder, 388 F.3d 1312, 94 FEP Cases 1226 (**10th Cir.** 2004), affirmed the grant of summary judgment to the Title VII sexual harassment defendant, holding that two sexist comments did not constitute actionable harassment.

b. <u>What Others Experienced and Plaintiff Only Heard About</u>

Septimus v. University of Houston, 399 F.3d 601, 612, 95 FEP Cases 129 (**5th Cir.** 2005), held that "evidence of a hostile environment pertaining to other women in the OGC, not Septimus . . . therefore is not relevant."

Ezell v. Potter, 400 F.3d 1041, 1048, 95 FEP Cases 689 (**7th Cir.** 2005), affirmed the grant of summary judgment to the race, sex, and age discrimination defendant on plaintiff's harassment claim. In the course of holding that the harassment was not severe, the court mentioned that some of plaintiff's supervisor's anti-white, anti-male, and anti-older worker statements were directed at others in plaintiff's hearing, the court stated: "We have characterized this 'second-hand' harassment as lesser in impact than harassment directed at the plaintiff." (Citations omitted.)

Mannie v. Potter, 394 F.3d 977, 983, 16 AD Cases 641 (**7th Cir.** 2005), affirmed the grant of summary judgment to the Rehabilitation Act harassment defendant, the U.S. Postal Service. The court rejected plaintiff's contentions involving statements made to others: "Most of the conduct that forms the basis of her claim consists of derogatory statements made by supervisors or co-workers out of her hearing."

Smith v. Northeastern Illinois University, 388 F.3d 559, 567, 94 FEP Cases 1295 (**7th Cir.** 2004), affirmed the grant of summary judgment and the judgment on a jury verdict for the Title VII racial harassment defendants. The court held that plaintiff Weaver was not subjected to an objectively hostile environment because she only heard second-hand about an official's repeated use of the "n" word. The court stated:

> While certainly relevant to the determination of a hostile work environment claim, when harassment is "directed at someone other than the plaintiff, the 'impact of [such] 'second-hand harassment' is obviously not as great as the impact of harassment directed at the plaintiff.'" . . .

> We do not mean to hold that a plaintiff can never demonstrate a hostile work environment through second-hand comments or in situations where a plaintiff is not the intended target of the statements. However, what Weaver personally experienced does not amount to an objectively hostile work environment. She heard an offensive term directed at a third person once and only learned from others about other offensive comments directed at third persons. The district court did not err when it dismissed her hostile work environment claim on summary judgment.

(Citations omitted.)

Dandy v. United Parcel Service, Inc., 388 F.3d 263, 271–72, 94 FEP Cases 1156 (**7th Cir.** 2004), affirmed the grant of summary judgment to the § 1981 racial harassment defendant. The court held that racial epithets are of less significance if plaintiff hears about them secondhand, but may still be part of a hostile environment. The court explained: "Repeated use of such highly offensive terms in the work environment (especially considering the fact that racial epithets are meant to denigrate a group of people) may create an objectively hostile work environment, even if they are heard secondhand."

Kriescher v. Fox Hills Golf Resort and Conference Center, 384 F.3d 912, 94 FEP Cases 1007 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII sexual harassment and ADEA age harassment defendant. The court held that plaintiff had shown an occasional sexually charged atmosphere—with naked strippers in the hot tub and pool at 3:00 A.M. on one occasion, and with a manager and a bartender being found in the dark together—but she was not exposed to ether event and had not shown that such an atmosphere had led to any difference in the working conditions or treatment of female or older employees.

McKenzie v. Milwaukee County, 381 F.3d 619, 624, 94 FEP Cases 532 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII racial harassment defendant. The court held that plaintiff had not shown an objectively hostile working environment, and stated: "Several of the incidents involved other female employees of the sheriff's office, and the impact of such 'second-hand' harassment is not as great as harassment directed at McKenzie herself." (Citations omitted.)

Williams v. ConAgra Poultry Co., 378 F.3d 790, 795, 94 FEP Cases 266 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII, § 1981, and Arkansas Civil Rights Act racial harassment and termination plaintiff, including the remitted awards of $173,156 in compensatory damages and $500,000 in punitive damages on the termination claim and compensatory damages of $600,000 on the harassment claim, but ordered that the punitive-damage award on the harassment claim be remitted to $600,000 from the jury's verdict of $6,063,750. The court held that plaintiff could not rely, for purposes of his harassment claim, on discriminatory actions of which he was unaware, because that would violate his duty to show that the working environment was subjectively hostile. See the discussion of the relevance of this evidence in the section below on "Evidence." The court rejected the lower court's discussion of incidents of which plaintiff "could have been aware."

c. Conduct Neutral in Form

Singletary v. District of Columbia, 351 F.3d 519, 526–28, 92 FEP Cases 1799 (**D.C. Cir.** 2003), reversed in part and affirmed in part the lower court's judgment after a bench trial to the Title VII and Rehabilitation Act retaliation defendant. The court rejected defendant's argument that plaintiff had not shown enough to constitute a hostile environment, *id.* at 568:

> Nor can we accept the defendants' further suggestion that no reasonable factfinder could find a hostile work environment here. In addition to the alleged 1993 discriminatory failure to promote and 1993-94 failure to provide him with the tools necessary to accomplish his assignments—the merits of which claims the district court must address on remand—Singletary made a host of allegations that the court ruled did have merit but that it erroneously thought were untimely for a hostile work environment claim. Most significantly, the district court determined that, notwithstanding the availability of appropriate office space, the defendants intentionally assigned Singletary to work in an unheated storage room for over a year and a half as "retaliatory discrimination" for the filing of a discrimination complaint. . . . As the court found:
>
> > The room to which plaintiff was assigned was not previously used as an office space, but rather was used as a general storage room. The storage room was without heat or ventilation. It was poorly lit, which posed problems for plaintiff, who is visually challenged. The only entrance to plaintiff's office was through a clinic to which plaintiff did not have keys. The phone in the room often did not work. The office space contained .. brooms [and] boxes of debris.. Defendants clearly intended to relegate plaintiff to this sub- standard office.. [T]he record shows that there were other, more suitable, places in which plaintiff's office could have been located.

The court added that, on remand, the lower court should determine whether an otherwise time-barred transfer and a time-barred failure to promote may be part of the hostile environment. *Id.* at 528–29.

Herron v. DaimlerChrysler Corp., 388 F.3d 293, 303, 94 FEP Cases 1219 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII and § 1981 racial harassment defendant, holding that plaintiff's problems were self-created and not the result of racial motivation or harassment: "Herron does not show any connection between these occurrences and his race. His problems were not related to his race—they were related to him. The fact that he is a member of a protected class does not transform them."

McKenzie v. Milwaukee County, 381 F.3d 619, 624–25, 94 FEP Cases 532 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII racial harassment defendant. The court held that plaintiff had not shown an objectively hostile working environment, but almost exclusively consisted of perceived slights by her second-level supervisor in personal interactions—failing to greet her, being "standoffish," "unapproachable," or "unfriendly," and disagreements with her supervisor's supervision of her conduct of a narcotics investigation. There was no evidence of a gender-based motive for any of these matters. Plaintiff testified that her first-level supervisor had told her of a sexually offensive remark by the second-level

supervisor, but the court held that a single remark could not make the working environment objectively hostile.

Hesse v. Avis Rent A Car System, Inc., 394 F.3d 624, 630, 94 FEP Cases 1805 (**8th Cir.** 2005), affirmed the grant of summary judgment to the Title VII sexual harassment defendant, holding that the loud noises and bumptious conduct of the alleged harasser were directed equally to male and female employees under his supervision, and there was no basis to say it was because of sex. "Hesse argues that even though Rod Johnson's conduct towards her was not sexual in nature, it was related to sex because his harassing actions were directed at women in the office and particularly at her. The record shows, however, that Johnson's loud behavior was directed at both male and female employees. Hesse has acknowledged that everyone in the office was subjected to Johnson's deliberate shoe squeaking and that he clapped his hands loudly to get the attention of male garage technicians. Hesse relies on the incident in which Johnson banged on a window to get Sheila Sexauer's attention, but that incident does not establish that Johnson's conduct was based on sex since he engaged in similar behavior to get the attention of male employees."

Griffith v. City of Des Moines, 387 F.3d 733, 739, 94 FEP Cases 993 (**8th Cir.** 2004), affirmed the grant of summary judgment to the Title VII and Iowa Human Rights Act defendant on plaintiff's hostile environment claim. Much of plaintiff's complaint involved comments about his being a child molester, stemming from his well-publicized arrest and guilty plea to a lesser offense. The court held that discrimination on such a ground is not covered by Title VII. Judge Magnuson concurred specially.

Chavez v. State of New Mexico, 397 F.3d 826, 833, 95 FEP Cases 434 (**10th Cir.** 2005), reversed the grant of summary judgment on the sexual harassment claim. The court held that conduct neutral in form can still be part of a sexually hostile environment. "This is because what is important in a hostile environment claim is the *environment*, and gender-neutral harassment makes up an important part of the relevant work environment. Conduct that appears gender-neutral in isolation may in fact be gender-based, but may appear so only when viewed in the context of other gender-based behavior." (Emphasis in original; citation omitted.)

d. Severe or Pervasive

Cerros v. Steel Technologies, Inc., 398 F.3d 944, 950 (**7th Cir.** 2005), reversed the judgment after a bench trial for the Title VII defendant, and ordered that the case be assigned to a different judge on remand, pursuant to Circuit Rule 36. The court held that the lower court erred by apparently requiring that the harassment be both severe and pervasive, when either would do.

e. Sexual Harassers of Both Men and Women

Chavez v. State of New Mexico, 397 F.3d 826, 835, 95 FEP Cases 434 (**10th Cir.** 2005), reversed the grant of summary judgment on the sexual harassment claim. The lower court held that "'Bochenek's and Cruz's behavior cannot be deemed actionable sexual harassment, for a male co-worker took Family and Medical Leave due to his 'anxiety and depression over the constant belittling that Bochenek and Cruz did to him.' These Defendants, thus, seem not to discriminate between who they wish to intimidate.'"

f. Other Motivations

Chavez v. State of New Mexico, 397 F.3d 826, 837, 95 FEP Cases 434 (**10th Cir.** 2005), reversed the grant of summary judgment on the sexual harassment claim. The court of appeals held that the unlawful motivations of an alleged sexual harasser could not be reasonably attributed to other employees who harassed a plaintiff, because their actions occurred shortly after the plaintiff in question had reported that the employees had been taking extra food from the cafeteria and retaliation for whistleblowing motive seemed a more obvious motive.

Lipphardt v. Durango Steakhouse of Brandon, Inc., 267 F.3d 1183, 1188, 86 FEP Cases 1409, 87 FEP Cases 1851 (**11th Cir.** 2001), reversed the grant of judgment as a matter of law on plaintiff's Title VII claim of retaliatory discharge. Plaintiff was fired after she complained of sexual harassment, and the case turned on whether she had a good-faith, objectively reasonable belief that she was being harassed sexually, as opposed to feeling the results of ill will after the end of her relationship with the harasser. The court stated that "while a prior intimate relationship is an important factor to consider, it is not determinative of a sexual harassment claim." The court continued: "The fact that Knuth and Lipphardt had a prior intimate relationship does not give Knuth a free pass to harass Lipphardt at work. While we recognize that '[p]ersonal animosity is not the equivalent of sex discrimination and is not proscribed by Title VII,' . . . there is a point where inappropriate behavior crosses the line into Title VII harassment." (Citation omitted.)

g. Same-Sex Harassment

LeGrand v. Area Resources for Community and Human Services, 394 F.3d 1098, 1101–03, 95 FEP Cases 14 (**8th Cir.** 2005), affirmed the grant of summary judgment to the Title VII same-sex sexual harassment defendant. The court set an extreme standard for actionable harassment, but did not suggest that the standard should be higher for homosexual than for heterosexual harassment.

Dick v. Phone Directories Co., Inc., 397 F.3d 1256, 1265–66, 95 FEP Cases 293 (**10th Cir.** 2005), reversed the grant of summary judgment to the Title VII defendant, holding that a plaintiff complaining of same-sex harassment need show only that the harassment was motivated by sexual desire. The court held that there was substantial evidence that the harassment of the female plaintiff was motivated by dislike on the part of her female supervisor and female co-workers, in part because plaintiff was a top producer. However, there were also substantial indications that part of the conduct—including attempts to touch plaintiff intimately—was motivated by sexual desire. The court also relied on the extensive same-sex sexual activity in which the supervisor and other employees openly engaged.

h. Same-Race Harassment

Kang v. U. Lim America, Inc., 296 F.3d 810, 817, 89 FEP Cases 566 (**9th Cir.** 2002), reversed the grant of summary judgment to the defendant. The court stated: "Generally, a plaintiff alleging racial or national origin harassment would present facts showing that he was subjected to racial epithets in the workplace. Here, however, Kang alleged that he and other Korean workers were subjected to physical and verbal abuse because their supervisor viewed

their national origin as superior. The form is unusual, but such stereotyping is an evil at which the statute is aimed." (Citation omitted.) The court continued:

> Kang presented evidence that Yoon abused him because of Yoon's stereotypical notions that Korean workers were better than the rest and Kang's failure to live up to Yoon's expectations. On numerous occasions, Yoon told Kang that he had to work harder because he was Korean; he contrasted Koreans with Mexicans and Americans who he said were not hard workers; and although U. Lim de Mexico employed 50–150 Mexican workers, Yoon did not subject any of them to physical abuse. This evidence created a genuine issue of material fact as to whether Yoon's abuse and imposition of longer working hours was based on Kang's national origin.

Id. Judge Fernandez dissented. *Id.* at 821–23.

i. District Courts That Just Did Not Get It

Petrosino v. Bell Atlantic, 385 F.3d 210, 221–22, 94 FEP Cases 903 (**2d Cir.** 2004), reversed the grant of summary judgment to the Title VII defendant on plaintiff's sexual harassment claim. The court described the lower court's incorrect approach:

> The district court concluded that no jury could reasonably find Petrosino's work environment objectively hostile to women. In so ruling, it decided, first, that evidence of incessant sexually offensive exchanges at the daily assignment meeting and omnipresent sexual graffiti in the terminal boxes could not support Petrosino's claim, because this conduct, while "undeniably boorish and offensive," was not "motivated by hostility toward Petrosino because of her sex." . . . Rather, it applied equally to all employees, male and female."

Id. at 221. The court of appeals disagreed: "The mere fact that men and women are both exposed to the same offensive circumstances on the job site, however, does not mean that, as a matter of law, their work conditions are necessarily equally harsh. The objective hostility of a work environment depends on the totality of the circumstances. . . . Further, the perspective from which the evidence must be assessed is that of a 'reasonable person in the plaintiff's position, considering all the circumstances [including] the social context in which particular behavior occurs and is experienced by its target.'" *Id.* The court held that there was no need to determine whether the "reasonable person" was a woman "or a person drawn from the public at large," *id.* at 222, because the evidence, seen in the light that most favors plaintiff, "would permit a jury to conclude that a reasonable person, regardless of gender, would consider the sexually offensive comments and graffiti here at issue more offensive to women than to men and, therefore, discriminatory based on sex." *Id.* The court explained:

> The comments and graphics that permeated Petrosino's work environment may have sexually ridiculed both men and women, but there is an important, though not surprising, distinction. The conduct at issue sexually ridiculed some men, but it also frequently touted the sexual exploits of others. In short, the insults were directed at certain men, not men as a group. By contrast, the depiction of women in the offensive jokes and graphics was uniformly sexually demeaning and communicated the message

> that women as a group were available for sexual exploitation by men. Such workplace disparagement of women, repeated day after day over the course of several years without supervisory intervention, stands as a serious impediment to any woman's efforts to deal professionally with her male colleagues.

Id. The court held that the fact that much of the offensive material was not directed at plaintiff did not preclude a finding of a hostile work environment. It cited *Ocheltree v. Scollon Products, Inc.*, 335 F.3d 325, 332 (**4th Cir.** 2003) (*en banc*), *cert. denied*, __ U.S. __, 124 S .Ct. 1406, 158 L. Ed. 2d 77 and __ U.S. __, 124 S. Ct. 1411, 158 L. Ed. 2d 77 (2004), as having held the same. It relied in part on the fact that plaintiff was sexually assaulted by a co-worker and that managers and co-workers made a joke out of the incident.

See the discussion of *Robinson v. Sappington*, 351 F.3d 317, 93 FEP Cases 75 (**7th Cir.** 2003), above.

Chavez v. State of New Mexico, 397 F.3d 826, 95 FEP Cases 434 (**10th Cir.** 2005), reversed the grant of summary judgment on the sexual harassment claim. The court of appeals described the lower court's view of the case:

> Despite this laundry list of gender-based and threatening, gender-neutral harassment, most of which occurred within one year of the June 1999 EQUIP training meeting, the district court found that "Plaintiffs fail[ed] to demonstrate that Defendant Bochenek's actions were sufficiently severe and pervasive 'to alter the conditions of [Plaintiffs'] employment, and create an abusive working environment.'" . . . According to the court, the instances of gender-based harassment, "though unpleasant, would not interfere with a reasonable person's work performance, for they do not reek of a sexually hostile working environment, as they were not physically threatening, severe or pervasive." . . . Of the many instances of arguably gender-neutral harassment, the district court considered only one: it found that Mr. Bochenek's pursuit of Ms. Chavez on the highway was not gender-based and therefore not actionable.

Id. at 835. The court of appeals then stated its own view:

> Plaintiffs in this case have presented considerably stronger evidence of a hostile work environment than the plaintiff in *O'Shea.* In *O'Shea,* the gender-based conduct consisted almost exclusively of derogatory comments about women, many of which were not even directed at the plaintiff. Here, Mr. Bochenek sexually propositioned Ms. Contreras in exchange for not issuing a reprimand letter. He stood close behind Ms. Lucero in the mail room, staring at her lewdly and massaging his genitals as she tried to exit; on another occasion he purposefully rubbed the front side of his body against her backside while she was collecting her mail. Finally, he called Ms. Contreras a "fucking bitch" and made a lewd, seductive invitation to Ms. Chavez for a "real experience." All of this conduct is substantially more severe than that in *O'Shea.*
>
> From this conduct, a jury could infer that the arguably gender-neutral harassment—which was also more severe in this case than in *O'Shea*—was in fact based on gender. In *O'Shea,* coworkers failed to invite the plaintiff to lunch; here, Mr. Cruz left

a death threat on Ms. Chavez's answering machine. In *O'Shea,* coworkers avoided discussing technical matters and became generally uncommunicative with the plaintiff; here, coworkers incited a plaintiff's clients against her and issued unwarranted letters of reprimand. In *O'Shea,* a coworker loudly informed the plaintiff that she was doing her work incorrectly; here, Mr. Bochenek engaged in a dangerous, high-speed chase of Ms. Chavez on the highway. Of course, it is difficult to compare scenarios on the basis of descriptions on paper. Every workplace is different. But the point is that in light of our precedents, there is a material issue of fact as to whether Plaintiffs faced gender-based harassment severe and pervasive enough to alter the conditions of their employment. The district court's sweeping grant of summary judgment was therefore inappropriate.

Id. at 836–37.

4. Tangible Employment Actions

Pennsylvania State Police v. Suders, __ **U.S.** __, 124 S. Ct. 2342, 159 L.Ed.2d 204, 93 FEP Cases 1473 (2004), held that an employer does not have the benefit of the affirmative defense under *Faragher* and *Ellerth* when a constructive discharge is caused by a tangible employment action.

Lee-Crespo v. Schering-Plough Del Caribe Inc., 354 F.3d 34, 93 FEP Cases 47 (**1st Cir.** 2003), affirmed the grant of summary judgment to the Title VII same-sex sexual harassment defendant. The court assumed without deciding that denial of a transfer could be a tangible employment action, but held there was no proof that the alleged harassing supervisor had had any role in the denial of the transfer request. To the contrary, she had expressed her hope that plaintiff would transfer. *Id.* at 44. "A reassignment could constitute a tangible employment action, particularly if it caused a loss of income. But again, there must be a causal link between the tangible employment action and the alleged harassment and harasser." *Id.* No such link was shown, and the reassignment was in direct response to plaintiff's request for a new supervisor. The court held that plaintiff's claim of constructive discharge was undercut by defendant's swift action in transferring her once she complained. *Id.* at 45–46. "Among other things, the evaluation of a constructive discharge claim takes into account how the employer responded to the plaintiff's complaints and whether it was likely that the harassment would continue." *Id.* at 45.

McPherson v. City of Waukegan, 379 F.3d 430, 439–41, 94 FEP Cases 247, 94 FEP Cases 257 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII sexual harassment defendant. Plaintiff testified that she was sexually assaulted on three occasions by her second-level supervisor, who resigned immediately after defendant learned of the problem and ultimately pleaded guilty to attempted criminal sexual assault, which required him to be registered as a sex offender. The court held that there was no tangible employment action, and that defendant was entitled to assert the affirmative defense. It rejected plaintiff's argument that she had been constructively discharged, constituting a tangible action:

> Within hours of learning of McPherson's allegations against Copenharve on March 27, 2001, the City convened a meeting during which it demanded that he either submit his resignation or face suspension during the pendency of its investigation. Copenharve

> chose to resign. McPherson, on the other hand, chose to resign months after Copenharve's resignation, when the hostile working conditions created by Copenharve were long gone. McPherson has offered no facts to show that her resignation was "an appropriate response" to an intolerable work environment.

Id. at 440. The court rejected plaintiff's argument that the City's use of a temporary employee while she was on leave, the packing of her belongings, and the request for return of City property, showed that her return would be unwelcome. It pointed out that defendant had urged her to return.

5. Employer's Duty to Prevent Harassment

Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 21–22, 89 FEP Cases 1361 (**1st Cir.** 2002), affirmed the jury's finding of Title VII liability for sexual harassment. The court held that a reasonable jury could find that there was no sexual harassment policy in existence, in light of the plaintiff's corroborated denial that employees were even informed about such a policy, the defendant's inability to produced a dated copy of the policy or a signed statement that plaintiff had received it, the defendant's testimony about the posting of sexual harassment posters that was contradicted by the film of the workplace, and the contradictions in the defendant's officials' testimony.

Petrosino v. Bell Atlantic, 385 F.3d 210, 225–26, 94 FEP Cases 903 (**2d Cir.** 2004), reversed the grant of summary judgment to the Title VII defendant on plaintiff's sexual harassment claim. The court held that plaintiff showed a material issue of disputed fact as to the "'reasonable care' element of the affirmative defense. "In this case, Petrosino does not dispute the existence of Bell Atlantic's complaint hotline, but she does challenge its effectiveness in promptly correcting reported sexual harassment. She asserts that when she telephoned the hotline in May 1997 to complain of gender discrimination by her supervisor Mangiero, her request to discuss her concerns with a female counselor was refused. Thereafter, no one investigated her complaint or took any remedial action." *Id.* at 226.

Robinson v. Sappington, 351 F.3d 317, 337 n.13, 93 FEP Cases 75 (**7th Cir.** 2003), reversed the grant of summary judgment to the Title VII defendants, and stated in *dicta* that a reasonable jury might find the defendants' adoption without promulgation of an anti-harassment policy inadequate to meet the requirements of the *Faragher* / *Ellerth* affirmative defense: "A jury certainly could conclude that the meager action of adopting, but not promulgating, a sexual harassment policy failed to inform employees of their right to be free from such behavior as well as of the steps the employees could take to remedy any offending behavior. The fact that Ms. Robinson understood that, if she had general workplace complaints, she should report those to Janice Shonkwiler does not absolve her employer of the responsibility to take reasonable steps to protect her from sexual harassment."

McPherson v. City of Waukegan, 379 F.3d 430, 441, 94 FEP Cases 247, 94 FEP Cases 257 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII sexual harassment defendant. Plaintiff testified that she was sexually assaulted on three occasions by her second-level supervisor, who resigned immediately after defendant learned of the problem and ultimately pleaded guilty to attempted criminal sexual assault, which required him to be

registered as a sex offender. The court rejected plaintiff's argument that defendant failed to take adequate preventive steps. No complaint of sexual misconduct had ever been made against the harasser, although he was a long-time employee. The only conduct of which the City was aware was that the harasser had on at least one occasion asked women in the workplace about the color of their underwear, and there was nothing to put the City on notice that this employee would ultimately assault plaintiff sexually. The assaults took place behind closed doors, and absent a complaint by plaintiff—which was not forthcoming—the City could not have known about the assaults and taken action to prevent further assaults.

6. Employer's Duty to Cure Any Harassment That Does Occur

McCombs v. Meijer, Inc., 395 F.3d 346, 95 FEP Cases 1 (**6th Cir.** 2005), affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff. The jury awarded $25,000 in compensatory damages, $100,000 in punitive damages, and the lower court awarded $460,450 in attorneys' fees, $4,532.50 in expert witness fees, $10,103.34 in costs, and supplemental attorneys' fees of $14,192.50. The court stated:

> This court has found that when the allegations of sexual harassment involve a coworker and the employer has fashioned a response, the employer will only be liable "if its response manifests indifference or unreasonableness in light of the facts the employer knew or should have known." . . . "The act of discrimination by the employer in such a case is not the harassment, but rather the inappropriate response to the charges of harassment." . . . Thus, an employer who implements a remedy "can be liable for sex discrimination in violation of Title VII only if that remedy exhibits such indifference as to indicate an attitude of permissiveness that amounts to discrimination."

Id. at 353 (citations and footnote omitted.) The court found that the jury could reasonably have found such indifference. Plaintiff complained orally several times, both to her supervisor and to "Department 10," defendant's internal department responsible for acting on harassment complaints. Defendant's officials dissuaded her from filing a written complaint so that the harasser's job would not be jeopardized. She made her first written complaint on November 25, 1997, after co-worker Pound touched her buttocks. In the investigation:

> . . . Pound admitted that he touched McCombs but viewed it "as a pat on the back," and also admitted that he told McCombs that he liked "the way that her legs went up to her butt," that he wanted to kiss her on her breast, and that she aroused him. After Pound had been interviewed regarding the sexual harassment allegations and admitted much of his behavior, Meijer allowed him to return to work in the meat department with McCombs.

Id. at 351. Pound then began stalking plaintiff internally in the Meat Department where they both worked. She complained orally, and ultimately made two more written complaints. Her second written complaint stated "that Pound told her that he wanted to kiss her all over and that he could hardly control himself." *Id.* The court described her third written complaint: "In the December 4 complaint, McCombs described an incident from the prior evening where Pound walked over to the counter near McCombs, holding a bloody knife in his hand. He held the knife at face level, and stared at her while he wiped the knife (the 'knife incident')." *Id.* Defendant finally fired Pound, and Pound was convicted on state criminal charges filed by plaintiff. The

court rejected defendant's argument that no reasonable jury could have found it proceeded indifferently because it did investigate, suspend, and ultimately fire Pound, because the argument was based on the assumption that the relevant time period was after plaintiff filed her first written complaint, and the jury was entitled to infer that plaintiff had made numerous oral complaints and that defendant had delayed her filing of a written complaint. It continued:

> In this case, viewing the evidence in the light most favorable to McCombs, a jury could have found that Meijer's inaction amounted to indifference or unreasonableness. Pound was transferred to McCombs's department *after* she informed her supervisor that Pound was spreading rumors of having an extramarital affair with her. Prior to filing her first written complaint, McCombs orally informed her supervisor and Department 10 on several occasions of Pound's inappropriate conduct. Neither addressed her concerns. This evidence is legally sufficient to establish that Meijer acted both indifferently and unreasonably.

Id. at 355 (emphasis in original). Judge Gilman dissented.

Cerros v. Steel Technologies, Inc., 398 F.3d 944, 953–55 (**7th Cir.** 2005), reversed the judgment after a bench trial for the Title VII defendant, and ordered that the case be assigned to a different judge on remand, pursuant to Circuit Rule 36. The court rejected the lower court's view that plaintiff's claim must fail because defendant had an adequate policy in place, pointing out that the employer also had a duty to cure any problems that occurred and to prevent future harassment. "We underscore, therefore, that the district court's analysis of Steel's actions must be consistent with these principles. Generalized references to Steel's anti-harassment policy will not suffice under the *Ellerth/Faragher* standard." *Id.* at 954–55.

Loughman v. Malnati Organization Inc., 395 F.3d 404, 95 FEP Cases 92 (**7th Cir.** 2005), reversed the grant of summary judgment to the Title VII sexual harassment defendant. The court stated: "An employer is liable for a co-employee's harassment only when it is negligent either in discovering or remedying the harassment. And when it comes to remedying a bad situation, greater vigor is necessary when the harassment is physically assaultive." *Id.* at 407. The court disagreed with the lower court on whether a reasonable jury would have to find defendant's actions adequate: "Loughman was not complaining merely of inappropriate jokes or comments, though she put up with those as well, but of serious physical violations. Considering the severity of the incidents, a reasonable jury could determine that simply talking to the people involved in the first two aggressive incidents was not a sufficient response." *Id.* The court continued:

> In addition, the consistent stream of harassment at the restaurant suggests that Malnati's policy was actually not very effective at all. Gros testified that she talked to the kitchen workers between 10 and 20 times about how to treat female employees, often in response to complaints from the female employees about inappropriate comments made to them. While a reasonable jury could view such diligence as evidence of Malnati's commitment to preventing harassment, it might also think the frequency of the discussions suggests that a different approach was needed. A jury could determine that, at some point, the management at Malnati's needed to stop merely issuing warnings and start taking disciplinary action against the offending employees. Gros's comments to Loughman suggesting that harassment was inevitable because it is in the "culture" of

> Hispanic workers do not help the restaurant's case, either. A jury could take Gros's comments to suggest that Malnati's thought any efforts to prevent harassment would be fruitless.

Id. at 407–08. The court also relied on the fact that two other employees had previously complained of being assaulted by some of the employees who harassed plaintiff. "Put together with the recurring nature of the harassment against Loughman, a reasonable jury could find that Malnati's was negligent in addressing its clear sexual harassment problems." *Id.* at 408.

Hesse v. Avis Rent A Car System, Inc., 394 F.3d 624, 631, 94 FEP Cases 1805 (**8th Cir.** 2005), affirmed the grant of summary judgment to the Title VII sexual harassment defendant, holding that the loud noises and bumptious conduct of the alleged harasser were directed equally to male and female employees under his supervision, and there was no basis to say it was because of sex. Independently, the court held that defendant met its affirmative defense. "Wallner met with Hesse and Johnson immediately after the chair incident and again the next day. She encouraged Hesse to discuss her concerns with human resources, and she met with Johnson and instructed him to stop his noisemaking. Within a week, Wallner and the human resources manager Jacobson met with Hesse and assured her that Johnson's conduct would improve. Avis sent Johnson to a management class, and Jacobson followed up with Hesse to make sure that she was not having any more problems with him. Hesse acknowledged in her deposition that Johnson's noisemaking diminished after she complained about it and admits that she did not raise it with management again." The class was an anger management class.

Rowe v. Hussmann Corp., 381 F.3d 775, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Missouri law sexual harassment plaintiff, including the award of $500,000 in compensatory damages and $ 1 million in punitive damages. Plaintiff began complaining to her direct supervisor, Oscar Weston, as soon as co-worker Roy Moore began touching her breast and buttocks and engaging in similarly foul verbal conduct, including threats of rape and murder if she did not engage in sexual activity with him. While Moore desisted for a short time after plaintiff's first complaint, he soon returned to the conduct, which worsened over time. Plaintiff testified that she complained "'at least two or three times a month,'" but little positive happened. Weston once told her that she should be understanding because Moore only had an eighth-grade education and did not know any better. In late March 2000, three and a half years after the harassment began, plaintiff went to Weston's office "very much upset and crying," and in the presence of Weston's supervisor told him that something had to be done because Moore's conduct was getting worse. *Id.* at 778. On April 3, 2000, Moore was warned not to speak with plaintiff or touch her again. Later that month, plaintiff found that a large rock had been thrown through the windshield of her car, with some evidence that Moore may have done it. Plaintiff complained to the police and demanded to see the Human Resources generalist, Lou Straika. "Rowe testified that Weston responded: 'Do you really want to do this? You know what's going to happen.'" *Id.* Plaintiff insisted. Straika transferred the plaintiff away from Moore but warned her to be careful because Moore had a lot of friends. "In June 2000, Rowe took to eating her lunch and taking her coffee breaks in the women's restroom to avoid encountering Moore in the plant." *Id.* at 779. Although she worked at some distance from Moore, he drove past her new work area in a forklift, sometimes when he was not carrying a load, staring at her as he did so. The last such occurrence was in October 2002, two weeks prior to trial. The court also rejected defendant's argument that the lower court erred in refusing to

issue a proposed instruction that would have allowed it to escape liability if it took adequate corrective action within the charge-filing period, regardless of what it had allowed to happen earlier. *Id.* at 781.

7. Truly Stupid Employer Responses to Complaints

Baker v. John Morrell & Co., 382 F.3d 816, 822 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Iowa Human Rights Act sexual harassment plaintiff, including the awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys' fees and costs, a total of $1,386,632. After plaintiff and other women had unsuccessfully complained for years about severe and pervasive harassment and degradation interfering with their work and their ability to work, Steve Joyce, Director of Human Resources, told plaintiff on the occasion of yet another complaint, in the presence of her harasser, that she and her primary harasser "had a 'hard-on for each other' and told them to get along." Subsequently, a company foreman told plaintiff she could no longer meet with the HR Director because he was tired of her complaints. The company refused to let plaintiff go to Personnel to make a complaint after a harasser threw a box of meat at her, hitting her foot. *Id.* at 823. Some boxes at the plant weighed 40 pounds. Despite being informed that some of the harassment against plaintiff occurred because she refused to go out with a co-worker and refused to give him her phone number, and despite his knowledge that the harassment included male employees' grinding their groins into plaintiff's rear as they passed her, the HR Director testified that he never saw any red flags suggesting sexual harassment and so never did a sexual harassment investigation.

Rowe v. Hussmann Corp., 381 F.3d 775, 778, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Missouri law sexual harassment plaintiff, including the award of $500,000 in compensatory damages and $ 1 million in punitive damages. Plaintiff repeatedly complained to her direct supervisor, Oscar Weston, that co-worker Roy Moore began touching her breast and buttocks and engaging in similarly foul verbal conduct, including threats of rape and murder if she did not engage in sexual activity with him. While Moore desisted for a short time after plaintiff's first complaint, he soon returned to the conduct, which worsened over time. Weston once told her that she should be understanding because Moore only had an eighth-grade education and did not know any better.

Bowen v. Missouri Department of Social Services, 311 F.3d 878, 884, 90 FEP Cases 782 (**8th Cir.** 2002), reversed the grant of summary judgment against the white plaintiff complaining of racial harassment by her African-American supervisor, Francine Lee. The court held that plaintiff's three complaints of harassment by Lee, one of them made within hours of the occurrence and all made promptly, and her complaint that Lee has intimidated her supervisor, coupled with the defendant's statement that it could not guarantee plaintiff's personal safety from Lee, were enough to create a jury issue.

8. Union Liability for Fostering Harassment

Eliserio v. United Steelworkers of America Local 310, 398 F.3d 1071, 95 FEP Cases 421 (**8th Cir.** 2005), reversed the grant of summary judgment to the Title VII and § 1981 harassment and retaliation claims. The Hispanic plaintiff crossed a picket line during a strike, and resigned

from Local 310. He thereafter became the target of graffiti referring to him as a "rat" and using racial slurs such as "Taco Bob" and "Ratserio." Six years after the crossing, Local 310 purchased "No Rat" stickers in support of the graffiti campaign. The court held that the local was potentially liable for its encouragement of a campaign of harassment including racial slurs that was intended to affect the terms and conditions of plaintiff's employment.

9. Plaintiff's Duty to Complain

a. Claims Rejected Because of Failures to Complain

McPherson v. City of Waukegan, 379 F.3d 430, 441–42, 94 FEP Cases 247, 94 FEP Cases 257 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII sexual harassment defendant. Plaintiff testified that she was sexually assaulted on three occasions by her second-level supervisor, who resigned immediately after defendant learned of the problem and ultimately pleaded guilty to attempted criminal sexual assault, which required him to be registered as a sex offender. The court held that there was no adverse employment action, so the affirmative defense was available. Plaintiff knew of the procedures for making an internal complaint, having used them previously with respect to another employee, but did not complain. She was covered by a collective bargaining agreement that also allowed her a means to complain, and did not use that procedure, either. The City learned of these events when plaintiff had lunch with her sister-in-law, who happened to be the Mayor's daughter and who alerted the City. The court held that plaintiff failed to mitigate her damages by complaining and thus ensuring the end of the harassment.

Okruhlik v. University of Arkansas, 395 F.3d 872, 881–82, 95 FEP Cases 82 (**8th Cir.** 2005), affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant because plaintiff failed to make any complaint until a month after the end of the conversations to which she objected. Defendant had a track record of taking her concerns seriously, and it responded appropriately to her belated complaint.

b. To Whom Must a Complainant Complain?

Cerros v. Steel Technologies, Inc., 398 F.3d 944, 952 (**7th Cir.** 2005), reversed the judgment after a bench trial for the Title VII defendant, and ordered that the case be assigned to a different judge on remand, pursuant to Circuit Rule 36. The court rejected the lower court's view that plaintiff's claim must fail because she failed to use the employer's designated reporting system: "At bottom, the employer's knowledge of the misconduct is what is critical, not how the employer came to have that knowledge. . . . The relevant inquiry is therefore whether the employee adequately alerted her employer to the harassment, thereby satisfying her obligation to avoid the harm, not whether she followed the letter of the reporting procedures set out in the employer's harassment policy." (Citations omitted.)

Loughman v. Malnati Organization Inc., 395 F.3d 404, 408, 95 FEP Cases 92 (**7th Cir.** 2005), reversed the grant of summary judgment to the Title VII sexual harassment defendant. The court rejected defendant's argument that plaintiff should be faulted for failure to complain to senior managers for almost a year, because she did complain immediately to her supervisors and others. "And while Malnati's sexual harassment policy allowed employees to report incidents to

upper management, a reasonable jury could find that Loughman took adequate steps by reporting the incidents to Solis, one of her supervisors."

c. How Many Times Should a Complainant Complain?

McCombs v. Meijer, Inc., 395 F.3d 346, 95 FEP Cases 1 (**6th Cir.** 2005), affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff. The jury awarded $25,000 in compensatory damages, $100,000 in punitive damages, and the lower court awarded $460,450 in attorneys' fees, $4,532.50 in expert witness fees, $10,103.34 in costs, and supplemental attorneys' fees of $14,192.50. Plaintiff complained orally several times, both to her supervisor and to "Department 10," defendant's internal department responsible for acting on harassment complaints. Defendant's officials dissuaded her from filing a written complaint so that the harasser's job would not be jeopardized. *Id.* at 350. She ultimately filed three written complaints, and the harasser was ultimately fired and convicted criminally. The court rejected defendant's arguments that only the written complaints required it to take action. *Id.* at 354–55. Judge Gilman dissented.

Baker v. John Morrell & Co., 382 F.3d 816, 824 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Iowa Human Rights Act sexual harassment plaintiff, including the awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys' fees and costs, a total of $1,386,632. Plaintiff and other women had unsuccessfully complained for years about severe and pervasive harassment and degradation interfering with their work and their ability to work. At one point, plaintiff had made 15 complaints over a two-month period.

Rowe v. Hussmann Corp., 381 F.3d 775, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Missouri law sexual harassment plaintiff, including the award of $500,000 in compensatory damages and $ 1 million in punitive damages. Plaintiff began complaining to her direct supervisor, Oscar Weston, as soon as co-worker Roy Moore began touching her breast and buttocks and engaging in similarly foul verbal conduct. While Moore desisted for a short time after plaintiff's first complaint, he soon returned to the conduct, which worsened over time. Plaintiff testified that she complained "'at least two or three times a month,'" but little positive happened. Weston once told her that she should be understanding because Moore only had an eighth-grade education and did not know any better. In late March 2000, three and a half years after the harassment began, plaintiff went to Weston's office "very much upset and crying," and in the presence of Weston's supervisor told him that something had to be done because Moore's conduct was getting worse. *Id.* at 778. On April 3, 2000, Moore was warned not to speak with plaintiff or touch her again. Later that month, plaintiff found that a large rock had been thrown through the windshield of her car, with some evidence that Moore may have done it. Plaintiff complained to the police and demanded to see the Human Resources generalist, Lou Straika. "Rowe testified that Weston responded: 'Do you really want to do this? You know what's going to happen.'" *Id.* Plaintiff insisted. Straika transferred the plaintiff away from Moore but warned her to be careful because Moore had a lot of friends.

Williams v. ConAgra Poultry Co., 378 F.3d 790, 796, 94 FEP Cases 266 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII, § 1981, and Arkansas Civil Rights Act

racial harassment and termination plaintiff, including the remitted awards of $173,156 in compensatory damages and $500,000 in punitive damages on the termination claim and compensatory damages of $600,000 on the harassment claim, but ordered that the punitive-damage award on the harassment claim be remitted to $600,000 from the jury's verdict of $6,063,750. In upholding punitive damages on the harassment claim, the court relied on the fact that plaintiff complained repeatedly to upper management, over a period of several years, without any meaningful action being taken.

d. What if Another Complained First?

Hatley v. Hilton Hotels Corp., 308 F.3d 473, 475–76, 89 FEP Cases 1861 **(5th Cir.** 2002), reversed the grant of judgment as a matter of law on plaintiffs' Title VII sexual harassment claims. The court relied in part on the defendant's inadequate investigation and failure to provide relief on earlier complaints. The court held that the testimony of other employees was relevant to show that defendant had earlier been placed on notice that particular employees, who had harassed the plaintiffs, might be harassing women. *Id.* at 476 n.1.

Rowe v. Hussmann Corp., 381 F.3d 775, 778, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Missouri law sexual harassment plaintiff, including the award of $500,000 in compensatory damages and $ 1 million in punitive damages. Plaintiff began complaining to her direct supervisor, Oscar Weston, as soon as co-worker Roy Moore began touching her breast and buttocks and engaging in similarly foul verbal conduct. "Weston responded by saying that Moore should know better because he had had two earlier incidents of similar behavior, and that he (Weston) would talk to Moore about the matter."

e. Judicial Acceptance of Failures to Complain

Loughman v. Malnati Organization Inc., 395 F.3d 404, 408, 95 FEP Cases 92 (**7th Cir.** 2005), reversed the grant of summary judgment to the Title VII sexual harassment defendant. The court held that a reasonable jury could infer that plaintiff's complaints to her supervisors were adequate to discharge her burden although she did not complain to senior management for almost a year. The court stated: "Moreover, the environment at Malnati's might have weakened its policy. One employee, Hannah Bulak, said she told D'Angelo that she felt she could not complain about improper conduct at work because the managers had spoken to her and reprimanded her about flirting in the past, making her worry that she would be blamed if she reported any problems."

Rowe v. Hussmann Corp., 381 F.3d 775, 781, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Missouri law sexual harassment plaintiff, including the award of $500,000 in compensatory damages and $ 1 million in punitive damages. Plaintiff began complaining to her direct supervisor, Oscar Weston, in October, 1996, as soon as co-worker Roy Moore began touching her breast and buttocks and engaging in similarly foul verbal conduct, including threats of rape and murder if she did not engage in sexual activity with him. Plaintiff complained repeatedly to her supervisor, to little effect. She filed her EEOC charge on June 7, 2000. The court held that against this background it did not matter if defendant lacked knowledge of the harassing activity within the 300-day charge-filing

period—necessarily implying a failure to complain of that incident—because the only relevant factor was whether the incident occurred. The court stated: "The second alternative in Hussmann's proposed instruction thus states an incorrect proposition of law, for it allows the employer to avoid liability if it lacked knowledge of particular harassing acts that occurred during the charge period, irrespective of its knowledge of prior harassment."

K. Malpractice

McKnight v. Dean, 270 F.3d 513, 516, 518, 87 FEP Cases 225 (**7th Cir.** 2001), a malpractice case against the malpractice attorney who had successfully obtained a $765,000 settlement against plaintiff's Title VII counsel, held that Title VII counsel did not commit malpractice by failing to argue that Title VII defendant General Motors had waived its right to argue that plaintiff's § 1981 claim was barred by the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 **U.S.** 164, 49 FEP Cases 1814 (1989). The court stated that it had never held that GM had waived its defense by asserting it so late, "only that it might have waived it," and that the defense was not self-evident; "it took us several pages of dense analysis in our 1990 opinion to conclude that it did. Legal malpractice is not a failure to be brilliant, but a failure to come up to even a minimum standard of professional competence. . . . It is not a synonym for undistinguished representation." *Id.* at 518 (citations omitted).

V. Litigation

A. Disqualification

Cerros v. Steel Technologies, Inc., 398 F.3d 944, 955 (**7th Cir.** 2005), reversed the judgment after a bench trial for the Title VII defendant, and ordered that the case be assigned to a different judge on remand, pursuant to Circuit Rule 36. The court held that "the need for a new trial was made more obvious at oral argument when Steel's counsel, John Baumann, who also served as Steel's manager of human resources during Cerros's tenure at the company, offered his firsthand account of the company's remedial efforts in response to Cerros's complaints. Counsel's statements at argument, perhaps more aptly characterized as testimony, raise serious concerns under Indiana Rule of Professional Conduct 3.7(a) (made effective in the District Court for the Northern District of Indiana pursuant to Local Rule 83.5(f)), which bars a lawyer from acting as an advocate at a trial in which she is likely to be a necessary witness, except in limited circumstances."

B. Exhaustion

Hottenroth v. Village of Slinger, 388 F.3d 1015, 1035–36 (**7th Cir.** 2004), affirmed the grant of summary judgment to defendant on plaintiff's Title VII sexual harassment claim, holding that plaintiff failed to exhaust the claim before the EEOC. One of her filings asserted facts that did not rise to the level of cognizable harassment—being yelled at, feeling upset at her co-workers, and feeling threatened—and the other contained only "vague and unsupported" statements. "In her complaints, Hottenroth alleges no specific evidence of anything which could reasonably be considered either objectively or subjectively hostile. . . . If this court were to hold otherwise, any complainant, who at any time filed any manner of claim with the EEOC, could

collaterally attack an adverse ruling on hostile work environment grounds. *Id.* at 1035 (citation omitted).

Parisi v. Boeing Co., 400 F.3d 583, 95 FEP Cases 596 (**8th Cir.** 2005), affirmed the dismissal of plaintiff's ADEA claim of discriminatory failure to rehire him for 94 available positions after his layoff. Plaintiff complained to the EEOC that he was laid off because of his age, and that because of his age he was not selected for an available position that would have avoided his layoff. He was notified on his last day of work that he did not get the position. The court held that his EEOC charge was not like or related to his judicial Complaint, because failures to rehire are distinct from layoffs and must be brought to the attention of the EEOC. His charge was filed six months after his termination, and did not include failures to rehire that had occurred between the termination and the filing of the charge.

C. Timeliness: Existence of Continuing Violations

Singletary v. District of Columbia, 351 F.3d 519, 526–28, 92 FEP Cases 1799 (**D.C. Cir.** 2003), reversed in part and affirmed in part the lower court's judgment after a bench trial to the Title VII and Rehabilitation Act retaliation defendant. The court held that plaintiff had timely challenged a hostile environment that had lasted for six years as of the filing of his EEOC charge, and that harassing actions had continued to within 300 days of the filing of the charge. These included the failure to give plaintiff an official job description, meaningful assignments, or the tools needed to perform his job. The court held that these actions were part of the hostile environment although the lower court had considered them time-barred instances of failure to accommodate his disability.

Petrosino v. Bell Atlantic, 385 F.3d 210, 220, 94 FEP Cases 903 (**2d Cir.** 2004), reversed the grant of summary judgment to the Title VII defendant on plaintiff's sexual harassment claim. The court held that only one sexually harassing incident need occur within the 300-day charge-filing period for the entire period of harassment to be considered in determining liability.

Felton v. Polles, 315 F.3d 470, 486, 90 FEP Cases 812 (**5th Cir.** 2002), reversed the denial of qualified immunity and held in part that plaintiff had not shown a continuing violation because there had been a three-year break during the alleged harassment, and no actions of the same type had occurred during the charge-filing period.

Dandy v. United Parcel Service, Inc., 388 F.3d 263, 271, 94 FEP Cases 1156 (**7th Cir.** 2004), affirmed the grant of summary judgment to the § 1981 racial harassment defendant. The court held that, because plaintiff failed to show that a pattern of racially biased statements had continued into the four-year period prior to the filing of suit, she could not rely on conduct outside the four-year period.

Wilson v. Brinker Int'l, Inc., 382 F.3d 765, 94 FEP Cases 585 (**8th Cir.** 2004), affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant because the jury found that no "act of harassment" took place within the 300 days preceding the charge.

Rowe v. Hussmann Corp., 381 F.3d 775, 779–81, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Missouri law sexual harassment plaintiff, including the award of $500,000 in compensatory damages and $ 1 million in punitive

damages. Plaintiff began complaining to her direct supervisor, Oscar Weston, in October, 1996, as soon as co-worker Roy Moore began touching her breast and buttocks and engaging in similarly foul verbal conduct, including threats of rape and murder if she did not engage in sexual activity with him. Plaintiff filed her EEOC charge on June 7, 2000, fixing the 300-day mark at August 12, 1999. *Id.* at 779. The court rejected defendant's contention that plaintiff's own testimony established a two-year hiatus in harassment prior to September 1999, and that the acts before and after that date could not be part of the same pattern, or was contradictory. The court referred to plaintiff's testimony that Moore had left her alone for a long time, but not as long as two years, and then to her testimony that he never left her alone and to her description of a February 1999 incident "in which Moore, in the crudest of terms, asked Rowe about her sexual relationship with her boyfriend and then in obscene terms accused Rowe of lying about not having engaged in a certain sex act." *Id.* at 780. The court held that there was at most a seven-month hiatus, and that it did not matter:

> In the present case, it was the same harasser, Moore, committing the same harassing acts both before and after August 12, 1999; there was evidence that Hussmann was made aware of this harassment through Weston; and there is no evidence of any "intervening action," *Morgan*, 536 U.S. at 118, 122 S. Ct. 2061, by Hussmann that can fairly be said to have caused the later acts of sexual harassment to be unrelated to those which occurred during the period when Rowe was first forced to run the gauntlet of Moore's repeated verbal and physical harassment and abuse. Accordingly, we conclude as a matter of law that the acts before and after the limitations period were so similar in nature, frequency, and severity that they must be considered to be part and parcel of the hostile work environment that constituted the unlawful employment practice that gave rise to this action.

Id. at 781. The court also rejected defendant's argument that the lower court erred in refusing to issue a proposed instruction that would have allowed it to escape liability if it took adequate corrective action within the charge-filing period, regardless of what it had allowed to happen earlier. *Id.*

Porter v. California Dept. of Corrections, 383 F.3d 1018, 1027, 94 FEP Cases 928 (**9th Cir.** 2004), reversed the grant of summary judgment to the Title VII sexual harassment defendant. The court held that, while the earlier conduct of plaintiff's supervisors had settled down by the time of the charge-filing period, taken as a whole it was severe and pervasive and continued to within the charge-filing period. By contrast, the actions of co-workers were not part of the same pattern of harassment, had ended before the start of the charge-filing period, and were now time-barred.

Boyler v. Cordant Technologies, Inc., 316 F.3d 1137, 90 FEP Cases 1249 (**10th Cir.** 2003), reversed the grant of summary judgment to the defendant, holding in light of *Morgan* that the plaintiff's claims of a racially and sexually hostile environment going back to 1982 were timely raised in her 1997 charge.

D. Constructive Amendments to Pleadings

Torry v. Northrop Grumman Corp., 399 F.3d 876, 95 FEP Cases 539 (**7th Cir.** 2005), affirmed the grant of summary judgment to the age and race discrimination defendant. Plaintiff's EEOC charge alleged both age and racial discrimination, but she pleaded only age discrimination in her court Complaint, and never amended it to include a claim of racial discrimination. Although plaintiff lost on her claims, the court held that the racial discrimination claims were properly before the district court notwithstanding the lack of a pleading asserting them. The court held that Rule 15 makes clear that claims never raised in a pleading may nonetheless be disposed of in the case, and pointed out that even the defendant may move for an amendment to the Complaint to make the scope of *res judicata* clearer. "The words that we have italicized show that Northrop Grumman's insistence that the plaintiff had to amend the complaint to add a charge of racial discrimination is frivolous." *Id.* at 878–79. It stated that a party may move for amendment of a pleading and added: "But that option has nothing to do with whether a complaint *must* be amended to conform to the issues litigated; there is no must." *Id.* at 879. The court criticized defendant for wasting its time with a "bad argument." *Id.* The court then held that the issue of racial discrimination had in fact been litigated with consent prior to the summary-judgment filings:

> So the question is simply whether the issue of racial discrimination was (pre)tried by implied consent of the parties (for there was never express consent). The answer is that it was. The defendant went through four years of discovery and other pretrial maneuverings without objecting to the fact that its opponent was patently engaged in endeavoring to prove racial as well as age discrimination. No more was required to satisfy Rule 15(b).

Id.

E. Jurisdiction: Questions on the Notice of Appeal

Marie v. Allied Home Mortgage Corp., 402 F.3d 1, 6–9, 95 FEP Cases 737 (**1st Cir.** 2005), reversed the denial of defendant's motions to stay judicial proceedings and to compel arbitration. This was an appealable order, but defendant moved for reconsideration and filed its Notice of Appeal within thirty days of the denial, more than thirty days after the original order. The court held that any order from which an appeal lies is a "judgment," and any timely motion for reconsideration of such an order operates as a Rule 59(e) motion whether or not so styled. Thus, the appeal period ran from denial of the motion, and the Notice was timely.

F. Arbitration

1. Exception in § 1 of the FAA for Transportation Employees

Palcko v. Airborne Express, Inc., 372 F.3d 588, 93 FEP Cases 1775 (**3d Cir.** 2004), reversed the lower court's denial of defendant's motion to compel arbitration. The court held that, while plaintiff was a transportation employee exempt from 9 U.S.C. § 1, he was still bound by the State's Arbitration Act.

Hill v. Rent-A-Center, Inc., 398 F.3d 1286, 95 FEP Cases 245 (**11th Cir.** 2005), affirmed an order compelling arbitration. Plaintiff claimed exemption under 9 U.S.C. § 1 because he was an Account Manager whose duties required that he deliver furniture to out-of-state customers. The court held that he was not entitled to the exemption because, while he was engaged in interstate transportation of goods, he was not employed in the transportation industry.

2. Waiver

Marie v. Allied Home Mortgage Corp., 402 F.3d 1, 95 FEP Cases 737 (**1st Cir.** 2005), reversed the denial of defendant's motion to compel arbitration and held that defendant did not waive its right to file such a motion by waiting to demand arbitration until plaintiff filed his Title VII Complaint in court. The arbitration agreement stated in part: "Arbitration under this section must be initiated within sixty days of the action, inaction, or occurrence about which the party initiating the arbitration is complaining." Defendant did not demand arbitration within sixty days of service of the EEOC charge, or within sixty days after the conclusion of charge proceedings, but did do so within sixty days of being served with the court Complaint. Discussing the division of functions between arbitrators and courts, the court stated: "We address these two points in turn, finding that the contractual timeliness issue is for the arbitrator but that the issue of waiver by conduct is for the court." It noted the split among the Circuits on the question of who decides the issue of waiver by conduct. "A shifting of the issue to the arbitrator will only be found where there is 'clear and unmistakable evidence' of such an intent in the arbitration agreement. No such evidence exists here." (Citations omitted.) The court stated: "At least two elements of waiver by conduct that this circuit has identified are (1) undue delay in bringing arbitration that is inconsistent with the desire to arbitrate and (2) prejudice to the other party from that delay." (Citations omitted.) It held that there was no undue delay in waiting for the court action to be filed. It noted that defendant could not have stopped the EEOC investigation, and that the investigation might have persuaded the plaintiff not to go further.

May v. Higbee Co., 372 F.3d 757, 764, 94 FEP Cases 44 (**5th Cir.** 2004), reversed the denial of defendant's motion to compel arbitration. At best, plaintiff did not sign the arbitration agreements she was given, but signed an acknowledgement that she had received the agreement. At worst for her claims, the acknowledgment was the agreement. The court held that plaintiff's continuation of working for defendant was an acceptance of the arbitration agreement. The court stated: "By signing the Acknowledgment Form, May indicated that she had received the Rules, but the signature did not all by itself bind May to the arbitration program. Rather, May became bound through her subsequent conduct, for the Acknowledgment Form unambiguously notified May that '[e]mployees are deemed to have agreed to the provisions of the Rules by virtue of . . . continuing employment [with Dillard's].' In other words, the Acknowledgment Form notified May of how she would manifest her assent to be bound. She undisputedly continued her employment at Dillard's, thus manifesting assent in the requested manner."

3. Costs of Arbitration

Parilla v. IAP Worldwide Services, VI, Inc., 368 F.3d 269, 284–85, 93 FEP Cases 1483 (**3d Cir.** 2004), reversed an order denying defendant's motion to compel arbitration. The court held that the "loser pays" provision of the agreement could not be found unconscionable on the present record. "Parilla has submitted no evidence of the potential costs of arbitration or of her inability to pay those costs. It is undisputed, however, that Parilla did not have the opportunity to present such evidence because the District Court declined to entertain her argument regarding the enforceability of the 'loser pays' provision. Accordingly, we will remand this matter to the District Court for the development of a record on, and a determination of, the issue of whether the reasonably anticipatable fees and expenses of the arbitrator and Parilla's financial circumstances are such that the prospect of her having to pay them in the event she loses unduly burdens her right to seek relief."

Faber v. Menard, Inc., 367 F.3d 1048, 93 FEP Cases 1730 (**8th Cir.** 2004), reversed the denial of defendant's motion to compel arbitration, "with directions that the district court determine whether the requirement that Faber pay the arbitrators' fees in the circumstances, unconscionably prevents his access to the arbitral forum. If found to be unconscionable, the offending clause should be severed and arbitration compelled."

> Faber failed to meet his burden of proof that the arbitrators' fees make the agreement unconscionable due to their prohibitive cost. The amount of the arbitrator's fees is not well-defined in the contract, and Faber has not provided the evidence necessary to estimate the length of the arbitration and the corresponding amount of arbitrators' fees (e.g. sophistication of the issues, average daily or hourly arbitrator costs in the region). He has also failed to provide evidence of his particular financial situation. Rather, Faber merely argues that the requirement that he pay half of the arbitrators' fees is unconscionable because it is a cost he would not pay in litigation and therefore discourages him from bringing his claims. Without the specific evidence, however, this hypothetical discouragement is purely speculative. . . . Accordingly, because there is insufficient information in the record on this question, we must remand for a determination of this issue. On remand, the district court may further develop the record and consider whether Faber can meet the high threshold of proving that the clause

requiring him to pay arbitrators' fees prevents him from being able to raise his claims in arbitration.

Id. at 1054 (citations omitted).

4. Unconscionability

Parilla v. IAP Worldwide Services, VI, Inc., 368 F.3d 269, 277–89, 93 FEP Cases 1483 (**3d Cir.** 2004), reversed an order denying defendant's motion to compel arbitration. The court held that the arbitration agreement was unconscionable in requiring notice of the claim within thirty days, on pain of loss of all rights. The court also held that the provision in the agreement waiving attorneys' fees, costs, and expenses was unconscionable as to both Title VII and Virgin Islands claims because of the greater financial resources of the defendant. It held that the confidentiality provision was not unconscionable because it made the task of future litigants more difficult, not the task of plaintiffs. It held that the non-residency requirement—that the arbitrators not live on the Virgin Islands or Puerto Rico—was not unconscionable. The court held that employers' after-the-fact offers to cure the unconscionable provisions should not be taken into account, because the provisions could deter employees from asserting claims. Such provisions are unenforceable. The court remanded the issue whether the unconscionable provisions could be severed.

5. Unconscionability as to Choice of Law

Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 377–78, 10 WH Cases 2d 609 (**6th Cir.** 2005), affirmed the district court's denial of defendant's motion to compel arbitration. The agreement applied to all facilities in all states. Defendant argued that Tennessee law on unconscionability could not be applied to persons who worked outside of Tennessee. The court stated that there are potential Constitutional limitations on the application of one State's law in other States, where the chosen law conflicts with the law of other States, but that Ryan's had not shown any relevant conflict between Tennessee law and the law of other states.

6. Unconscionability as to Discovery Rights

Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 387, 10 WH Cases 2d 609 (**6th Cir.** 2005), affirmed the district court's denial of defendant's motion to compel arbitration. The court held that the limitation of one deposition per side, with any additional discovery subject to the control of a possibly biased panel, did not allow employees to vindicate their rights effectively.

7. Consideration

Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 10 WH Cases 2d 609 (**6th Cir.** 2005), affirmed the district court's denial of defendant's motion to compel arbitration, in part because there was no consideration. The arbitration services provider, EDSI, reserved the right to amend its rules from time to time. A previous case had held that this rendered EDSI's promise to provide arbitration services fatally indefinite. EDSI amended its rules to state that an employee could choose to have his or her claim arbitrated under the old rules or the new rules. The court held that this did not cure the defect because the arbitration agreements said that they

could not be changed without a new agreement signed by EDSI and the employee, and none of them had signed new agreements. "Although the 2000 version of the rules purport to afford Plaintiffs the right to enforce the rules in effect at the time of execution, Plaintiffs' agreements do not incorporate that right." *Id.* at 375. The court emphasized the problems of lack of consideration flowing from the fact that employees' agreements were with the arbitration services provider, not with Ryan's:

> Adequate consideration cannot take the form of Ryan's promise to submit any claims it may have against Plaintiffs to EDSI's arbitral forum. As explained by one district court:
>
> > EDSI is bound by its promise to Plaintiffs only to the extent that Ryan's is bound to submit to the forum, for without Ryan's consent EDSI can provide no benefit to Plaintiffs. EDSI/Ryan's Contract contains an escape clause whereby Ryan's can cancel its Contract with EDSI on ten days notice.. This provision stands in clear contrast to the mutual termination clause found in the Arbitration Agreement, thus negating any consideration that Plaintiffs might be deemed to receive from EDSI's promise to provide the forum. Similarly, the ten-day escape clause eliminates consideration that might otherwise exist or flow from Plaintiffs' "third-party beneficiary" status, as alluded to in the Arbitration Agreement.
>
> . . . Indeed, we question whether the agreement between EDSI and Ryan's even obligates Ryan's to submit to EDSI's arbitral forum at all. The EDSI/Ryan's agreement merely obligates EDSI (for a fee from Ryan's) to "[a]dminister and provide access to the EDSI alternative dispute resolution procedures and forum for all Company job applicants, employees, and the Company itself, as provided in the EDSI Rules and Procedures." (J.A. 1758.) (emphasis added). Notably, the agreement does not require Ryan's to submit its employment claims to the EDSI forum.

Id. at 380 (citation omitted).

8. Unilateral Power to Pick the Panel from Which Arbitrators Are Chosen

Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 10 WH Cases 2d 609 (**6th Cir.** 2005), affirmed the district court's denial of defendant's motion to compel arbitration, in large part because defendant accounted for 42% of the income of Employment Dispute Services, Inc. ("EDSI"), the for-profit arbitration services provider, and the indicia that two of the arbitrators come from potentially biased pools of persons associated with EDSI. The pools, each of which contributes one arbitrator to the panel, are: "(1) supervisors or managers of an employer signatory to an agreement with EDSI; (2) employees who are non-exempt from the wage and hour protections of the Fair Labor Standards Act; and (3) attorneys, retired judges, or other competent legal professional persons not associated with either party." *Id.* at 387. The court continued:

> The bias is exacerbated by the lack of a protocol governing EDSI's selection of potential adjudicators from the three pools. The individuals in the supervisor and

> employee pools are neither randomly selected nor chosen by a disinterested person for their skills. Instead, all members of these two pools are chosen by the small number of employers who, like Ryan's, have signed alternative dispute resolution agreements with EDSI: Golden Corral Steak Houses, K & W Cafeterias, Papa John's Pizza, Sticky Fingers Restaurants, The Cliffs at Glass, Inc., and Wieland Investments, Inc. In addition, the rules do not prevent a supervisor of a signatory company from sitting on an adjudication panel with a non-supervisory employee from the same company, including someone whom the supervisor directly supervises. Further, EDSI has no policy in place that prohibits a signatory company from discussing the arbitration process or specific claims with its employee adjudicators or from attempting to improperly influence its employee adjudicators.

Id.

G. Bars to Actions

1. Do EEOC Lawsuits Bar Private Actions?

EEOC v. Pemco Aeroplex, Inc., 383 F.3d 1280, 94 FEP Cases 848 (**11th Cir.** 2004), reversed the grant of summary judgment to the Title VII racial harassment defendant, holding that the EEOC was not in privity with private plaintiffs and was not bound by *res judicata* or by collateral estoppel by the judgment for defendant in that case. The EEOC had brought suit on behalf of persons not involved in the earlier case, and had twice unsuccessfully sought to consolidate its case with the earlier case.

2. Ripeness

Wyatt, Virgin Islands, Inc. v. Government of the Virgin Islands, 385 F.3d 801, 21 IER Cases 1583 (3d Cir. 2004), reversed the grant of declaratory judgment to the plaintiff employer that its mandatory arbitration agreements with employees were enforceable. Defendant had issued cease-and-desist letters to plaintiff as to this requirement, but had done nothing further. The court held that the action was unripe.

H. Enforcement of Settlement Agreements

Sims-Madison v. Inland Paperboard and Packaging, Inc., 379 F.3d 445, 94 FEP Cases 545 (**7th Cir.** 2004), reversed the lower court's *sua sponte* enforcement of a settlement agreement, because defendant had relied on the agreement only to establish the affirmative defense of accord and satisfaction, and plaintiff was never on notice that the agreement might be enforced. Defendant had relied on the agreement to fire the plaintiff. The court stated that *sua sponte* judgments are disfavored. Plaintiff's counsel agreed with defendant to settle the case for $30,000, with several commitments including the withdrawal of plaintiff's arbitration over her termination. Plaintiff stated that she had never authorized an offer that included the withdrawal of her arbitration. She refused to sign the agreement and defendant accordingly refused to pay the $30,000. The court held that defendant's failure to pay defeated its defense of accord and satisfaction, because actual payment was essential to the defense.

Chavez v. State of New Mexico, 397 F.3d 826, 831, 95 FEP Cases 434 (**10th Cir.** 2005), affirmed the lower court's denial of plaintiffs' motion to enforce a $60,000 settlement agreement covering all five plaintiffs, because plaintiffs' counsel withheld information from defendants that one of the plaintiffs was filing a second lawsuit, and defense counsel did not learn of this until shortly after signed the agreement settling the first case. The court rejected plaintiffs' argument that the $60,000 settlement was several, with each of the four other plaintiffs entitled to $12,000, because this contradicted the representations plaintiffs' counsel made below.

I. Class Actions

1. Multi-Facility Classes

Cooper v. Southern Co., 390 F.3d 695, 94 FEP Cases 1854 (**11th Cir.** 2004), affirmed the denial of class certification to the Title VII and § 1981 racial discrimination plaintiffs. The court described the proposed class and its claims:

> Seven African-American past or present employees of the defendant companies filed suit on July 27, 2000, alleging that the Southern Company and several of its subsidiaries—Georgia Power Company, Southern Company Services, Inc. and Southern Company Energy Solutions, Inc.—unlawfully discriminated against their employees on account of race. The plaintiffs alleged that the defendants discriminated against them in connection with promotion opportunities and performance evaluations, as well as in terms of compensation, and claimed that the defendants tolerated a racially hostile working environment. . . . At the time suit was filed, the proposed class included approximately 2,400 individuals residing in Georgia, Alabama, Florida, and Mississippi, and working at locations dispersed throughout the four states. The proposed class consisted of entry-level manual laborers and skilled professionals, among others, and encompassed exempt, non-exempt, unionized and non-unionized workers." *Id.* at (footnote omitted).

Id. at 703 (footnotes omitted). Plaintiffs alleged that the defendant companies followed common personnel policies and systems. The court described wide variations in the defendant companies' functions, labor forces, unionization, management structures, regionalization, and locations. *Id.* at 703–04. It summarized some of the differences:

> The differences in management structures, working environments, and criteria for employment decisions vary substantially among the defendant companies. The promotion and compensation decisions affecting laborers involved in electrical power transmission and distribution, for example, take into account very different criteria than do decisions involving the professional and managerial ranks of the companies. Similarly, the more than 200 locations in which employees of the different defendants work are spread throughout a widely dispersed geographical area and encompass an extremely diverse range of working environments.
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> * * *
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> The terms of compensation for unionized workers are strictly governed by the terms of the CBA, giving managers precious little discretion over salary and similar issues. For non-unionized workers, hiring and promotion decisions are made by managers of various rank based in geographically dispersed facilities within each of the defendant companies. Different managers assign various weights to different qualifications in making their employment decisions, and managers have the discretion to utilize a wide

> range of processes and procedures when making compensation and promotion decisions.
>
> Several different types of promotions are available to non-unionized employees. . . .
>
> Other promotions occur outside the context of the competitive promotions available on JobNet. . . . These promotions are not competitive since they do not involve unfilled positions, but rather are available only to employees progressing individually within their own job family.

Id. at 704–05 (footnote omitted). However, the court held that there are common factors. "Thus, for instance, SCS provides the defendant companies with resources to assist managers in promotion decisions, including structured interview guidelines designed to evaluate job-related skills." *Id.* at 705. SCS also develops evaluation forms, affirmative action plans, and has an EEO Department that works with all the defendant companies. *Id.* at 705–06. "The EEO Department's policy is to investigate discrimination complaints, and if any discrimination or harassment is revealed, to take remedial action to eliminate the discrimination or harassment. SCS's EEO Department also acts in conjunction with Compliance Officers within each defendant company to conduct annual compliance surveys. Every individual employee within the defendant companies receives an annual compliance questionnaire, which asks whether the employee is aware of any incidents of discrimination or harassment." *Id.* at 706. The court held that the lower court did not engage in an impermissible inquiry into the merits of the case but merely examined the factors bearing on the existence of classwide issues. "In this case, the district court was obliged to make some preliminary assessment of the plaintiffs' evidence to determine, at the very least, whether the named plaintiffs were claiming discrimination that was *common* to the members of the putative class." *Id.* at 713 (emphasis in original). The court stated that the failure to do so would have been error. *Id.* The court held that the lower court did not abuse its discretion in finding that plaintiffs had failed to show commonality. "As for the commonality requirement, the district court concluded that it was impossible to say that the employment histories of the named plaintiffs and the ways in which they claimed to have experienced discrimination could be 'fairly compared with the history or individual experiences of absent class members,' or that the claims of class members shared such common features that rulings could be fashioned to fairly adjudicate the claims as a group. . . . Where, as here, class certification was sought by employees working in widely diverse job types, spread throughout different facilities and geographic locations, courts have frequently declined to certify classes." *Id.* at 715 (citations omitted). The court explained:

> Since the hiring, compensation, and promotion decisions at issue were made by different managers in different companies implementing different policies, even if the named plaintiffs established that they were, individually, subjected to intentional discrimination, they would not necessarily have established that other class members suffered from the same discrimination. Commonality in the claims of the broad class the plaintiffs sought to certify would have to be established by showing that the discrimination sustained was either part of an overarching pattern and practice of intentional discrimination on the part of the defendants or the result of the discriminatory disparate impact of a facially neutral employment policy.

Id. at 715–16. The court stated that: "To establish a 'pattern or practice' of disparate treatment, the plaintiff must show that intentional discrimination was the employer's "standard operating procedure.' . . . The plaintiff can prove that discrimination was the standard operating procedure 'through a combination of statistics and anecdotes.'" (Citations omitted.) The court held that

plaintiff's evidence did not show a pattern of either racially disparate impact or racially disparate treatment common among the class members. *Id.* at 716–17. "In addition, the Madden reports did not make any reference to any of the specific named plaintiffs or their specific similarly-situated comparators, making it altogether unclear how the reports could establish *commonality* among these named plaintiffs' claims and the overall claims of the affected class." *Id.* at 718 (emphasis in original). The court stated that plaintiffs had presented anecdotal evidence of "ugly" racial incidents, and had presented affidavits of class members supporting their claims but held they were not enough to show commonality: "Again, we conclude that the district court acted within its discretion in determining that, given the sheer size and geographically dispersed nature of the defendants' workforce, the anecdotal evidence—disturbing as some of it may have been—was inadequate to establish discrimination class-wide." *Id.* at 719.

2. Claims for Injunctive Relief

Monreal v. Potter, 367 F.3d 1224, 1236, 93 FEP Cases 1562 (**10th Cir.** 2004), reversed the grant of summary judgment to the Title VII defendant U.S. Postal Service. The court affirmed the denial of class certification under Rule 23(b)(2), because plaintiffs' claims for compensatory damages predominated over their claim for injunctive relief. Independently, the court stated that plaintiffs had not identified any specific policy that was being challenged, and held that "the variety of claims asserted in the Complaint do not lend themselves to the formulation of appropriate class-wide injunctive or declaratory relief." It stated that plaintiffs are not required to proffer injunctive terms specific enough to meet the requirements of Rule 65, but continued: "However, the breadth and discontinuity of the acts of discrimination alleged here reveal how ill-suited a class-wide injunction would be that would satisfy the requirements of Rule 65." *Id.* at 1236 n.11.

3. Claims for Common-Law Damages

Monreal v. Potter, 367 F.3d 1224, 1236–37, 93 FEP Cases 1562 (**10th Cir.** 2004), reversed the grant of summary judgment to the Title VII defendant U.S. Postal Service. The court affirmed the denial of class certification under Rule 23(b)(2), because plaintiffs' claims for compensatory damages predominated over their claim for injunctive relief. The court held that the lower court did not abuse its discretion in denying class certification under Rule 23(b)(3) because plaintiffs had not identified any specific policy or practice affecting the class. "Plaintiffs merely speculate that their particularized claims are the result of a pattern and practice discrimination based upon their national origin." *Id.* at 1237.

Cooper v. Southern Co., 390 F.3d 695, 720–21, 94 FEP Cases 1854 (**11th Cir.** 2004), affirmed the denial of class certification to the Title VII and § 1981 racial discrimination plaintiffs. The court held that claims for compensatory and punitive damages cannot be maintained in a (b)(2) class action unless such claims are incidental to equitable relief, and that (b)(2) certification is not appropriate where such damages are the exclusive or predominant relief sought. Nor could careful pleading resolve the problem:

> The plaintiffs argue, nevertheless, that the district court could have certified a class under Rule 23(b)(2) only as to the injunctive and declaratory prayer for relief, thereby excluding altogether the damages issues from class certification. However, to the extent the named plaintiffs were willing to forego

> class certification on damages in order to pursue injunctive relief that consisted of an admonition to follow general principles of settled law, it is far from clear that the named plaintiffs would adequately represent the interests of the other putative class members. Indeed, to many of the class members (and especially to those who no longer work for the defendants), the monetary damages requested might be of far greater significance than injunctive relief, stated at a high order of abstraction, that simply directs the defendants not to discriminate. Moreover, determining the level of damages to which each class member was entitled plainly would require detailed, case-by-case fact finding, carefully calibrated for each individual employee. The "complex, individualized determinations" necessary to fix the appropriate level of individual damage awards in this case are exactly the type that *Murray* and *Allison* make clear should not be considered "incidental" to the claims for injunctive and declaratory relief.

Id. at 721 (footnote omitted). The court noted that plaintiffs' Prayer sought injunctive relief of the very general type described. *Id.* at 721 n.13. The court held that the lower court did not abuse its discretion by denying certification under Rule 23(b)(3). "Our case law plainly establishes that a class action should not proceed under Rule 23(b)(3) when it appears that 'most, if not all, of the plaintiffs' claims will stand or fall, not on the question whether [the defendant] has a practice or policy of [race] discrimination, but on the resolution of . . . highly case-specific factual issues.'" *Id.* at 722 (citations omitted.) The court held that the defects in plaintiffs' statistical evidence "rendered the form of proof wholly insufficient to show that any pattern or practice of discrimination disparately affected the plaintiffs' class, or, for that matter, that the defendants had a general policy of discrimination." *Id.* It continued" "Moreover, the individual determinations on liability and damages necessary for the individual plaintiffs to succeed would require highly fact-specific inquiries concerning each plaintiff. Thus, we can discern no abuse of discretion in the district court's determination that the issues subject to individualized proof predominated over those that could be established with class-wide proof, and therefore that the Rule 23(b)(3) class action procedure would not be superior for the fair and efficient adjudication of the controversy." *Id.* at 722–23. The court rejected the use of a hybrid class certification under (b)(2) for injunctive and declaratory relief and back pay, and under (b)(3) for compensatory and punitive damages. "The cases relied on by the plaintiffs stand for the proposition that it may be appropriate to use a bifurcated or hybrid trial process in Rule 23(b)(2) cases when class-wide injunctive relief is appropriate, followed by individualized awards of *back pay*. Significantly, these cases do not hold that such a process is appropriate (much less required, as plaintiffs would have it) when highly individualized awards of compensatory and punitive damages are at stake." *Id.* at 721 n.14 (emphasis in original).

4. The "Same Jury" Argument

Cooper v. Southern Co., 390 F.3d 695, 722, 94 FEP Cases 1854 (**11th Cir.** 2004), affirmed the denial of class certification to the Title VII and § 1981 racial discrimination plaintiffs. The court held that the same jury would have to determine all matters at law as to classwide discrimination and as to the damages awards to each class member. "Finally, as the district court noted, since the plaintiffs demanded a jury trial in this case, the parties were entitled under the Seventh Amendment to have all matters at law determined by a single jury before having decisions concerning equitable relief made by the trial court. . . . Under the circumstances of this case, even assuming that the district court could conduct an initial bench trial on the merits of the equitable claims, and that the court actually found in favor of the plaintiffs, it would still be necessary for a single jury to hear and rule on more than 2,000 individual claims for

compensatory damages. Again, on this record we can discern no abuse of discretion in the district court's refusal to proceed under the class action umbrella." (Citations omitted.) The court did not discuss contrary authority.

5. Tolling in Serial Class Actions

Yang v. Odom, 392 F.3d 97, 104 (**3d Cir.** 2004), a securities case, affirmed in part, and reversed in part, the tolling decisions of the district court. No class had been certified in an earlier case, in the Northern District of Georgia, because of a problem with the class representative. Class members then filed a new action in the District of New Jersey. The court held that "American Pipe tolling applies to would-be class members who file a class action following the denial of class certification due to Rule 23 deficiencies of the class representative. American Pipe tolling will not apply to sequential class actions where the earlier denial of certification was based on a Rule 23 defect in the class itself." Judge Alito concurred in part and dissented in part.

6. Pre-Certification Discovery

Monreal v. Potter, 367 F.3d 1224, 1234–38, 93 FEP Cases 1562 (**10th Cir.** 2004), affirmed the lower court's denial of class certification because plaintiffs failed to allege any specific policy or practice that was discriminatory. The court held that the lower court did not abuse its discretion in denying discovery for purposes of class certification. "Plaintiffs' Fourth Amended Complaint did not fail for lack of statistical evidence, but for failure to identify one or more specific USPS policies that were discriminatory toward or imposed a common disparate impact on the proposed class. Thus, the district court did not abuse its discretion in denying Plaintiffs' motion for discovery." *Id.* at 1238.

Comment: It is often the case that discovery is necessary in order to identify the specific practices causing the disparate impact. Plaintiffs are certainly capable of noticing that persons of their race, national origin, age, or gender are not advancing as quickly as all other employees, but are not able to examine personnel folders and test results and make a responsible specific allegation before having discovery. The Supreme Court recognized this in *Wards Cove Packing Co., Inc. v. Atonio*, 490 **U.S.** 642, 657, 49 FEP Cases 1519 (1989), when it stated: "Some will complain that this specific causation requirement is unduly burdensome on Title VII plaintiffs. But liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims." The court's requirement that the pleadings be specific in order to get the discovery necessary to make the pleadings specific appears to be an epic instance of a "Catch-22."

7. Effect of Rule 68 Offers Before Class Certification

Weiss v. Regal Collections, 385 F.3d 337, 348 (**3d Cir.** 2004), reversed the dismissal for mootness of the Fair Debt Collection Practice Act plaintiff's case. Plaintiff filed the case as a class action, and defendant made a Rule 68 offer of judgment for the maximum relief plaintiff could individually recover under the Act. The lower court then dismissed the action as moot. Reversing, the court of appeals relied on the fact that defendant made its offer six weeks after plaintiff filed his Amended Complaint. It stated that Rule 68 motions do not moot a case when

filed after the plaintiff has moved for class certification, and repeatedly referred to the danger that a defendant might "pick off" plaintiff after plaintiff by making Rule 68 offers as soon as they filed their claims. It continued: "Absent undue delay in filing a motion for class certification, therefore, where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint. Because in this case, no motion for class certification was made, we will direct the trial court to allow Weiss to file the appropriate motion." (Footnote omitted.)

J. Theory of the Case

Banos v. City of Chicago, 398 F.3d 889, 890–91, 95 FEP Cases 431 (**7th Cir.** 2005), affirmed the grant of summary judgment to the Title VII defendant. "As anyone who was awake during the fall of 2004 knows, the label of 'flip-flopper' got considerable play during the presidential campaign. The term lives again in this appeal, which involves yet another challenge to the promotion procedures of the Chicago Police Department. The plaintiffs are minority police sergeants who claim their failure to be promoted after taking the 1998 lieutenant examination violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e–17. During the course of litigation, the plaintiffs elected to renounce one theory of recovery in order to pursue another. But later, when this fresh approach appeared doomed, they tried to resuscitate their original claim." The court held that the City had shown prejudice.

K. Amendment

See the discussion of *Baker v. John Morrell & Co.*, 382 F.3d 816, 830–32 (**8th Cir.** 2004), and the post-verdict amendment of the Complaint to limit the effect of the caps on damages, in the section below on "Compensatory Damages."

L. Summary Judgment

Jackson v. Flint Ink North American Corp., 382 F.3d 869, 94 FEP Cases 549 (**8th Cir.** 2004), on panel rehearing, reversed the grant of summary judgment to the Title VII racial harassment defendant. The court rejected plaintiff's argument that a jury must always decide whether an environment is objectively hostile. The court held that this was a legal question. "In other words, a showing of some minimal level of harassment is necessary before a case is submissible to a jury. A court of course may decide this issue of submissibility on summary judgment." *Id.*

M. Evidentiary Rulings

1. Criminal Conviction of the Harasser

McCombs v. Meijer, Inc., 395 F.3d 346, 95 FEP Cases 1 (**6th Cir.** 2005), affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff, and held that the lower court did not abuse its discretion by admitting evidence that the harasser—a co-worker in the Meat Department where plaintiff worked—had pleaded guilty to a criminal charge after he waved a bloody knife at her in response to her complaints. "Meijer was not prejudiced by the jury knowing that Pound had been convicted of a misdemeanor that resulted from the knife

incident. Meijer does not argue that the knife incident did not occur; in fact, evidence of the knife incident was admitted through McCombs's written complaint on December 4. Moreover, if Pound himself had been the defendant or if the occurrence of the knife incident was at issue, the situation may have been different. But, as the district court properly concluded, it does not 'hurt [ ] Meijer[ ] at all to know the man was convicted.'" *Id.* at 354–55. (Footnote omitted.) Judge Gilman dissented.

2. Admissions

Eliserio v. United Steelworkers of America Local 310, 398 F.3d 1071, 1078, 95 FEP Cases 421 (**8th Cir.** 2005), reversed the grant of summary judgment to the Title VII and § 1981 harassment and retaliation claims. The Hispanic plaintiff crossed a picket line during a strike, and resigned from Local 310. He thereafter became the target of graffiti referring to him as a "rat" and using racial slurs such as "Taco Bob" and "Ratserio." Six years after the crossing, Local 310 purchased "No Rat" stickers in support of the graffiti campaign. The court held that the local could not be held liable simply because its members were engaging in the graffiti campaign, but that the union was potentially liable for its encouragement of a campaign of harassment including racial slurs that was intended to affect the terms and conditions of plaintiff's employment. It held that statements by union officials were probative of intent:

> An affidavit by former Firestone employee Robert Osterhout supports Eliserio's claim that Local 310 officials purchased the stickers to support the graffiti campaign against Eliserio. Osterhout avers that, in the course of distributing the stickers, Local 310 executive board member Terry Welch told him the stickers were targeted at Eliserio. In addition, Osterhout claims that Vonk and Osterhout's union steward, Andy Byrkette, stated on more than one occasion that they would "stop at nothing to get rid of" Eliserio.
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> Local 310 asks us to discount the affidavit because of questions surrounding Osterhout's credibility, but issues of credibility are for a jury to determine. . . . Local 310 also argues that the alleged statements were inadmissible hearsay because its officials were not acting as agents of the union at the time they made the comments reported by Osterhout. . . . On the contrary, Welch's statement was allegedly made while distributing the union-purchased stickers. Although Osterhout provided little context for Vonk's alleged statements, the statements were made in regard to a matter of union concern and in the presence of a union steward. Based upon the summary judgment record, we conclude that Vonk's alleged statements were made within the scope of his duties as a union official. Therefore, the statements of Welch and Vonk reported by Osterhout are not hearsay and should be considered as admissions of a party-opponent. *See* FED. R. EVID. 801(d)(2).

3. Hearsay

Luckie v. Ameritech Corp., 389 F.3d 708, 714, 94 FEP Cases 1351 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII racial harassment defendant, because plaintiff did not show actionable harassment. The court rejected plaintiff's argument that the affidavit of decisionmaker Patterson was hearsay when she referred to conversations she had had with others in which they made statements criticizing plaintiff's performance, because the

statements were offered to prove the state of the decisionmaker's mind, rather than the truth of the matter.

4. Evidence of What Happened to Others

Williams v. ConAgra Poultry Co., 378 F.3d 790, 794, 94 FEP Cases 266 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII, § 1981, and Arkansas Civil Rights Act racial harassment and termination plaintiff, including the remitted awards of $173,156 in compensatory damages and $500,000 in punitive damages on the termination claim and compensatory damages of $600,000 on the harassment claim, but ordered that the punitive-damage award on the harassment claim be remitted to $600,000 from the jury's verdict of $6,063,750. The court held that plaintiff could not rely, for purposes of his harassment claim, on discriminatory actions of which he was unaware, because that would violate his duty to show that the working environment was subjectively hostile. The court held that such evidence is still relevant, because it adds to the credibility of plaintiff's testimony of the hostile environment to which he was subjected. In addition, the court held that such evidence bears on plaintiff's termination and retaliation claims, as well as on punitive damages:

> Evidence of widespread toleration of racial harassment and disparate treatment condoned by management was relevant to its motive in firing Mr. Williams. We believe that evidence of racial bias in other employment situations could permissibly lead to the inference that management was similarly biased in the case of Mr. Williams's firing. Furthermore, Mr. Williams alleged that part of the motivation for firing him was that he had complained about the racially hostile environment at the plant and that management wished to silence him in order to avoid addressing the issue. Evidence of the extent of the hostile environment was thus probative on the matter of managerial motives. . . . Furthermore, as we discuss below, the issue of motive was relevant to Mr. Williams's eligibility for punitive damages on his harassment claim . . . even if the conduct of which he was unaware was not relevant to the question of whether he experienced actionable harassment.

(Citations omitted.)

Obrey v. Johnson, 400 F.3d 691, 697–99, 95 FEP Cases 531 (**9th Cir.** 2005), reversed the judgment on a jury verdict for the Title VII defendant. Plaintiff is an Asian-Pacific Islander who claimed that persons of his race were systematically excluded from senior management positions at the Pearl Harbor Naval Shipyard. The lower court excluded the anecdotal evidence of three shipyard employees who believed they had suffered from racial discrimination in promotions. The court held that this was an abuse of discretion. It noted that anecdotal testimony is important in establishing a pattern and practice of discrimination, and that the proffered testimony made plaintiff's claim more credible. It rejected the lower court's rationale that allowing the testimony would have resulted in time-wasting mini-trials, and that this justified exclusion of the testimony:

> We recognize, however, that the district court retains broad discretion to determine whether the probative value of the evidence at issue is substantially outweighed by considerations of "undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403 . . . . Nevertheless, none of the testimony that

> the appellant attempted to offer into evidence so clearly involved delay that was "undue" or a "waste of time" or was cumulative of other evidence that it was excludable. Rather, the testimony was offered to show that the defendant had a discriminatory motive when it denied his promotion because it had unlawfully rejected other applicants in circumstances similar to his, and tended to support his pattern or practice theory. While the jury naturally has to determine the credibility of witness testimony in order to assess the weight it should be accorded, this is not the sort of undue delay and waste of time that the Rules contemplate.
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> We acknowledge that the trial court was properly concerned with the prospect of mini-trials on the witnesses' own claims of discrimination. The trial court should have first addressed these concerns with the parties through other, less restrictive means. On balance, we believe that this proposed testimony was likely to be relevant, and Rule 403 considerations do not warrant exclusion in this case. Consequently, we find that the district court abused its discretion when it excluded this testimony. On remand, the district court, of course, will retain discretion to decide that the witnesses' claims so overwhelm the issues in the trial that their testimony must be excluded under Rule 403.

Id. at 698–69 (citations omitted). The court held that there is a presumption of prejudice and that, because the testimony had not yet been adduced, it was not possible to find that the exclusion caused no prejudice. *Id.* at 699–702.

5. Rule 412, Fed. R. Evid.

Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 855–56, 75 FEP Cases 1228 (**1st Cir.** 1998), affirmed the Title VII judgment of liability against the defendant employer and its owner. "Defendants continually sought to make an issue of plaintiff's sexual history. In the course of this litigation, defendants attempted to paint the plaintiff as sexually insatiable, as engaging in multiple affairs with married men, as a lesbian, and as suffering from a sexually transmitted disease. Defendants claimed that plaintiff had an affair with a married man that caused her to become distracted from work, and led to the lapses for which she was fired." (Footnote omitted). Nor was this all. "During discovery, defendants requested that plaintiff submit to an AIDS test, apparently to substantiate their allegations of promiscuity. The request was denied." *Id.* at 856 n.2. The court stated that Rule 412 "reverses the usual approach . . . by requiring that the evidence's probative value 'substantially outweigh' its prejudicial effect." *Id.* at 856. The district court excluded "evidence concerning plaintiff's moral character or promiscuity and the marital status of her boyfriend," but "allowed defendants to introduce evidence directly relevant to their theory that plaintiff's relationship distracted her from work" and allowed evidence "concerning plaintiff's allegedly flirtatious behavior toward Miranda . . . to determine whether Miranda's advances were in fact 'unwanted.'" *Id.* The court of appeals held that these rulings "were well within the district court's discretion." *Id.* The court rejected the defendants' claim of a double standard on evidentiary rulings, because "Fed. R. Evid. 412 required the district court to apply a stricter standard with regard to admission of evidence of plaintiff's sexual history than to the evidence admitted under the more liberal standard of Fed. R. Evid. 402 & 403." *Id.* at 857 (emphasis in original). The court's discussion of the $500 fine imposed on a defense attorney for violating the court's Rule 412 rulings at trial is described in Chapter 56 (Sanctions).

Wolak v. Spucci, 217 F.3d 157, 161, 83 FEP Cases 253 (**2d Cir.** 2000), affirmed the judgment for the Title VII sexual harassment defendant on a jury verdict, holding that the lower court violated Rule 412, FED. R. EVID., by admitting evidence of the plaintiff's sexual behavior. The lower court stated that Rule 412 "is not by its terms directly applicable to this case" and allowed inquiry into plaintiff's sexual behavior outside work. Although the Magistrate Judge denied the defense's discovery request for allegedly sexually explicit photographs of plaintiff and her boyfriend, the district court declared the need for "balance and practicality in dealing with . . . plaintiff's sexual sophistication in the context of a hostile environment case. At least for purposes of computing her damages for shame and humiliation and the like, no plaintiff should be permitted to portray herself to the trial jury falsely, as some sort of shrinking violet or as a novice in a nunnery." *Id.* at 159. "Over objection at trial, the defense attorney asked plaintiff about two parties at which pornographic videos were shown while she was present, and two or three other occasions on which she watched sexual acts as they were performed. *Id.* The court of appeals held that Rule 412 "encompasses sexual harassment lawsuits." *Id.* at 160. The court rejected the defendant's attempt to distinguish its inquiries from inquiries into sexual behavior or predisposition. "The Advisory Committee Notes, however, explain that 'behavior' encompasses 'activities of the mind, such as fantasies.' . . . Because viewing pornography falls within Rule 412's broad definition of behavior, defendants' extensive questions were subject to the Rule." *Id.* The court continued:

> Moreover, the evidence elicited in response to defendant's questions should not have been admitted under the criteria set forth in the Rule. Defendants argue that questions regarding Wolak's viewing of pornography were relevant to the subjective prong of the hostile work environment test whether she was actually offended and to damages. We conclude that the evidence was of, at best, marginal relevance. Whether a sexual advance was welcome, or whether an alleged victim in fact perceived an environment to be sexually offensive, does not turn on the private sexual behavior of the alleged victim, because a woman's expectations about her work environment cannot be said to change depending upon her sexual sophistication. . . . Even if a woman's out-of-work sexual experiences were such that she could perhaps be expected to suffer less harm from viewing run-of-the-mill pornographic images displayed in the office, pornography might still alter her status in the workplace, causing injury, regardless of the trauma inflicted by the pornographic images alone. Thus, defendants failed to establish that "the probative value" of Wolak's admissions concerning her activities outside the office, "substantially outweighed the danger of harm . . . and of unfair prejudice," and the evidence was not admissible. FED. R. EVID. 412(6)(2).

Id. at 160–61 (citations omitted). The court held that the error was harmless because the plaintiff failed to introduce any evidence of injury, including evidence that she took offense at the pictures, thus failing to establish an essential element of her claim. *Id.* at 161–62.

Beard v. Flying J, Inc., 266 F.3d 792, 801–02, 87 FEP Cases 1836 (**8th Cir.** 2001), affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff, and the judgment on a jury verdict for the defendant on plaintiff's constructive-discharge claim. The court stated that it was an open question whether Rule 412 applied to sexual harassment cases, but held in any event that the defendant's failure to follow the procedures set forth in Rule 412

was harmless in light of the plaintiff's knowledge that the material on her non-intimate sexual conduct would be offered, and in light of the fact that the conduct took place in a public area.

Excel Corp. v. Bosley, 165 F.3d 635, 640–41, 78 FEP Cases 1844 (**8th Cir.** 1999), affirmed the judgment on a jury verdict for the sexual harassment plaintiff. The plaintiff had been harassed at work by her former husband, and the defendant appealed the exclusion under Rule 412, Fed. R. Evid., of the former husband's testimony that the plaintiff had had sexual relations on several occasions with him, outside of the workplace, during the same time period in which she was complaining of harassment. The defendant also challenged the exclusion of the testimony of Dr. Patrick Barrett, a clinical psychologist whom the former husband saw twice during the same time period. The plaintiff attended the second session, at Dr. Barrett's request. "Dr. Barrett testified that Bosley may have acknowledged sending Johnson mixed signals. Dr. Barrett could not recall whether Bosley acknowledged sleeping with Johnson." *Id.* at 640. The court noted that the defendant sought admission of the evidence solely under Rule 412, and not under any other rule. *Id.* at 641. It described Rule 412 as allowing "admission of evidence of an alleged victim's past sexual behavior or alleged sexual predisposition in sex offense cases. Specifically Rule 412(b)(2) allows for the admission of such evidence in a civil case if it is otherwise admissible under the Rules of Evidence and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." *Id.* The court noted that it had never decided the applicability of Rule 412 to evidence proffered in a Title VII case, but stated without explanation that it did not need to decide the question because the defendant rested solely on Rule 412. The court held that the lower court had not "manifestly erred." It explained: "The alleged sexual activity took place outside the workplace. There was no allegation that Excel was aware of it or that it informed Excel's actions regarding the sexual harassment about which Bosley complained. This was the issue before the jury not Bosley's actions outside the workplace. Further the danger of harm and unfair prejudice to Bosley was great." *Id.*

B.K.B. v. Maui Police Department, 276 F.3d 1091, 1103–06, 87 FEP Cases 1306 (**9th Cir.** 2002), reversed the lower court's denial of plaintiff's motion for a new trial after defense counsel introduced trial testimony as to the plaintiff's sexually-oriented statements and conduct, without complying with Rule 412. "Having failed in two previous motions to obtain the court's approval to introduce Rule 412 material, the defendants instead simply sprang the offending testimony upon the court and then misrepresented the nature of Becraft's testimony to the trial judge in response to plaintiff's objections that the defense intended to violate Rule 412." *Id.* at 1104–05. The court held that Becraft's testimony as to the plaintiff's sexual practices did not involve any admissions by the plaintiff as to the advances she rejected, and "Plaintiff's alleged statements regarding her sexual habits were not probative as to the welcomeness of any harassing conduct by her coworkers." *Id.* at 1105. The court held that no instruction could have cured the prejudice of Becraft's "lurid" testimony, but that the lower court's curative instruction was in any event not forceful and was diminished in effect by its having been prefaced with a jocular reference to its being nearly lunchtime. *Id.* at 1105–06 & n.7. The court affirmed the award of $5,000 in attorney's fee sanctions against both the defendant and its counsel under 28 U.S.C. § 1927 and the court's inherent power for knowing and reckless violation of Rule 412 and having misled the court about the testimony after plaintiff's counsel had made an anticipatory objection. The court also affirmed the sanction of $5,000 in emotional-distress damages for the plaintiff

because of the emotional stress caused by the humiliation of hearing this evidence come in. *Id.* at 1106–09.

Judd v. Rodman, 105 F.3d 1339, 1341 (**11th Cir.** 1997), assumed without deciding that Rule 412, Fed. R. Evid., applied to a case seeking damages for transmission of genital herpes, a sexually transmitted disease. The court held that the admission of evidence of plaintiff's prior sexual history was not an abuse of discretion, because the record showed that "the herpes virus can be dormant for long periods of time and the infected person can be asymptomatic. Consequently, evidence of prior sexual relationships and the type of protection used during sexual intercourse is highly relevant to Rodman's liability." *Id.* at 1343. The court also held that the plaintiff did not waive her objection by bringing out her sexual history on her own direct examination, because this was a "valid trial strategy" to minimize the importance of the evidence after the court had denied plaintiff's motion in limine and stated that it considered Rule 412 inapplicable. *Id.* at 1342. A party is not required to object to her own testimony in order to preserve the point made in her motion in limine. *Id.* The court also held that plaintiff failed to show a substantial right was affected by the trial court's admission of evidence that plaintiff was a nude dancer both before and after she contracted genital herpes. While this was a closer question, the court held that the district court did not commit reversible error in admitting this potentially prejudicial evidence because the plaintiff had testified that she felt "dirty" after she contracted herpes, and continued: "The court determined that Judd's employment as a nude dancer before and after she contracted herpes was probative as to damages for emotional distress because it suggested an absence of change in her body image caused by the herpes infection." *Id.* at 1343. The court also reached its decision in light of "the specific facts of this case and the considerable evidence of sexual history and predisposition which were appropriately admitted." *Id.* Finally, because plaintiff cited Rule 402 but failed to cite Rule 412 in her objection to the introduction of evidence on her breast augmentation surgery, the court held that she waived her right to object to this evidence under Rule 412. *Id.* at 1342.

N. Experts

McCombs v. Meijer, Inc., 395 F.3d 346, 359, 95 FEP Cases 1 (**6th Cir.** 2005), affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff, and held that the lower court did not abuse its discretion by allowing Elizabeth Bjick ("Bjick") to testify as an expert about the psychological impact that McCombs suffered as a result of the harassment. Bjick was a trainee, working under the supervision of a licensed psychologist as permitted by Ohio law. "As indicated in her testimony, Bjick worked under the supervision of another licensed psychologist, Dr. Virginia Reid, who, in fact, signed all of Bjick's diagnoses and treatments. Meijer does not offer authority that requires Dr. Reid to be present while Bjick testified about her opinion regarding McCombs—the opinion that she had established under the supervision of Dr. Reid."

O. Jury Instructions

1. "Permissive Inference" Jury Instructions

There is a substantial conflict among the Circuits on whether juries should be informed of their power to draw the inference of discrimination or retaliation when plaintiff shows that the

defendant's proffered nondiscriminatory reason for the challenged action is false. The Eighth Circuit is the only Circuit to include the topic in its pattern jury instructions, but some others require such an instruction where plaintiff requests it.

Because some jurors may wrongly believe that there must be direct or circumstantial evidence pointing to the impermissible motive, in a close case it is difficult to see how a just result can be achieved without their being informed of their power. Relegating the information to the argument of counsel is not an adequate substitute because the court's failure to mention the subject may lead the jury to reject the concept of such a power as the mere puffery of an advocate.

None of the decisions on this point identify any harm that would arise from requiring such an instruction.

Fite v. Digital Equipment Corp., 232 F.3d 3, 84 FEP Cases 524 (**1st Cir.** 2000), affirmed the judgment on a jury verdict to the ADA and ADEA defendant on the cocaine-addicted plaintiff's difficult claim that discrimination, not declining job performance, was the real reason for his discharge. On appeal, plaintiff argued that the jury should have been instructed that it was permitted to infer discrimination from a finding of pretext. The court stated: "While permitted, we doubt that such an explanation is compulsory, even if properly requested." *Id.* at 7. Plaintiff did not anticipate *Reeves*, and did not timely request a permissive-pretext instruction. The court held that the failure to give such an instruction was not plain error.

Cabrera v. Jakabovitz, 24 F.3d 372, 382, 64 FEP Cases 1239 (2d Cir.), *cert. denied*, 513 U.S. 876 (1994), a housing discrimination case following Title VII principles, held that a pretext instruction must be given where the defendant has satisfied its burden of production:

> If the defendant has met its burden of producing evidence that, if taken as true, would rebut the prima facie case, a threshold matter to be decided by the judge, the jury need not be told anything about a defendant's burden of production. In that event, whether or not the facts of the plaintiff's prima facie case are disputed, the jury needs to be told two things: (1) it is the plaintiff's burden to persuade the jurors by a preponderance of the evidence that the apartment (or job) was denied because of race (or, in other cases, because of some other legally invalid reason) . . . and (2) the jury is entitled to infer, but need not infer, that this burden has been met if they find that the four facts previously set forth have been established and they disbelieve the defendant's explanation . . . . There is no need to inform the jury that the defendant had a burden of production because it is no longer relevant. . . . There is also no need to refer to a burden shifting back to the plaintiff because, if the case requires submission to the jury, all the jury needs to be told about the plaintiff's burden of proof is that the burden of persuasion as to discrimination is on the plaintiff; the presumption that triggered the defendant's burden of production has "drop[ped] out of the picture."

Id. (citations and footnotes omitted).

Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280, 77 FEP Cases 119 (**3d Cir.** 1998), reversed the judgment on a jury verdict for the ADEA defendant because the lower court failed to instruct the jury on pretext:

> Applying these principles, it is clear that the jury must be given the legal context in which it is to find and apply the facts. It is difficult to understand what end is served by reversing the grant of summary judgment for the employer on the ground that the jury is entitled to infer discrimination from pretext, as we instructed in *Fuentes v. Perskie*, 32 F.3d 759, 764–65 (3d Cir.1994), if the jurors are never informed that they may do so. Accordingly, we join the Second Circuit in holding that the jurors must be instructed that they are entitled to infer, but need not, that the plaintiff's ultimate burden of demonstrating intentional discrimination by a preponderance of the evidence can be met if they find that the facts needed to make up the prima facie case have been established and they disbelieve the employer's explanation for its decision. [FN4]
>
> _____
>
> FN4. This does not mean that the instruction should include the technical aspects of the McDonnell Douglas burden shifting, a charge reviewed as unduly confusing and irrelevant for a jury. . . .

Ratliff v. City of Gainesville, 256 F.3d 355, 360–61, 86 FEP Cases 472 (**5th Cir.** 2001), reversed the judgment on a jury verdict for the defendant, in part because the lower court failed to give a pretext instruction making clear that an inference of unlawful motivation may be drawn, but is not required, when plaintiff shows that defendant's proffered nondiscriminatory reason is false. The court adopted the *Cabrera* and *Smith* decisions requiring that such an instruction be made. *Id.* at 361 n.7.

Kanida v. Gulf Coast Medical Personnel LP, 363 F.3d 568, 9 Wage & Hour Cases 2d 865 (**5th Cir.** 2004), an FLSA retaliation case, called for *en banc* reconsideration of *Ratliff*, based on its view that *Ratliff* extended *Reeves* by applying the permissive-pretext rule outside the context of summary judgment and judgment as a matter of law. It saw no basis for applying *Reeves* to jury instructions, but did not identify the harm it feared from letting juries know their actual function. The court held that it was bound by the decision, but held that the omission was harmless error. Judge Benavides concurred specially but disagreed that the *Ratliff* rule should be reconsidered *en banc*.

Gehring v. Case Corp., 43 F.3d 340, 343, 66 FEP Cases 1373 (7th Cir. 1994), *cert. denied*, 515 U.S. 1159 (1995), affirmed the judgment on a jury verdict for the ADEA defendant. The court rejected plaintiff's argument that the jury should have been instructed in each of the *McDonnell Douglas* elements, and continued:

> Gehring also wanted the judge to instruct the jury about one permissible inference: that if it did not believe the employer's explanation for its decisions, it may infer that the employer is trying to cover up age discrimination. This is a correct statement of the law . . . but a judge need not deliver instructions describing all valid legal principles. Especially not when the principle in question describes a permissible, but not an obligatory, inference. Many an inference is permissible. Rather than describing each, the judge may and usually should leave the subject to the argument of counsel. . . . Gehring's

lawyer asked the jury to draw this inference; neither judge nor defense counsel so much as hinted that any legal obstacle stood in the way. Instructions on the topic were unnecessary.

The Eighth Circuit Model Instructions 5. 91 and 5.95 state in part:

5.91 DISPARATE TREATMENT CASES - PRETEXT/INDIRECT EVIDENCE INSTRUCTION - ESSENTIAL ELEMENTS

. . . [You may find (age) was a determining factor if you find defendant's stated reason(s) for its decision(s) [(is) (are)] not the true reason(s), but [(is) (are)] a "pretext" to hide [(age) (gender) (race)] discrimination].[9]

_____

9. The bracketed phrase may be added at the court's option in cases in which plaintiff relies on indirect evidence/pretext to prove discriminatory motive.

Committee Comments

* * *

Plaintiffs can prove that unlawful bias was a "determining factor" by showing "either direct evidence of discrimination or evidence that the reasons given for the adverse action are a pretext to cloak the discriminatory motive." Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1061, 1063 (8th Cir. 1988) (emphasis added). "[A]n employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1059 (8th Cir. 1988). See also Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

5.95 PRETEXT INSTRUCTION

You may find that plaintiff's (age)[1] was a motivating factor in defendant's (decision)[2] if it has been proved by the [(greater weight) (preponderance)][3] of the evidence that defendant's stated reason(s) for its (decision) [(is) (are)] not the true reason(s), but [(is) (are)] a pretext to hide [(age) (gender) (race)] discrimination.

Committee Comments

. . . "[A]n employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1059 (8th Cir. 1988). This instruction, which is based on St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), may be used in conjunction with the essential elements instruction when the plaintiff relies substantially or exclusively on "indirect evidence" of discrimination. . . .

Townsend v. Lumbermens Mutual Casualty. Co., 294 F.3d 1232, 89 FEP Cases 306 (**10th Cir.** 2002), a three-opinion case, reversed the judgment on a jury verdict for the § 1981 and Title VII racial discrimination defendant. Senior Judge Holloway wrote at 1241:

> This is a difficult matter for courts, and would certainly be difficult for a jury. We consider the danger too great that a jury might make the same assumption that the Fifth Circuit did in Reeves. Therefore, we hold that in cases such as this, a trial court must instruct jurors that if they disbelieve an employer's proffered explanation they may—but need not—infer that the employer's true motive was discriminatory. Moreover we are persuaded by the position of the EEOC that the issue is whether in the absence of any instructions about pretext, "the jury found for the defendant because it believed the plaintiff could not prevail without affirmative evidence that his race was a motivating factor in the challenged employment decisions."
>
> We do not hold that a pretext instruction is always required, but rather that it is required where, as here, a rational finder of fact could reasonably find the defendant's explanation false and could "infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."

(Footnote and citations omitted.) Judge Henry concurred at 1244, stating: "Given the recent confusion regarding the nature of the proof necessary to prevail on a Title VII claim, I am persuaded that, absent the proposed instruction, jurors are left without adequate guidance as to the circumstances in which they may infer discriminatory intent. Thus, under similar facts and where requested, I believe the instruction must be given; I concur." Senior Judge Brorby dissented. *Id.* at 1244–48.

Palmer v. Board of Regents, 208 F.3d 969, 974–75, 82 FEP Cases 1024 (**11th Cir.** 2000), affirmed the judgment on a jury verdict for the Title VII religious discrimination defendant, but held that a pretext instruction could be useful but that it was not required. The court stated: "We would however suggest that it might be helpful for the Committee On Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit to revisit the pattern jury instruction on this issue to consider whether any improvements in clarity might be warranted." Judge Cox concurred specially, stating that such an instruction may confuse more than clarify.

Conroy v. Abraham Chevrolet-Tampa, Inc., 375 F.3d 1228, 1233–35, 94 FEP Cases 107 (11th Cir.), *cert. denied*, __ U.S. __, 125 S. Ct. 811 (2004), affirmed the judgment on a jury verdict for the ADEA defendant. The court held that plaintiff's proposed pretext instruction described the law accurately, but that the use of such instructions, while proper, is not compulsory.

> Even if Palmer were not controlling here, we would still hold there was no error in failing to give Conroy's requested instruction. Conroy argues that the jury was misled to believe that it could not infer discrimination or retaliation from a finding of pretext due to the district court's charge to the jury that (1) it was Conroy's burden to prove discrimination and (2) the jury could not second guess Abraham Chevrolet's legitimate business decisions. We do not agree, however, that either of these instructions misled the jury. First, the instruction on burden of proof required Conroy to establish

discrimination, but it did not limit the methods by which he could prove it. Second, although the business judgment instruction explained to the jury that it could not second guess Abraham Chevrolet's legitimate business motives, it did not require the jury to believe that any of the legitimate reasons advanced by the employer were in fact the true motivations behind Conroy's discharge. Not only do we reject Conroy's assertion that these instructions inhibited the jury from inferring discrimination or retaliation based on a finding of pretext, but we consider them both to be standard jury instructions that accurately reflect the law in this Circuit.

Though we do acknowledge that Conroy's pretext instruction is also a correct statement of law, we can only reverse the district court's decision if (1) the contents of the requested instruction were not adequately covered by the jury charge and (2) Conroy suffered prejudicial harm. . . . The charge to the jury gave instructions on drawing inferences from the evidence and weighing the credibility of witnesses. This was sufficient to allow the jury to find discrimination or retaliation so long as they disbelieved Abraham Chevrolet's explanation for Conroy's termination. We also find it significant that Conroy's counsel made good use of his opportunity to argue pretext to the jury in closing statements:

> A claim has been made, there is no confession. Nobody ever confesses in a discrimination case. You're going to have [to] weigh the testimony and decide do you think age had something to do with it. And I would suggest to you that when the man who fires him or without any warning, any documented reports of anything going wrong and comes up here with inconsistent statements that you can read into, that inconsistency and make an inference that, perhaps, the reason that was given by them may not have been the real reason. That's going to be one of the jury instructions[,] that you can read into and understand what the evidence is, make reasonable inferences in terms of their explanation . . . You can certainly read into that. If there's an inconsistent reason, then the age maybe had something to do with it.

We therefore reject Conroy's contention that he was prejudiced by the district court's failure to give his requested instruction. . . . Accordingly, we find no reversible error and hold that the district courts, though permitted, are not required to give the jury a specific instruction on pretext in employment discrimination cases.

Id. at 1234–35.

2. "Business Judgment" Jury Instructions

The risk to fairness in a "business judgment" instruction is that, without more, it can readily short-circuit the process of deliberation by leading jurors to believe they should not question the sincerity of the proffered nondiscriminatory reasons. Its specificity winds up trumping the general instructions about credibility and the weight of the evidence.

Even trial judges have made this mistake, granting defendants summary judgment or judgment as a matter of law without even considering the evidence against the defendant, on the

ground that the adverse employment decision was first and foremost a business decision they are not allowed to second-guess:

- *Byrnie v. Town of Cromwell Public Schools*, 73 F.Supp.2d 204, 214, 85 FEP Cases 307 (D. Conn. 1999), relied on the "business judgment" doctrine in refusing to compare the candidates' qualifications, and granted summary judgment to the Title VII, ADEA, and State-law defendant. Reversing, the Second Circuit relied on the fact that plaintiff was better-qualified on paper, and that there were numerous procedural and substantive anomalies raising doubts about the defendant's good faith in evaluating the candidates. It stated: "That is to say that '[w]hile the business judgment rule protects the sincere employer against second-guessing of the reasonableness of its judgments, it does not protect the employer against attacks on its credibility.'" *Byrnie v. Town of Cromwell, Board of Education*, 243 F.3d 93, 105, 85 FEP Cases 323 (2d Cir. 2001).

- *Wexler v. White's Furniture*, 317 F.3d 564, 576–78, 90 FEP Cases 1551 (**6th Cir.** 2003) (*en banc*), reversed the grant of summary judgment to the ADEA defendant. The court held that the lower court paid unwarranted deference to the defendant's business judgment in blaming plaintiff for the store's low sales. The court held: "A plaintiff can refute the legitimate, nondiscriminatory reason that an employer offers to justify an adverse employment action 'by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct.'" *Id.* at 576.

  > The district court therefore erred by invoking the business judgment rule to exclude consideration of evidence relevant to the question of pretext. As a result, the district court ignored inferences in favor of Wexler that can be drawn from the evidence about whether it was reasonable to blame him for the Morse Road store's declining sales. Wexler produced evidence indicating that White's was aware that the decline in revenue was not his fault. He pointed to evidence showing that the management of White's knew that the company's advertising strategy had hurt sales throughout the chain, including a decrease in sales at the Morse Road store. If believed, a trier of fact could reasonably infer that the justification for Wexler's demotion was insufficient to warrant the adverse decision.

  Id. at 577. Judges Krupansky and Boggs dissented. *Id.* at 578–97.

- *McCowan v. All Star Maintenance, Inc.*, 273 F.3d 917, 926, 87 FEP Cases 596 (10th Cir. 2001), reversed the grant of summary judgment to the Title VII and § 1981 national-origin or ethnic discrimination plaintiffs, commenting on the short0-circuiting of analysis below by defendant's talismanic invocation of "business judgment": "Although the district court did not evaluate All Star's explanation for terminating Plaintiffs against this evidence, the employer's business judgment cannot be immunized from the totality of the circumstances inquiry."

- *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1169, 76 FEP Cases 1865 (10th Cir.), *cert. denied*, 525 U.S. 1054 (1998), affirmed in part and reversed in part the grant of summary judgment to the defendant, stating:

> But this principle does not immunize all potential "business judgments" from judicial review for illegal discrimination. . . . Such a doctrine would defeat the entire purpose of the ADEA. . . . There may be circumstances in which a claimed business judgment is so idiosyncratic or questionable that a factfinder could reasonably find that it is a pretext for illegal discrimination.

The Eighth Circuit is the only Circuit to require that this type of instruction be given when requested, but it also has a pattern instruction informing the jury that it is permitted, but not required, to draw the inference of unlawful motive from proof that the defendant's proffered nondiscriminatory reasons are false.

The text of the Seventh Circuit's "cautionary" instruction and the Eighth Circuit's instruction illustrate the dangers of going down this road. Both tell jurors to ignore defendant's unreasonableness, but that unreasonableness can be powerful evidence of discrimination. The overly harsh treatment of a black or Hispanic or female or older or sabbatarian employee, compared with others from different groups, is one of the things a jury would rationally and accurately find unreasonable. Telling them to disregard such matters invites miscarriages of justice.

Courts should rethink their willingness to issue "business judgment" decisions in the absence of instructions making clear that the jury must examine the *bona fides* of the defendant's exercise of business judgment.

In addition, cautionary instructions must be balanced. A natural counterbalance to the "business judgment" type of instruction would be provided by *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977): "Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." (Footnote omitted.)

a. First Circuit Case Law

Kelley v. Airborne Freight Corp., 140 F.3d 335, 350–51, 76 FEP Cases 1340 (1st Cir.), *cert. denied*, 525 U.S. 932 (1998), affirmed judgment on a jury verdict for the ADEA and Massachusetts-law plaintiff in the amounts of $1,244,152.24 on the ADEA claim, $3,136,858.29 on the Massachusetts Chapter 151B claim, and awarded attorney fees of $190,000. The court held that, while a business-judgment instruction might have been useful, it was not required:

> While perhaps a business judgment instruction might have been useful in this case, its omission does not provide a basis for undermining the adequacy of the charge as a whole. We cannot see how the jury could have thought that it was free to find that age had a determinative influence on Kelley's discharge if it merely disagreed with Airborne's

> business judgment. The district court instructed the jury, on more than one occasion, that Kelley could prevail on his federal claim only if he proved by a preponderance of the evidence that the he would not have been fired but for his age. Interrogatory number 2, which the jury answered affirmatively, asked "has the plaintiff proved that his age had a determinative influence on defendant's decision to discharge him?" These instructions did not permit or suggest that the jury could predicate a finding of age discrimination on their disagreement with Airborne's business judgment. Similarly, we cannot agree that the instruction prevented the jury from focusing on the state of mind of the decisionmaker.

(Footnote omitted.)

b. <u>Fifth Circuit Case Law</u>

Julian v. City of Houston, 314 F.3d 721, 727, 90 FEP Cases 887 (5th Cir. 2002), affirmed the judgment on a jury verdict for the ADEA plaintiff, and held that the lower court did not abuse its discretion in denying defendant's proposed "business judgment" instruction where the lower court covered the substance of such an instruction in other language:

> Your verdict should be for the defendant if you find that the defendant has proved that plaintiff would not have received the promotion regardless of his age. You should not find that the decision is unlawful just because you may disagree with the defendant's stated reason or because you believe the decision was harsh or unreasonable, as long as defendant would have reached the same decision regardless of plaintiff's age.
>
> ..
>
> It is not against the law for an employer to fail to promote an employee who is over forty years of age if the reason for doing so is unrelated to the employee's age..
>
> If you determine that Julian was not promoted because of factors other than his age, you must decide in favor of the City.

Incorrectly citing *Julian* as approving business-judgment instructions rather than the mere choice between two different forms of such an instruction, the Fifth Circuit held that the giving of a business-judgment instruction was not plain error. *Kanida v. Gulf Coast Medical Personnel LP*, 363 F.3d 568, 581, 9 Wage & Hour Cas.2d (BNA) 865 (5th Cir. 2004) (FLSA retaliation). The instruction at issue was:

> You may not return a verdict for Ms. Kanida just because you might disagree with Gulf Coast's or Nursefinders' actions or believe them to be harsh or unreasonable. Under the law, employers are entitled to make employment decisions for a good reason, for a bad reason, or for no reason at all, so long as the decision is not motivated by unlawful retaliation. You should not second-guess Gulf Coast or Nursefinders' decision or substitute your own judgment for theirs.

Id. at 581 n.13.

c. Seventh Circuit Case Law

Wichmann v. Board of Trustees of Southern Illinois University, 180 F.3d 791, 804–05, 79 FEP Cases 1673 (7th Cir. 1999), *vacated and remanded for reconsideration in light of vacated, and case remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of Kimel v. Florida Board of Regents, 528 U.S. 62, 120 S. Ct. 631, 145 L.Ed.2d 522 (2000)*, 528 U.S. 1111 (2000), affirmed the judgment on a jury verdict for the ADEA plaintiff, and held that the trial court did not abuse its discretion in refusing to give defendant's proffered "business judgment" instruction:

> The jury instructions given were accurate—to find liability only if "Plaintiff's age was a substantial motivating factor in the decision to terminate his employment, that is, but for Plaintiff's age, his employment would not have been terminated." But according to the University, the jury might have been improperly swayed by the facts that Wichmann was a sympathetic plaintiff, capable, hardworking, popular, and that his firing could have seemed unwise or unfair. The ADEA, the University argues, does not prohibit incompetence, stupidity or general injustice by employers, but only age discrimination. . . . The University contends that for these reasons the trial court stated the law insufficiently to the point of misleadingness. Our civil justice system, however, is based on the idea that "the jury is well-equipped to evaluate the evidence and use its good 'common sense' to come to a reasoned decision." . . . A judge "need not deliver instructions describing all valid legal principles. . . ." . . . Generally speaking, "the judge may and usually should leave the subject to the argument of counsel." . . .
>
> All parties are entitled to jury instructions which are accurate and complete. But trial courts need not take any extraordinary measures in instructing the jury to protect employers who make foolish or inequitable decisions about sympathetic employees. In employment discrimination law, as in tort law, one takes one's plaintiffs as one finds them, sympathetic or not. Moreover, a defendant cannot escape the fact that a jury must use its good common sense in addressing how much, if at all, the foolishness or unfairness of the employer's decision weighs in the evidence of pretext. Since the challenged jury instruction involved no misstatement or insufficient statement of the law, we need not consider whether the University was prejudiced by any error.

(Citations omitted.)

d. Seventh Circuit Draft Model Cautionary Instruction 3.07

> In deciding Plaintiff's claim, you should not concern yourselves with whether Defendant's actions w ere wise, reasonable, or fair. Rather, your concern is only whether Plaintiff has proven that Defendant [*adverse employment action*] him [because of race/sex] [in retaliation for complaining about discrimination].

e. Eighth Circuit Model Instructions 5.58 and 5.94

The text of Eighth Circuit Model Instruction 5.58 is identical to that of Model Instruction 5.94; only the Committee Comments differ, and their only difference is that the last case cited in the Comment below is not mentioned in the Comment to Model Instruction 5.94.

5.58 BUSINESS JUDGMENT INSTRUCTION

You may not return a verdict for plaintiff just because you might disagree with defendant's (decision)[1] or believe it to be harsh or unreasonable.

Committee Comments

In Walker v. AT&T Technologies, 995 F.2d 846 (8th Cir. 1993), the Eighth Circuit ruled that it is reversible error to deny a defendant's request for an instruction which explains that an employer has the right to make subjective personnel decisions for any reason that is not discriminatory. Moreover, the Circuit has expressly approved the language of the instruction set forth here. See Wolff v. Brown, 128 F.3d 682, 685 (8th Cir. 1997) ("In an employment discrimination case, a business judgment instruction is 'crucial to a fair presentation of the case,' and the district court must offer it whenever it is proffered by the defendant."). Cf. Blake v. J.C. Penney Co., 894 F.2d 274, 281 (8th Cir. 1990) (upholding a different business judgment instruction as sufficient).

Notes on Use

1. This instruction makes reference to the defendant's "decision." It may be modified if another term—such as "actions" or "conduct"—is more appropriate.

f. Ninth Circuit Comment on Model Instruction 14.1

In the Comment to Model Instruction 14.1 (Age Discrimination—Disparate Treatment—Elements and Burden Of Proof—Discharge), the Ninth Circuit Jury Instruction Manual states:

The court should also consider whether a business judgment instruction may be required. In *Walker v. AT & T Technologies,* 995 F.2d 846 (8th Cir.1993), the Eighth Circuit, in an ADEA case, held it was reversible error not to give a business judgment instruction. *See* also *Doan v. Seagate Technology, Inc.,* 82 F.3d 974, 977–78 (10th Cir.1996); *Faulkner v. Super Valu Stores, Inc.,* 3 F.3d 1419, 1425–26 (10th Cir.1993). The Ninth Circuit has not ruled on this issue in a published opinion. For a proposed business judgment instruction see e.g. Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions* § 171.75 (5th ed. 2001).

3. Punitive Damages Jury Instructions

Seventh Circuit Draft Model Instruction 3.13 contains six factors to be considered by the jury. Ninth Circuit Model Instruction 7.6 mentions a few of them.

Given that awards of punitive damages will be reviewed in light of several factors, it seems to me to make sense that the jury be informed of the factors.

4. Other Questions

McCombs v. Meijer, Inc., 395 F.3d 346, 95 FEP Cases 1 (**6th Cir.** 2005), affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff. The court rejected

defendant's argument that the instructions misstated the law on *respondeat superior*, because "the jury instructions explained that, to find liability, the jury must determine that 'Meijer knew or should have known of the conduct but failed to implement prompt and appropriate corrective action.'" *Id.* at 357. The court also rejected defendant's argument that the instructions prejudicially failed to inform the jury it should not use hindsight in evaluating defendant's actions, because three instructions addressed that issue. "In its instructions, the court explained to the jury that McCombs alleged that 'Meijer's remedy and response to her complaint of gender harassment was reckless and indifferent *in light of the facts known to it at the time.*'" *Id.* at 357 (emphasis in original). The court also gave the following instructions:

> When determining whether a reasonable person would find the alleged harassment sufficiently severe or pervasive to constitute a hostile work environment, you must consider the *totality of the circumstances instead of looking at each single event.* That is, you must determine whether, taken together, the accumulated effect of all the reported incidents of harassment amounted to a hostile work environment.
>
> You must determine whether Meijer took prompt and appropriate corrective action in responding to the harassment or whether its remedy exhibits such an indifference as to indicate an attitude of permissiveness that amounts to discrimination. You must determine whether Meijer acted in good faith; that is, whether Meijer took remedial action that was *reasonably calculated to end the harassment once it became aware of the harassment.*

Id. (emphasis in original). Judge Gilman dissented.

Wilson v. Brinker Int'l, Inc., 382 F.3d 765, 771–72, 94 FEP Cases 585 (**8th Cir.** 2004), affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant because the jury found that no "act of harassment" took place within the 300 days preceding the charge. The court rejected plaintiff's argument that the instructions should have stated that defendant had the burden of proof to show what she termed the affirmative defense of untimeliness, instead of stating that plaintiff had the burden of proving all issues, necessarily including timeliness. Because plaintiff did not make this argument at the charging conference, the court held that the instruction could be reviewed only for plain error. The court stated that pre-*Morgan* precedent in the Circuit assigned the burden of proof to plaintiff, and did not decide whether *Morgan* changed the allocation of the burden because the jury verdict could be upheld regardless of who had the burden.

Wilbur v. Correctional Services Corp., 393 F.3d 1192, 1200–01 (**11th Cir.** 2004), affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant because the jury's answers to the special interrogatories removed any basis for the award of damages. The court rejected plaintiff's argument that the "no" verdict to the question whether plaintiff was discharged because she refused demands for sexual favors, and the "no" verdict to the question whether plaintiff was discharged because of sexual discrimination, were still consistent with the damages verdict because the jury may have thought that each factor contributed to the termination but that neither may have been sufficient by itself. The court held that the instructions—which the jury was presumed to follow—precluded such a result, because the jury was instructed that it should find whether these motives were a substantial contributing

factor in the termination. The court held that the jury's answers to fact questions were not general verdicts. *Id.* at 1201. The court stated that "additional instructions and further deliberation may have been the preferred method of resolving" the inconsistency, but the lower court was not required to adopt the most preferable alternative. *Id.* at 1203–04.

P. Verdicts and Verdict Forms

Wilson v. Brinker Int'l, Inc., 382 F.3d 765, 772–73, 94 FEP Cases 585 (**8th Cir.** 2004), affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant because the jury found that no "act of harassment" took place within the 300 days preceding the charge. The court rejected plaintiff's argument that the verdict form should have referred instead to acts contributing to a hostile environment. Because plaintiff did not make this argument at the charging conference, the court held that the verdict form could be reviewed only for plain error. The court stated that *Morgan* used the term "act of harassment" interchangeably with "act contributing to a hostile environment," and that there was no plain error.

Bains LLC v. Arco Products Co., __ F.3d __, 2005 WL 894657 (**9th Cir.** April 19, 2005), affirmed the judgment of liability and the award of compensatory damages, but held that the award of $5 million in punitive damages to the Sikh-owned plaintiff was excessive and that the most that could be allowed was between $300,000 and $450,000. The court rejected defendant's challenge to the verdict form as inconsistent, holding that the $1 awarded in nominal damages did not necessarily mean that there was no harm, but that the extent of the harm had not been proven. The court was required to adopt the latter interpretation because it made sense out of the verdict, considering the evidence.

Wilbur v. Correctional Services Corp., 393 F.3d 1192, 1200 n.4 (**11th Cir.** 2004), affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant because the jury's answers to the special interrogatories removed any basis for the award of damages. The court held that defendant did not waive its Rule 49(b) challenge to the inconsistency of the verdict despite its failure to raise the issue before the jury was discharged. The court held it would have been futile, because plaintiff's counsel had raised the issue of inconsistency prior to discharge of the jury, and the trial court had refused to resubmit the question. "To find otherwise means that CSC was required, solely for the sake of formality, to challenge the same matter that the district court had expressly ruled on an instant before."

Q. Compensatory Damages

McCombs v. Meijer, Inc., 395 F.3d 346, 95 FEP Cases 1 (**6th Cir.** 2005), affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff. Plaintiff recovered $25,000 in compensatory damages and spent $9,482.00 in expert witness fees, of which she recovered $4,532.50. She thus received $2.64 in damages for every dollar she spent in expert witness fees.

Baker v. John Morrell & Co., 382 F.3d 816, 830–32 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Iowa Human Rights Act sexual harassment and retaliation plaintiff, including the awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in

attorneys' fees and costs, a total of $1,386,632. Plaintiff filed suit only under Title VII, and after the verdict moved to amend her complaint to add a claim under the Iowa Civil Rights Act, which provides for uncapped compensatory damages but no punitive damages. That would allow her to keep all of her compensatory-damage award, and $300,000 of her punitive-damage award. District Judge Mark Bennett ultimately granted the motion under Rules 15(b) and 54(c), FED. R. CIV. PRO., and the court of appeals affirmed. The court noted the agreement of the parties that the proof and legal standards under Title VII and the ICRA were identical, stated that the amendment was not inconsistent with defendant's position through the litigation, held that an issue can be tried by consent even if the evidence is also relevant to an issue withinb the pleadings, and held that Judge Bennett did not abuse his discretion in holding that the amendment reflected the issues tried by consent, *i.e.*, without objection,. *Id.* at 831. The court held in the alternative that the amendment was also permitted under Rule 54(c), as relief to which the plaintiff was entitled even if she did not demand it in her pleadings. It stated that there are limits on such a use of Rule 54(c), and that the rule cannot be applied so as to prejudice the other side. "For example, if the pleading failure denies the opposing party the 'opportunity to make a 'realistic appraisal of the case, so that [their] settlement and litigation strategy [could be] based on knowledge and not speculation,' the amendment may properly be denied." *Id.* at 831–32 (citations and some internal quotation marks omitted). The court rejected Morrell's claim that it would have settled the case if it had known of its larger exposure:

> Morrell contends it was prejudiced by Baker's failure to plead an ICRA claim because had it known damages would not be capped under Title VII it may have settled the claim instead of risking a verdict in excess of the cap. Morrell, however, has failed to present any evidence to show its settlement strategy was affected by the Title VII cap. Indeed, aside from Morrell's bare assertion, we have no reason to believe it would have been any more inclined to settle this claim irrespective of whether an ICRA claim was pleaded. Furthermore, Morrell was well aware throughout the course of the litigation Baker was demanding an amount to settle the claim well in excess of the Title VII caps. Surely, this fact alone put Morrell on notice Baker was seeking a verdict in excess of $300,000. In light of the liberal policy in favor of Rule 54(c) amendments, and because it is undisputed Baker proved an ICRA claim, we will not permit Morrell's bare assertion of prejudice to thwart the amendment.

Id. at 832. The obduracy of defendant's litigation position—denying a hostile environment even after years of degrading comments, actions, and physical assaults drove plaintiff to a suicide attempt and mental hospitalization—may have contributed to this holding.

Rowe v. Hussmann Corp., 381 F.3d 775, 782 n.6, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Missouri law sexual harassment plaintiff, including the award of $500,000 in compensatory damages and $ 1 million in punitive damages. The court rejected defendant's argument, relying on earlier Eighth Circuit case law construing Missouri law, that damages under Missouri law had to be limited to the 180-day period prior to plaintiff's charge. "Missouri courts imposed this limitation by relying on federal precedent that *Morgan* clearly overrules." (Citations omitted.) The court held that the compensatory-damage award was not excessive in light of the years-long harassment by co-worker Moore, including forced touchings, demands for sexual favors, foul verbal conduct, and threats of rape and murder. The court described the effect this had on plaintiff:

> Rowe testified to a constant fear of Moore and to experiencing panic attacks variously characterized by nausea, headaches, sweating, and hyperventilation. She was so afraid of Moore that she moved to a different home, obtained a gun card, purchased mace, and since June of 2000 has been eating lunch and taking coffee breaks in the women's restroom to avoid any contact with Moore. Rowe indicated that her fear has adversely affected her relationship with her four children. Her treating psychologist testified that Rowe suffers from an anxiety disorder and that her prognosis is poor.

Id. at 783. The court continued: "Because it is difficult to quantify the extent of the psychic injury that months and years of unwanted touching and verbal abuse, combined with threats of murder and rape, might cause, it was for the jury, equipped as it was with the collective wisdom that life's experiences confer, to determine the amount that would adequately compensate Rowe for that injury, and thus we decline to reduce the compensatory award." (Citations omitted.)

Bains LLC v. Arco Products Co., 405 F.3d 76 (**9th Cir.** 2005), affirmed the judgment of liability and the award of compensatory damages, but held that the award of $5 million in punitive damages to the Sikh-owned plaintiff was excessive and that the most that could be allowed was between $300,000 and $450,000. The court held that the $1 awarded in nominal damages on the § 1981 claim and the $50,000 awarded on the breach of contract claim supported an award of punitive damages.

Wilbur v. Correctional Services Corp., 393 F.3d 1192 (**11th Cir.** 2004), affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant because the jury's answers to the special interrogatories removed any basis for the award of damages. Although the jury accepted plaintiff's quid-pro-quo claim, the only tangible employment action giving rise to damages was her termination, and it found that her termination was not related to discrimination.

R. Punitive Damages

1. Entitlement

Baker v. John Morrell & Co., 382 F.3d 816, 832 n.4 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Iowa Human Rights Act sexual harassment and retaliation plaintiff, including the awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys' fees and costs, a total of $1,386,632. Plaintiff filed suit only under Title VII, and after the verdict moved to amend her complaint to add a claim under the Iowa Civil Rights Act, which provides for uncapped compensatory damages but no punitive damages. That would allow her to keep all of her compensatory-damage award, and $300,000 of her punitive-damage award. District Judge Mark Bennett ultimately granted the motion under Rules 15(b) and 54(c), FED. R. CIV. PRO., and the court of appeals affirmed. The court held that it would not consider the permissibility of allocating all $300,000 in Title VII damages to punitive damages, without a compensatory award under Title VII, because defendant did not raise the issue.

See the discussion of *Rowe v. Hussmann Corp.*, 381 F.3d 775, 782 n.6, 94 FEP Cases 520 (**8th Cir.** 2004), in the section above on "Compensatory Damages." The court held that the

million-dollar punitive-damage award was not excessive in light of the years-long harassment by co-worker Moore, including forced touchings, demands for sexual favors, foul verbal conduct, and threats of rape and murder. The court rejected defendant's argument that it should not have been liable for punitive damages. "Recklessness and outrageousness may be inferred from evidence of "management's participation in the discriminatory conduct," . . . or where an employee's repeated complaints to supervisors fall on deaf ears. . . . In light of Weston's knowledge of Moore's abusive conduct, his repeated failure to take effective action to put a stop to such conduct, and his defense of and excuses for that conduct, all chargeable to Hussmann, the evidence is sufficient to support the award of punitive damages." *Id.* at 784 (citations omitted). The court held that the award was within the jury's discretion.

Bains LLC v. Arco Products Co., Bains LLC v. Arco Products Co., 405 F.3d 76 (**9th Cir.** 2005), affirmed the judgment of liability and the award of compensatory damages, but held that the award of $5 million in punitive damages to the Sikh-owned plaintiff was excessive and that the most that could be allowed was between $300,000 and $450,000. The court rejected defendant's argument that it could not be held liable for punitive damages because only a low-level attendant had engaged in discrimination:

> The district court reviewed the evidence with care, and concluded, correctly, that the jury could find that Davis was not a mere gas station attendant, but a supervisor. While ARCO claims that Davis had no managerial responsibilities, the evidence demonstrated that Davis had direct control over the daily fuel hauling operation and fuel carriers. Moreover, immediately after the termination of the contract, Davis himself took credit for getting Flying B terminated, bragging to non-Flying B drivers about his part in "kick[ing] those ragheads out" of the facility.
>
> Even were Davis not a supervisor, there can be no question under the evidence that Lawrence was. Lawrence was ARCO's official in charge of the Seattle terminal and, as Tim Reichert testified, Lawrence had full authority over safety issues at the terminal, including the power to lock Flying B out of the facility. The jury could conclude that when Flying B first complained to Lawrence about Davis's racial harassment, Lawrence simply made excuses for Davis's behavior and did nothing about it. And when Flying B repeated its complaints several times, Lawrence did nothing to restrain Davis, but instead terminated Flying B without even the thirty-days notice required by the contract.
>
> Davis testified that Lawrence was present on occasions when he called the Flying B drivers "ragheads." The jury did not have to conclude, as ARCO urges, that Lawrence locked out Flying B only for safety violations. The jury could conclude, to the contrary, that Lawrence perceived a conflict between Flying B and Davis—over Davis's harassment and intentional delays of those he called "ragheads"—and that Lawrence chose to back up Davis. That suffices for corporate liability. If a company official with sufficient authority to subject the company to vicarious liability backs-up a racist employee's racially-motivated conduct instead of protecting the victim from the employee, then the company is liable, even if the supervisor's motivation is non-racial, such as loyalty to his subordinate or a desire to avoid conflict within the company. A written antidiscrimination policy does not insulate a company from liability if it does not enforce the antidiscrimination policy and, by its actions, supports discrimination.

Id. at *7–*8 (footnote omitted).

Wilbur v. Correctional Services Corp., 393 F.3d 1192, 1205 (**11th Cir.** 2004), affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant because the jury's answers to the special interrogatories removed any basis for the award of damages. The court held that, even assuming the claim for punitive damages was not moot, the lower court did not err in dismissing it. It reasoned that, although plaintiff's supervisors may have acted with malice or reckless indifference towards her, "she failed to establish a sufficient basis for imputing their conduct to CSC." (Citation omitted.) The court added:

> And, in this Circuit, "punitive damages will ordinarily not be assessed against employers with only constructive knowledge of harassment." . . . In order to ground liability in an employer, the plaintiff must establish that "the discriminating employee was high[] up the corporate hierarchy" or that "higher management countenanced or approved his behavior." . . . Even if, as Wilbur asserts, CSC's corporate office had notice of the alleged sex discrimination as of February 2002, when she complained to CSC's human resources department, Wilbur has offered nothing to establish that CSC's higher management "countenanced or approved" the offending behavior of Wilbur's supervisors. Moreover, to hold otherwise seems irreconcilable with the jury's finding that CSC had "exercised reasonable care to prevent and correct promptly any sexually harassing behavior in the work place." . . . Therefore, even if the issue is not moot, we conclude that the district court did not err in dismissing Wilbur's punitive damages claim.

(Citation omitted.)

2. Evidence

McCombs v. Meijer, Inc., 395 F.3d 346, 359, 95 FEP Cases 1 (**6th Cir.** 2005), affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff. Plaintiff recovered $100,000 in punitive damages. The court rejected defendant's argument that the lower court erroneously admitted evidence of its gross annual sales, because high volume does not mean high profit. The court held that defendant had not shown it was prejudiced, or that it was unable to pay the award. Judge Gilman dissented.

3. Affirmative Defense

Hatley v. Hilton Hotels Corp., 308 F.3d 473, 477, 89 FEP Cases 1861 **(5th Cir.** 2002), reversed the grant of judgment as a matter of law on plaintiffs' Title VII sexual harassment claims but affirmed the denial of punitive damages. The court held that, notwithstanding the inadequacy of the defendant's handling of plaintiffs' internal harassment complaints and earlier complaints filed by others, the defendant made out its affirmative defense:

> Davidson was arguably an agent in a managerial capacity, and she may have acted with malice or reckless indifference to the rights of the plaintiffs within the scope of her employment. However, these actions were contrary to Bally's good faith effort to prevent sexual harassment in the workplace, as is evidenced by the fact that Bally's had a well-publicized policy forbidding sexual harassment, gave training on sexual harassmet to new employees, established a grievance procedure for sexual harassment complaints,

and initiated an investigation of the plaintiffs' complaints. These actions evidence a good faith effort on the part of Bally's to prevent and punish sexual harassment.

4. Punitive-Damage Amounts After *State Farm*: Civil Rights Cases

Lust v. Sealy, Inc., 383 F.3d 580, 590, 94 FEP Cases 645 (**7th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII sex discrimination plaintiff, but held that the award of $273,000 in punitive damages was excessive in light of defendant's remedial efforts, and that $150,000 is the most that could be sustained. The court affirmed the award of $27,000 in compensatory damages, and held that the caps made it unnecessary to address the ratio between the punitive and compensatory damage awards. "When Congress sets a limit, and a low one, on the total amount of damages that may be awarded, the ratio of punitive to compensatory damages in a particular award ceases to be an issue of constitutional dignity . . . ." (Citations omitted.) The court also stated:

> As we emphasized in *Mathias*, moreover, capping the ratio of compensatory and punitive damages makes sense only when the compensatory damages are large, which the statutory cap on total damages in employment discrimination cases precludes. Suppose Lust had been emotionally sturdier and incurred only $10 in emotional injury from the delay in her promotion to Key Account Manager. Would Sealy argue that in that case the maximum award of punitive damages would be $100? So meager an award would accomplish none of the purposes, discussed in *Mathias*, for which punitive damages are validly awarded.

Id. at 591. The case cited is *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 675–78 (7th Cir.2003). The court went on to state that imposing the maximum penalty in a case involving "slight, because quickly rectified, discrimination" would "impair marginal deterrence." *Id.* Its argument is that employers in such a situation would have no incentive to avoid further discrimination "It's as if the punishment for robbery were death; then a robber would be more inclined to kill his victim in order to eliminate a witness and thus reduce the probability of being caught and punished, because if the murdering robber were caught he wouldn't be punished any more severely than if he had spared his victim." *Id.*

Williams v. ConAgra Poultry Co., 378 F.3d 790, 796–97, 94 FEP Cases 266 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII, § 1981, and Arkansas Civil Rights Act racial harassment and termination plaintiff, including the remitted awards of $173,156 in compensatory damages and $500,000 in punitive damages on the termination claim and compensatory damages of $600,000 on the harassment claim, but ordered that the punitive-damage award on the harassment claim be remitted to $600,000 from the jury's verdict of $6,063,750. The court rejected defendant's argument that it should not be liable for punitive damages, relying on incidents affecting the plaintiff, incidents affecting others of which the plaintiff was not aware, and relying on the egregiousness of the harassment. The court held that a reasonable jury could find malice from these facts and from the fact that ConAgra managers were inconsistent in their reasons for firing plaintiff:

> As we noted above, there was substantial evidence of egregious racial harassment at the El Dorado plant, and although Mr. Williams did not testify to being aware of this

> activity, it could be probative of the state of mind of ConAgra's managers in firing him. Furthermore, at trial there were contradictions in the testimony of ConAgra managers with respect to the basis for Mr. Williams's firing. Thus, in this case the same evidence that the jury used to support its finding of racial motivation in Mr. Williams's discharge also supports an inference of intentional and malicious conduct by ConAgra.

Id. at 796. The court also held that there was sufficient evidence to support a jury determination of reckless indifference on plaintiff's harassment claim, because plaintiff made many complaints to upper management about his supervisor's harassment, over several years, and no meaningful action was taken. The court held that the $6,063,750 punitive-damage award on the harassment claim was unconstitutionally excessive "for three interrelated reasons." "First, in upholding the award the district court improperly relied on evidence of misconduct by ConAgra unrelated to Mr. Williams's claim. Second, the punitive damages award is far in excess of what analogous statutes would allow. Finally, the ratio of punitive damages to compensatory damages far exceeds the levels that the Supreme Court has suggested are consistent with due process." *Id.* at 796. As to the first, the court stated:

> Tying punitive damages to the harm actually suffered by the plaintiff prevents punishing defendants repeatedly for the same conduct: If a jury fails to confine its deliberations with respect to punitive damages to the specific harm suffered by the plaintiff and instead focuses on the conduct of the defendant in general, it may award exemplary damages for conduct that could be the subject of an independent lawsuit, resulting in a duplicative punitive damages award. Where there has been a pattern of illegal conduct resulting in harm to a large group of people, our system has mechanisms such as class action suits for punishing defendants. Punishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff, however, deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure.
>
> That does not mean that conduct in other cases is always irrelevant when assessing the defendant's reprehensibility. An incident that is recidivistic can be punished more harshly than an isolated incident. . . . In determining what constitutes a previous example of the same conduct, however, we must be careful not to let the exception swallow the rule. By defining his or her harm at a sufficiently high level of abstraction, a plaintiff can make virtually any prior bad acts of the defendant into evidence of recidivism. . . .
>
> The Supreme Court has therefore emphasized that the relevant behavior must be defined at a low level of generality. "[E]vidence of other acts need not be identical to have relevance in the calculation of punitive damages," *id.*, but the conduct must be closely related.

Id. at 797 (emphasis in original). The question whether particular incidents are sufficiently factually and legally similar is not always simply, as the court's application of the standard shows:

> In upholding the punitive damages award on the harassment claim, we find that the district court improperly relied on evidence of harassment not suffered by Mr.

> Williams that was insufficiently similar to his experiences to be evidence of recidivism under the narrow exception set forth in *State Farm.* In particular, the district court relied extensively on the testimony of Mr. Johnican who stated that he saw black dolls hung from nooses around the plant. He also reported invitations to KKK barbecues and seeing a long racist joke about keeping black individuals out of heaven posted in the factory. Another black employee, James Atkins, testified that he was invited on KKK hunting trips, where he was to serve as the hunted. He also testified to seeing nooses left about the factory. Tasha Moore testified that female black employees who responded favorably to sexually suggestive banter were extended the privileges of white employees, while black women who did not respond favorably were, along with other black employees, given less favorable treatment. Mr. Williams never testified to being aware of these events, let alone being the target of similar behavior. We hold that this misconduct is insufficiently similar to that of which Mr. Williams was the object to count as evidence of its recidivist character.
>
> The district court did, however, identify evidence that would fall within the *State Farm* recidivism exception. Mr. Atkins testified that white managers were extended privileges, like travel at company expense, unavailable to black employees. Ms. Moore testified that black employees were given shorter breaks than white employees. These instances are factually similar to the disparate work assignments that Mr. Williams testified about. Mr. Johnican testified to the widespread use of racist language of the kind that Mr. Williams complained of. Once the evidence has been subject to the winnowing required by *State Farm,* ConAgra's conduct in Mr. Williams's case remains reprehensible, but it is less appalling than the general picture of ConAgra's misconduct that the district court drew.

Id. at 797–98. The court stated that "it would be inappropriate for the courts simply to extend the Title VII limitations to § 1981 cases under the guise of interpreting the Constitution," and continued: "In this case, the award of punitive damages alone on the harassment claim was $6,063,750, more than twenty times the Title VII limit. We do not hold that there is any constitutionally required ratio between § 1981 damages awards and the Title VII cap, but so huge a discrepancy when coupled with the other infirmities that we discern in this award is telling and hard to ignore." *Id.* at 798. The court then addressed the ratio between compensatory and punitive damages, and held that there was no simple test. "Rather, the mathematics alerts the courts to the need for special justification. In the absence of extremely reprehensible conduct against the plaintiff or some special circumstance such as an extraordinarily small compensatory award, awards in excess of ten-to-one cannot stand." *Id.* It held that this case did not present such an extreme, and continued:

> Mr. Williams's large compensatory award also militates against departing from the heartland of permissible exemplary damages. The Supreme Court has stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, 538 **U.S.** at 425, 123 S. Ct. 1513. Mr. Williams received $600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, we find that due process requires that the punitive damages award on Mr. Williams's harassment claim be remitted to $600,000.

Id. at 799.

VI. Special Problems with the Federal Government as Employer

Monreal v. Potter, 367 F.3d 1224, 1230–34, 93 FEP Cases 1562 (**10th Cir.** 2004), reversed the grant of summary judgment to the Title VII defendant U.S. Postal Service. The court affirmed the denial of class certification but held that three plaintiffs who filed individual discrimination complaints—which the Postal Service dismissed on the grounds that more than 180 days had passed and that the claims were subsumed in a pending administrative class action—adequately exhausted their administrative remedies without having to appeal the dismissals to the EEOC. The court also held that the plaintiffs who had filed the class administrative complaint adequately exhausted their individual claims by using the class procedure. Discussing 29 C.F.R. § 1614.408, the court held that "the following persons are authorized to file civil actions in United States District Court within the prescribed time periods: 1) 'a *complainant* who has filed an individual complaint'; 2) 'an *agent* who has filed a class complaint'; and 3) 'a *claimant* who has filed a claim for individual relief pursuant to a class complaint.'" *Id.* at 1232 (emphases in original).

VII. Appellate Tips for Effective Advocacy

Smith v. Northeastern Illinois University, 388 F.3d 559, 94 FEP Cases 1295 (**7th Cir.** 2004), affirmed the grant of summary judgment and the judgment on a jury verdict for the Title VII racial harassment and First Amendment harassment defendants. The court stated: "Plaintiffs' appellate brief provides a 'laundry list' of factual allegations followed by an 'argument' section in which the litany of unorganized factual allegations are prefaced or followed by conclusory statements. Plaintiffs' counsel should be well aware that courts are not to do counsel's work of organizing its arguments nor are they 'in the business of formulating arguments for the parties.'" *Id.* at 562 n.3. Later in its opinion, the court stated, in connection with two plaintiffs' appeal from the denial of their motion for a new trial:

> Smith and Reeves make two arguments to support their motion, both of which are cursory. Apparently addressing the weight of the evidence, their argument consists of a single sentence: "To fail to correct the present verdict will leave Defendants with the mistaken impression that it is legal and protected activity to create a vile, loathsome[,] intimidating environment against persons based on race. . ." This undeveloped argument constitutes waiver.

Id. at 569 (citations omitted).

Lust v. Sealy, Inc., 383 F.3d 580, 590, 94 FEP Cases 645 (**7th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII sex discrimination plaintiff, but held that the award of $273,000 in punitive damages was excessive in light of defendant's remedial efforts, and that $150,000 is the most that could be sustained. The court commented adversely on defendant's attack on the punitive-damages award after failing to request a jury instruction on the good-faith defense. "In its reply brief it argues mysteriously that '*Kolstad* does not require that jury instructions be structured around its analytical frame-work.' Whatever that means, it doesn't excuse a party's failure to seek an instruction if it wants to present a defense to the jury."