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Trends in Employment Discrimination Law

by

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I. The Statistics

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

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

There has been a *30% decline* since 1997 in the number of new fair-employment cases filed in Federal district courts.

From the third calendar quarter of 2004 to the third calendar quarter of 2005, there has been a 10.0 % decrease in general civil filings but a *14.3%* decrease in EEO filings in Federal courts.

Fair-employment filings represent a large but declining proportion of the civil workload of Federal district courts. A total of 253,273 new civil cases were filed in Federal courts during the twelve months ending September 30, 2005. EEO cases were therefore 6.7% of all civil filings in Federal court, or one of every 15 civil filings. Federal-question EEO cases are 12.5% of all Federal-question cases, or one in every 8.0 such cases.

At least for the present, the Administrative Office of the U.S. Courts has ceased to report class action filings by subject matter. The following figures are thus the latest available:

The number of EEO cases initially filed as class actions has declined 5.6% from 2000 to the present, while the number of FLSA collective actions has increased by more than 77.5% in the same period:

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 EEO Class Action Filings in 12 months ending June 30, 2005:	85

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
New FLSA Collective-Action Filings in 12 months ending June 30, 2005:	126

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 was the number of civil and criminal trials combined. Nineteen trials represented 4% of the average 478 matters terminated. These data were downloaded on September 28, 2005, from http://www.uscourts.gov/cgi-bin/cmsd2004pl.

The pace of litigation is brisk in the Courts of Appeals. A total of 611 Federal-question EEO cases were decided after oral argument in the twelve months ending September 30, 2005; this is the category of cases most likely to result in published opinions. EEO cases were 17.9% of all civil Federal- question cases decided after oral argument, or one in every 5.6 civil Federal-question cases decided after oral argument.

Federal-question fair-employment cases are substantially more likely than general Federal- question civil cases to reach oral argument: 27.5% of EEO federal-question appeals filed during this period made it to oral argument, compared with only 16.5% of all civil Federal-question cases filed during this period.

The aggregate volume of published and unpublished decisions in the courts of appeals is impressive: 1,312 employment discrimination cases were decided on the merits in the twelve months ending September 30, 2005, and another 1,009 employment discrimination appeals were resolved on procedural grounds during that period. On September 30, 2005, a total of 1,814 Federal-question employment discrimination cases were pending action in the U.S. courts of appeals, down 186 cases from the prior year.

II. Legislative and Regulatory Action, and Related Judicial Action

The Advisory Committee on the Civil Rules is looking at the possibility of changes to Rule 30(b)(6), FED. R. CIV. PRO.

III. The Constitution and Statutes

A. The First Amendment

Garcetti v. Ceballos, __ U.S. __, 126 S. Ct. 1951, 164 L. Ed. 2d 689, 24 IER Cases 737 (2006), held with important limitations that the First Amendment does not protect the speech of a public speech employee that is required by the employee's official duties. Justice Kennedy wrote for the Court: "We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support the existence of a constitutional cause of action behind every statement a public

employee makes in the course of doing his or her job." *Id.* at 1962. However, the Court also stated:

> We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. . . . Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Id. at 1961–62. The Court also stated that it was not deciding whether its decision would apply in an academic-freedom context. Justice Stevens dissented. *Id.* at 1962–63. Justice Souter dissented, joined by Justices Stevens and Ginsberg. *Id.* at 1963–73. Justice Breyer dissented. *Id.* at 1973–76.

Second, Justice SOUTER suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. See post, at 1969 - 1970. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

Borges Colon v. Roman-Abreu, 438 F.3d 1 (**1st Cir.** 2006), affirmed the judgment for the First Amendment political-affiliation plaintiffs, holding that there was sufficient evidence that defendants' privatization of the municipal sanitation department was motivated by discrimination.

Wainscott v. Henry, 315 F.3d 844, 849–52, 19 IER Cases 915 (**7th Cir.** 2003), affirmed the grant of summary judgment on liability to the First Amendment retaliation plaintiff, holding that the First Amendment protected plaintiff's statement that the city administration did not know what it was doing from one day to the next. The court held that this protection was not lost because an unprotected statement was made at the same time. The court held that the *Pickering* balancing test favored plaintiff because he was a line employee, and no longer Superintendent. It explained: "Employees periodically criticize the inefficiency of their employer. To suggest the vague criticism that 'the city administration does not know what it is doing from one day to the next' made to a single co-worker would spread like wildfire and reek havoc in the Department is, at best, dubious." *Id.* at 851. The court rejected the Mayor's argument that the time. Place, manner, and context of the speech made it disruptive because it occurred on a sidewalk right at a work site, during working hours, with a fellow employee and members of the public present. "As we have noted, Wainscott's statement was exceedingly bland and made in an offhand manner to three other people, only one of whom was a fellow employee. We do not see how Wainscott's statement could cause turmoil or confusion in these circumstances." *Id.* at 852. The court continued: "The mayor, in his argument, is asking us essentially, to give a governmental entity the right to terminate employees if they criticize their employer. This runs counter to the most basic understandings of the First Amendment. Employees of governmental entities

generally should be able to complain or criticize; it highlights inefficiencies and promotes a more effective system of government." *Id.*

B. The Fourth Amendment

Fuerschbach v. Southwest Airlines Co., 439 F.3d 1197 (**10th Cir.** 2006), illustrates the consequence of an idea undertaken with the best of intentions but the worst of judgment. To celebrate plaintiff's successful completion of her probationary period, her supervisors arranged a prank in which uniformed officers of the Albuquerque Police Department staged a mock arrest of plaintiff at defendant's ticket counter, required her to turn in her badges, failed to respond when she asked if this were a joke, handcuffed her with her hands behind her back, and led the weeping plaintiff to the elevator fifteen feet away. Someone then congratulated her on being off probation, but the weeping did not stop. She was found later in the women's room, crying, began seeing a psychologist, and was diagnosed with PTSD. The court held that the mock arrest was a seizure, the officers staging the mock arrest were not entitled to qualified immunity although they had received assurances from a supervisor that plaintiff would be "okay" with the prank, and that the New Mexico workers' compensation law barred her State-law tort claims against her supervisors and the airline.

C. The Fourteenth Amendment

Lauth v. McCollum, 424 F.3d 631, 633, 23 IER Cases 859 (**7th Cir.** 2005), affirmed the grant of summary judgment to the Equal Protection Clause defendant. Plaintiff was a police officer who complained that his sixty-day suspension for misfeasance in a missing-child case was in retaliation for his union activities protected by Illinois law. The court held that the "class of one" jurisprudence does not apply to public employees with a plethora of State-law remedies, and added: "If reporting Lauth's misfeasance violated the Constitution, McCollum might as well resign, since he will lose all control over Lauth and any other officer with whom McCollum may have clashed over labor issues. It would be a paradox, moreover, to provide federal judicial protection (in the name of equal protection of the laws) for the union activities of a part of the workforce (namely state and municipal employees) that Congress has placed outside the protection of federal labor law."

Wainscott v. Henry, 315 F.3d 844, 852–54, 19 IER Cases 915 (**7th Cir.** 2003), affirmed the grant of summary judgment on liability to the procedural due process plaintiff. Plaintiff was summoned to a meeting without notice of the subject of the meeting, at the meeting he was handed a sheet of paper telling him he was fired, and was warned by the Mayor that if he attempted to say anything he would be removed by a police officer. The court held that this did not meet the standards of adequate pre-termination process. The court stated that plaintiff was entitled to pre-termination procedures that include "(1) oral or written notice of the charges; (2) an explanation of the employer's evidence; and (3) an opportunity for the employee to tell his side of the story." *Id.* at 852 (citations omitted). The court then rejected the Mayor's newfound position that plaintiff was not entitled to procedural due process because he was never terminated, a position that conflicted with the consistent testimony of all other participants at the meeting and with the clear statement of the letter, "You are hereby terminated for insubordination." The court rejected the Mayor's only evidence for this position—the fact that plaintiff's medical insurance was not discontinued—as a mere "scintilla" that is

"inconsequential" and "marginally reliable." *Id.* at 853. Evidence to the contrary from the Mayor himself refuted it. The court held that being handed the letter of termination and finding out about the subject of the meeting from reading the letter did not even qualify as "contemporaneous notice," which is sufficient in some situations. The court observed that a major purpose of the pre-termination hearing is to provide the employee with an opportunity to present his or her side of the story, and held that no such opportunity was provided. He was not provided with an explanation of the evidence, or even an explanation of the conduct with which he was charged.

D. 42 U.S.C. § 1981

Domino's Pizza, Inc. v. McDonald, __ **U.S.** __, 126 S. Ct. 1246, 1249–50, 163 L. Ed. 2d 1069 (2006), held that an African-American sole shareholder and owner of a company does not have standing to sue under § 1981 except as to rights the plaintiff would have himself or herself under the actual or proposed contract. "Any claim brought under § 1981, therefore, must initially identify an impaired 'contractual relationship,' § 1981(b), under which the plaintiff has rights. Such a contractual relationship need not already exist, because § 1981 protects the would-be contractor along with those who already have made contracts." (Footnote omitted.)

Ofori-Tenkorang v. American International Group, Inc., 460 F.3d 296, 98 FEP Cases 1089 (**2d Cir.** 2006), affirmed the dismissal of plaintiff's § 1981 claim with respect to events occurring while he was living and working outside the United States, holding that § 1981 does not apply extraterritorially. Plaintiff was a non-citizen resident alien who lived in Connecticut before he was re-assigned to South Africa. His "home country" was still the United States, but his "host country" was South Africa. The discrimination occurred in South Africa.

Hart v. Transit Management of Racine, Inc., 426 F.3d 863, 866, 96 FEP Cases 1095, 178 LRRM 2324 (**7th Cir.** 2005), held without any meaningful discussion that § 1981, as amended by the Civil Rights Act of 1991, does not apply to retaliation.

Bains LLC v. Arco Products Co., 405 F.3d 764 (**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 at 770 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 773:

> 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.

El-Hakem v. BJY Inc., 415 F.3d 1068, 96 FEP Cases 84, 10 WH Cases 2d 1313 (**9th Cir.** 2005), *cert. denied*, __ **U.S.** __, 126 S. Ct. 1470, 164 L.Ed.2d 248 (2006), affirmed the judgment for the § 1981 and Title VII plaintiff for $15,000 in compensatory damages and $15,000 in punitive damages because of a hostile working environment based on race and national origin, arising from defendant's manager's insistence on using the nickname "Manny" for plaintiff. "Despite El-Hakem's strenuous objections, Young insisted on using the non-Arabic name rather than 'Mamdouh,' El-Hakem's given name. In Young's expressed view, a 'Western' name would increase El-Hakem's chances for success and would be more acceptable to BJY's clientele." *Id.* at 1071. The court rejected defendant's argument that § 1981 did not apply to Arabs because there was no physical or genetic difference between Arabs and Westerners, and that § 1981 could not be based on use of the word "Manny" because it was not a racial epithet. The court held that § 1981 was intended to protect persons from discrimination because of their ancestry or ethnic characteristics. *Id.* at 1072–73. The court continued: "A group's ethnic characteristics encompass more than its members' skin color and physical traits. Names are often a proxy for race and ethnicity." *Id.* at 1073. See the discussion of this case in the section below on "Severe or Pervasive."

E. 42 U.S.C. § 1983

Velez-Rivera v. Agosto-Alicea, 437 F.3d 145, 156 (**1st Cir.** 2006), affirmed the grant of summary judgment to a § 1983 individual defendant because plaintiff failed to show that the defendant had been directly involved in the decision to terminate plaintiff's government contract, relied only on a theory of supervisory liability, and failed to show a link between the defendant and the decision.

F. Equal Pay Act

Wernsing v. Department of Human Services, 427 F.3d 466, 96 FEP Cases 1153 (**7th Cir.** 2005), affirmed the judgment for the Equal Pay Act defendant. The court once again rejected the approach of four other Circuits that employer justifications for differential pay must meet a standard of acceptability, holding that such an approach imports disparate-impact analysis into the Equal Pay Act, where it is unavailable.

G. Federal Whistleblower Legislation

Willy v. Administrative Review Board, 423 F.3d 483, 23 IER Cases 554 (**5th Cir.** 2005), reversed the ARB's dismissal of petitioner's 1984 whistleblower complaint. The court held that the creation of the ARB did not violate the Appointments Clause of the Constitution. *Id.* at 490–94. See the discussion of attorney-client privilege in the section on "Privilege" below.

Anderson v. United States Department of Labor, 422 F.3d 1155, 1156–57, 23 IER Cases 673 (**10th Cir.** 2005), affirmed the decision of the Appeals Review Board that petitioner lacked standing under environmental whistleblower statutes. At the recommendation of an employee union, petitioner was appointed to the Board of Directors of the Denver Metro Wastewater Reclamation District. The environmental statutes at issue "prohibit discrimination against 'any employee or any authorized representative of employees.'" The court held that she was not an "authorized representative of employees" while a director, and therefore lacked standing to sue.

H. Title VII of the Civil Rights Act of 1964

1. Coverage

Arbaugh v. Y & H Corp., __**U.S.** __, 126 S. Ct. 1235, 1245, 97 FEP Cases 737 (2006), reversed the dismissal of plaintiff's Title VII sexual harassment claim. Two weeks after judgment had been entered on a jury verdict for plaintiff, defendant moved to dismiss on the ground that it did not have 15 employees. The lower court treated the number of employees as jurisdictional. Reversing, the Court held that the number of employees was simply part of the claim, and was waived if defendant did not timely contest the allegation that it had 15 or more employees for the requisite amount of time. The Court held: "If the Legislature clearly states that a threshold limitation n on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. . . . But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character. Applying that readily administrable bright line to this case, we hold that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue." (Citation and footnote omitted.)

2. Adverse Employment Actions

Burlington Northern and Santa Fe Ry. Co. v. White, No. 05–259 (Supreme Court), will decide the standard for actionable conduct for a retaliation claim, and specifically whether the EEOC formulation is a correct interpretation of the statute.

3. English-Only Rules

Maldonado v. City of Altus, 433 F.3d 1294, 1304–05, 97 FEP Cases 257, 23 IER Cases 1706 (**9th Cir.** 2006), reversed the grant of summary judgment to the Title VII defendant on plaintiffs' claim that defendant's English-only rule had a disparate impact on Hispanic employees by creating a hostile working environment. The court explained how a reasonable juror could find that the policy created a disparate impact on Hispanics:

> The policy itself, and not just the effect of the policy in evoking hostility by co-workers, may create or contribute to the hostility of the work environment. A policy requiring each employee to wear a badge noting his or her religion, for example, might well engender extreme discomfort in a reasonable employee who belongs to a minority religion, even if no co-worker utters a word on the matter. Here, the very fact that the City would forbid Hispanics from using their preferred language could reasonably be construed as an expression of hostility to Hispanics. At least that could be a reasonable inference if there was no apparent legitimate purpose for the restrictions. It would be unreasonable to take offense at a requirement that all pilots flying into an airport speak English in communications with the tower or between planes; but hostility would be a reasonable inference to draw from a requirement that an employee calling home during a work break speak only in English. The less the apparent justification for mandating English, the more reasonable it is to infer hostility toward employees whose ethnic group or nationality favors another language. For example, Plaintiffs presented evidence that the English-only

> policy extended beyond its written terms to include lunch hours, breaks, and even private telephone conversations, if non-Spanish-speaking co-workers were nearby. Absent a legitimate reason for such a restriction, the inference of hostility may be reasonable.
>
> Our task in this appeal is not to determine whether Plaintiffs have established that they were subjected to a hostile work environment. Rather, in reviewing the grant of summary judgment to Defendants, we are to decide only whether a rational juror could find on this record that the impact of the English-only policy on Hispanic workers was "sufficiently severe or persuasive to alter the conditions of [their] employment and create an abusive working environment."

Id. at 1305–06. The court relied heavily on the EEOC Guidelines at 29 C.F.R. § 1606.7. The court also rejected the lower court's determination that defendant had shown the absence of a triable issue of fact on business necessity:

> Defendants' evidence of business necessity in this case is scant. As observed by the district court, "[T]here was no written record of any communication problems, morale problems or safety problems resulting from the use of languages other than English prior to implementation of the policy." . . . And there was little undocumented evidence. Defendants cited only one example of an employee's complaining about the use of Spanish prior to implementation of the policy. Mr. Willis admitted that he had no knowledge of City business being disrupted or delayed because Spanish was used on the radio. In addition, "city officials who were deposed could give no specific examples of safety problems resulting from the use of languages other than English . . . ." . . . Moreover, Plaintiffs produced evidence that the policy encompassed lunch hours, breaks, and private phone conversations; and Defendants conceded that there would be no business reason for such a restriction.

Id. at 1306–07. The court also held that there was a triable issue of fact as to whether defendant intended to discriminate by implementing its "English-only" policy:

> Here, Plaintiffs can rely on more than just that inference. First, there is evidence that management realized that the English-only policy would likely lead to taunting of Hispanic employees: Street Commissioner Willis allegedly told two Hispanic employees about the policy in private because of concern that non-Hispanic employees would tease them if they learned of it. Also, a jury could find that there were no substantial work-related reasons for the policy (particularly if it believed Plaintiffs' evidence that the policy extended to nonwork periods), suggesting that the true reason was illegitimate. Further, the policy was adopted without prior consultation with Hispanic employees, or even prior disclosure to a consultant to the City who was conducting an investigation of alleged anti-Hispanic discrimination during the period when the English-only policy was under consideration. Finally, there is evidence that during a news interview the Mayor referred to the Spanish language as "garbage." . . .
>
> In our view, the record contains sufficient evidence of intent to create a hostile environment that the summary judgment on those claims must be set aside.

Id. at 1308.

I. The Age Discrimination in Employment Act

Smith v. City of Jackson, 544 **U.S.** 228, 95 FEP Cases 641 (2005), held in Part III of the opinion that disparate-impact claims may be brought under the ADEA. See the discussion of this case below, in the section on "Disparate Impact."

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. The court also held that *Desert Palace* applies to ADEA cases. See the discussion of "Mixed Motives" below.

J. The Americans with Disabilities Act and Rehabilitation Act

1. Sovereign Immunity under Title II of the ADA

United States v. Georgia, __ **U.S.** __, 126 S. Ct. 877, 881–82, 163 L.Ed.2d 650, 17 AD Cases 673 (2006), a case brought by a paraplegic prison inmate, held that Title II validly waived State sovereign immunity to suits for damages for conduct that actually violates the Fourteenth Amendment.

2. "Qualified" Individuals

Hammel v. Eau Galle Cheese Factory, 407 F.3d 852, 16 AD Cases 1185 (**7th Cir.**), *cert. denied*, __ **U.S.** __, 126 S. Ct. 746, 163 L. Ed. 2d 572 (2005), affirmed the judgment after a bench trial for the ADA defendant. "Hammel suffers from congenital glaucoma in both eyes, is without any sight in his right eye, retains only gun-barrel vision in his left eye and thus is considered legally blind." *Id.* at 856 (footnotes omitted). The court held that he was not a qualified individual with a disability because his work habits, work aptitudes, work ethic, observance of safety rules, and exercise of common sense, were in the range of appalling to execrable. He was fired. *Id.* at 857–58. The court rejected plaintiff's argument that the lower court should not have considered his work record in determining that he was not a qualified individual with a disability, and should only have considered disability-related evidence. "The fact that Hammel repeatedly saw fit to disregard the safety and operational rules at EGC, which were enacted to protect the workers from the dangers of suffering injuries inherent in a busy, fast-moving factory setting is obviously eminently relevant to a determination of whether he can measure up to the requirements of his position." *Id.* at 862–63. The court observed that defendant lied to plaintiff at the time of his discharge, stating that he was being fired because of his vision impairment, but held that defendant adequately showed that plaintiff was in fact fired for misconduct and insubordination unrelated to his disability. *Id.* at 864–65. The court rejected plaintiff's expert's proposed "accommodations" that involved solely adaptive behavior by plaintiff, because these were steps a plaintiff should take without prodding and do not involve changes in the work environment. *Id.* at 866.

3. Accommodations

Hammel v. Eau Galle Cheese Factory, 407 F.3d 852, 16 AD Cases 1185 (**7th Cir.**), *cert. denied*, __ **U.S.** __, 126 S. Ct. 746, 163 L. Ed. 2d 572 (2005), affirmed the judgment after a bench trial for the ADA defendant. "Hammel suffers from congenital glaucoma in both eyes, is without any sight in his right eye, retains only gun-barrel vision in his left eye and thus is considered legally blind." *Id.* at 856 (footnotes omitted). The court rejected plaintiff's expert's proposed "accommodations" that involved solely adaptive behavior by plaintiff, because these were steps a plaintiff should take without prodding and do not involve changes in the work environment. *Id.* at 866. It rejected plaintiff's expert's suggestion that co-workers could check plaintiff's stamping of the cheese wheels:

> The courts have been reticent, as they should be, to require employers to provide accommodations that necessitate the enlistment of another employee to assist an ADA claimant in performing the essential functions of his job. . . . To be sure, the ADA does not require an employer to accommodate a disabled employee by making special, individualized training or supervision available in order to shepherd that employee through what is an essential and legitimate requirement of the job. . . . In this regard, let us make clear that the ADA "is not an affirmative action statute in the sense of requiring an employer to give preferential treatment to a disabled employee merely on account of the employee's disability" . . . although it does provide disabled persons an opportunity to work assuming accommodations exist which allow them to perform a job as would any other employee. Accommodations which require special dispensations and preferential treatment are not reasonable under the ADA, thus Davis's recommendation that Hammel be given special training and provided with a person to "check" up on him does not qualify as a reasonable accommodation.

Id. at 867 (citations omitted). The court stated that plaintiff had failed to propose accommodations that would cover all of the essential duties of the job, and continued: "In addition, Hammel was an insubordinate, reckless, and thus undesirable employee, and we agree with the trial judge's conclusion that "*[n]o accommodation would make a difference for an employee unwilling to exercise care, accept instruction or take responsibility for getting his work done properly.*" *Id.* at 868 (emphasis in original).

K. ERISA, Age, and Cash-Benefit Pension Plans

Cooper v. IBM Personal Pension Plan, 457 F.3d 636, 38 Employee Benefits Cases 1801 (**7th Cir.** 2006), reversed the judgment for cash-benefit pension-plan participants claiming age discrimination in violation of ERISA, and directed that judgment be entered in favor of IBM. The court described the issues at *1:

> The IBM Personal Pension Plan is a cash-balance defined-benefit plan. It is almost, but not quite, a defined-contribution plan. Although each employee in a defined-contribution plan has a fully funded individual account, the personal account in a cash-balance plan is not separately funded. Instead IBM imputes value to the account in the form of "credits": there are pay credits (set at 5% of the employee's gross taxable income) and interest credits (set at 100 basis points above the rate of interest on one-year Treasury

> bills). A trust holds assets that may (or may not) be enough to fund all of the individual accounts when workers quit or retire. IBM's plan permits an employee who quits or retires after working long enough for pension benefits to vest (a maximum of five years) to withdraw the balance in cash or roll it over into a fully funded annuity. During the time before cash-out the employee takes the risk that IBM will suffer business reverses and be unable to pay the full stated value of the account (if the amount already in trust for participants as a group turns out to be insufficient); otherwise IBM's plan is economically identical to a defined-contribution plan funded the same way and invested in a bond fund that returns 1% above the Treasury rate.
>
> Plaintiffs in this class-action litigation contend that IBM's plan violates a subsection of ERISA (the Employee Retirement Income Security Act) that prohibits age discrimination. . . .
>
> All terms of IBM's plan are age-neutral. Every covered employee receives the same 5% pay credit and the same interest credit per annum. The basis of the plaintiffs' challenge—and the district court's holding—is that younger employees receive interest credits for more years.

The court held that plaintiff's theory was fundamentally flawed. It stated at *2: "This approach treats the time value of money as age discrimination. Yet the statute does not require that equation. Interest is not treated as age discrimination for a defined-contribution plan, and the fact that these subsections are so close in both function and expression implies that it should not be treated as discriminatory for a defined-benefit plan either."

L. Fair Labor Standards Act

IBP, Inc. v. Alvarez, __ **U.S.** __, 126 S. Ct. 514, 163 L.Ed.2d 288, 10 WH Cases 2d 1825 (2005), clarified the standards for determining the start of compensable work, and compensable activities. The decision was a substantial victory for wage and hour plaintiffs.

M. Family and Medical Leave Act

Taylor v. Progress Energy, Inc., 415 F.3d 364, 368, 10 WH Cases 2d 1281 (**4th Cir.** 2005), *vacated on the grant of panel rehearing* (**4th Cir.** June 14, 2006), reversed the grant of summary judgment to the FMLA defendant, holding that a severance agreement not supervised by a court or by the U.S. Department of Labor is not effective to waive FMLA claims. The court relied on a DOL regulation, 29 C.F.R. § 825.220(d), and recognized a conflict with the Fifth Circuit, but held.

> The regulation's plain language prohibits both the retrospective and prospective waiver or release of an employee's FMLA rights. In addition, the regulation applies to all FMLA rights, both substantive and proscriptive (the latter preventing discrimination and retaliation). Finally, the DOL, by recognizing that the FMLA's enforcement scheme is analogous to that of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.,* has indicated that § 825.220(d) permits the waiver or settlement of FMLA claims only with the prior approval of the DOL or a court. For reasons we discuss more fully below, we conclude that the regulation is based on a permissible construction of the FMLA, and it is

not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron,* 467 **U.S.** at 844, 104 S. Ct. 2778. As a result, we agree with Taylor that § 825.220(d) renders the release unenforceable with respect to her FMLA rights.

N. Sarbanes-Oxley

Carnero v. Boston Scientific Corp., 433 F.3d 1, 23 IER Cases 1505 (**1st Cir.** 2006), affirmed the dismissal of plaintiff's Sarbanes-Oxley whistleblower claims, holding that the statute does not protect a foreign national complaining of misconduct in a foreign country by foreign subsidiaries of a covered U.S. company.

O. Uniformed Services Employment and Reemployment Rights Act of 1994

On Dec. 19, 2005, the Department of Labor promulgated regulations under USERRA. They can be found at 70 FED. REG. 75245–75313 (2005), and can be downloaded from the Department of Labor web site at http://www.dol.gov/vets/regs/fedreg/final/2005023961.htm.

P. Medicaid

Arkansas Dept. of Health and Human Services v. Ahlborn, __ **U.S.** __, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006), limited the permissible reach of a State-law Medicaid lien on a tort judgment to the portion of the judgment corresponding to medical costs, and barred enforcement of the lien as to emotional-distress damages and other elements of the judgment.

IV. Theories and Proof

A. The Inferential Model

1. General

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]
>
> ————
>
> [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.

[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.

2. <u>Adequacy of Employer's Nondiscriminatory Reason</u>

Asserting at Trial that There Was Actually a Different Unlawful Reason for the Challenged Action: *Cross v. New York City Transit Authority*, 417 F.3d 241, 251, 96 FEP Cases 239 (**2d Cir.** 2005), affirmed the judgment on a jury verdict for the ADEA plaintiffs. Plaintiffs were Maintainer Helpers who were promoted to Maintainers at union assistance, were denied the necessary manual, equipment, and training to perform their jobs, and were then demoted because of poor performance. The court rejected one of defendant's explanations: "Defendants half-heartedly suggest that the record in this case reveals that the plaintiffs' supervising foreman was inclined to favor Maintainers who were Russian, the same nationality as himself. The argument is somewhat incongruous given the plaintiffs' assertion of a race discrimination claim, which was rejected by the jury. No matter. We note simply that the evidence shows that the younger Maintainers were not all Russian and that it was not only

Russians who received more training than the plaintiffs. Thus, the jury could reasonably have rejected an argument that discrimination was based on national origin rather than age."

Springer v. Henry, 435 F.3d 268, 280, 23 IER Cases 1658 (**3d Cir.** 2006), affirmed the judgment on a jury verdict for the First Amendment retaliation plaintiff. The court held that new nondiscriminatory reasons first advanced on appeal were after-the-fact rationalizations irrelevant to the challenged decision. "As the Supreme Court has noted, 'the court should ask whether the [official] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.' *Hunter v. Bryant,* 502 **U.S.** 224, 228, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991). Henry raises the issues of knowledge and recklessness for the first time in the instant appeal; she never sought to present evidence as to Dr. Springer's mental state with regard to allegedly false statements." (Footnote omitted.)

3. Pretext

Set Up to Fail: *Cross v. New York City Transit Authority*, 417 F.3d 241, 250–51, 96 FEP Cases 239 (**2d Cir.** 2005), affirmed the judgment on a jury verdict for the ADEA plaintiffs. Plaintiffs were Maintainer Helpers who were promoted to Maintainers at union assistance, were denied the necessary manual, equipment, and training to perform their jobs, and were then demoted because of poor performance. In holding that there was sufficient evidence of pretext to support the jury's determination, the court relied in part on age-discriminatory remarks made by the decisionmakers and on evidence that could lead a reasonable jury to conclude that the responsible officials were lying to the court. The court held that the jury could infer discrimination from deliberately false testimony as to material facts. It stated: "This is a case in which the defendants' discredited testimony at trial as to the means employed to achieve the discriminatory demotion—discriminatory training—itself strengthened plaintiffs' case." *Id.* at 251.

Kasper v. Federated Mutual Insurance Co., 425 F.3d 496, 504, 96 FEP Cases 961 (**8th Cir.** 2005), affirmed the grant of summary judgment to the Title VII retaliation defendant, holding that plaintiff could not show pretext: "The undisputed evidence unequivocally establishes Federated discharged Kasper because Kuck and Hyland believed Kasper refused to perform the monthly file reviews without additional training. None of the evidence Kasper presented sufficiently demonstrates retaliatory intent to establish Federated's proffered reason for discharging Kasper is pretext. We will not second guess an employer's decision to discharge an employee who refuses to perform the essential functions of the employee's job." (Citation omitted.)

B. Mixed Motives

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.)

C. <u>Disparate Impact</u>

1. <u>Age Discrimination</u>

Smith v. City of Jackson, 544 **U.S.** 228, 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.

- **Comment:** 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.

Meacham v. Knolls Atomic Power Laboratory, 461 F.3d 134 (**2d Cir.** 2006), reversed the judgment on a jury verdict in favor of the ADEA and New York Human Rights Act RIF plaintiffs. The court held that an ADEA disparate-impact plaintiff bears the burden of persuasion that the employer's non-age-based factors relied upon in the challenged decisions are not reasonable factors other than age. It accepted the defendant's justifications for using a heavily subjective evaluation system:

> At trial, defendants' expert witness—a specialist in industrial psychology with substantial corporate downsizing experience—testified that the criteria of "criticality" and "flexibility" were ubiquitous components of "systems for making personnel decisions," and that the subjective components of the IRIF were appropriate because the managers conducting the evaluations were knowledgeable about the requisite criteria and familiar with the capabilities of the employees subject to evaluation. KAPL's staffing manager testified to the importance of criticality and flexibility to ensuring that KAPL could carry on operations with a shrinking workforce. This evidence unquestionably discharged defendants' burden of production—it suggested that the specific features of the IRIF challenged by plaintiffs were routinely-used components of personnel decisionmaking systems in general, and were appropriate to the circumstances that provoked KAPL's IRIF.

Id. at 144. Plaintiffs showed that defendant did not audit or evaluate the results, that application of the criteria were inconsistent and uneven, and that defendant did not perform any analysis of the age discrimination issues in its studies of implementation. Nevertheless, the court held that plaintiffs did not meet their burden:

> The probative record evidence suggests that the factors used in KAPL's IRIF could have been better drawn and that the process could have been better scrutinized to guard against a skewed layoff distribution. However, KAPL set standards for managers constructing matrices and selecting employees for layoff, and it did monitor the implementation of the IRIF. The IRIF restricted arbitrary decision-making by individual managers, and the measures that KAPL put in place to prevent such arbitrary decision-making and ensure that the layoffs satisfied KAPL's business needs—while not foolproof—were substantial. Any system that makes employment decisions in part on such subjective grounds as flexibility and criticality may result in outcomes that disproportionately impact older workers; but at least to the extent that the decisions are made by managers who are in day-to-day supervisory relationships with their employees, such a system advances business objectives that will usually be reasonable.
>
> "[T]here may have been other reasonable ways for [KAPL] to achieve its goals" (as we held in *Meacham*, 381 F.3d at 75), but "the one selected was not unreasonable." *City of Jackson*, 544 **U.S.** at 243.

Id. at 145–46..

Pippin v. Burlington Resources Oil and Gas Co., 440 F.3d 1186, 97 FEP Cases 745 (**10th Cir.** 2006), affirmed the grant of summary judgment to the ADEA RIF defendant. The court approved defendant's agreement that the disparate-impact claim could be raised on appeal, given the intervening decision in *Smith*, but held that plaintiff had not shown disparate impact because his only statistics involved the persons laid off, not the comparable employees who were not laid off. The court held that defendant's RIF decisions were based on prior evaluations and skills, and that this was a reasonable factor other than age. It rejected plaintiff's argument that defendant unreasonably honored its prior commitment to hire new employees, and unreasonably refused to lay off new hires who had not yet been evaluated. The court stated: "Further, a decision by Burlington to honor its prior commitment to new hires in order to protect its hiring reputation at the schools involved is reasonable, as is the decision to keep new hires who have not yet been evaluated." *Id.* at 1201.

2. Specifying the Practice Causing the Disparate Impact

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."

3. Disparate Impact Creating a Hostile Working Environment

Maldonado v. City of Altus, 433 F.3d 1294, 1304–05, 97 FEP Cases 257, 23 IER Cases 1706 (**9th Cir.** 2006), reversed the grant of summary judgment to the Title VII defendant on plaintiffs' claim that defendant's English-only rule had a disparate impact on Hispanic employees by creating a hostile working environment. See the discussion of this case under "Title VII," in the section on "English-Only Rules."

4. Disparate Impact of Subjective Interviewing Practices

Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 95 FEP Cases 1121 (**4th Cir.**), *reh'g en banc denied*, 418 F.3d 393 (**4th Cir.** 2005), *cert. denied*, __ **U.S.** __, 126 S. Ct. 1431 (2006), affirmed the grant of summary judgment to the Title VII defendant, adopting a standard of causation in subjective-practice cases that virtually precludes such litigation by requiring that plaintiffs account for all of the subjective variables in a subjective decision—"presentation in the interview, answers to interview questions, demeanor, and ability demonstrated in the interview"—*and* that plaintiffs must satisfy the prima facie case requirements under the inferential model, *and* that plaintiffs must show pretext as to the subjective factors whenever the decisionmakers are told to refer to a list of factors in making their decisions.

5. EPLI and Disparate-Impact Claims

Coleman v. School Bd. of Richland Parish, 418 F.3d 511 (**5th Cir.** 2005), held that defendant's EPLI policy, which excluded intentional actions but covered racial discrimination, must be construed under Louisiana law to cover disparate-impact discrimination.

6. Less Discriminatory Alternatives

See the discussion of *Smith v. City of Jackson*, __ **U.S.** __, 125 S. Ct. 1536, 95 FEP Cases 641 (2005), above.

International Bhd. of Elec. Workers, AFL-CIO, Local Unions Nos. 605 & 985 v. Mississippi Power & Light Co., 442 F.3d 313, 319, 97 FEP Cases 1501 (**5th Cir.** 2006), reversed the judgment after a bench trial for the Title VII plaintiffs, and entered judgment for defendant. Plaintiffs challenged only the increase in the cut score on the Edison Electric Institute's Clerical

Aptitude Battery test, and did not challenge the test otherwise. The court stated that disparate impact had been shown, and continued:

> We also conclude that MP & L adequately demonstrated that its challenged business practices were both job related and consistent with business necessity. MP & L showed that increasing the CAB cutoff score to 180 from 150 significantly increases the likelihood that successful applicants for the positions in question will develop into proficient employees.[11] These differences have great value: MP & L can and has pointed to specific and sizable savings estimates related to its challenged practices.
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> [11] More specifically, MP & L's expert demonstrated that an applicant with a score of 180 on the CAB has almost a 50% chance of developing into an above-average worker, and only a 31% chance of winding up in the bottom third of all workers. On the other hand, an applicant scoring 150 on the CAB is equally likely (at 39%) to develop into an above-average employee or to wind up in the bottom third of all employees.

The court held that the lower court erred in placing on defendant the burden of showing the absence of a less discriminatory alternative, and held that plaintiffs had the burden of demonstrating the existence of a less discriminatory alternative. Their expert had referred to the possibility of such an alternative only briefly in his lengthy testimony, and the court held that plaintiffs had not presented adequate evidence that such an alternative was possible.

Allen v. City of Chicago, 351 F.3d 306 (**7th Cir.** 2003), affirmed the grant of summary judgment to defendants on the plaintiff African-American and Hispanic police officers' challenge to the 1998 selection process for promotion to Sergeant. Plaintiffs did not challenge the validity of the procedure, but urged that an alternative procedure would have had substantially equal validity but less disparate impact. The promotional process consisted of two means of selection. The assessment procedure had a disparate impact, but the merit-based selection process, based on nominations by supervisors, had no disparate impact. Defendants had limited merit-based selections to no more than 30% of total promotions. Plaintiffs sought to increase the percentage of promotions that were merit-based selection process. The court criticized their suggestion of more than one increased percentage as interfering with the defendants' ability to adopt a specific alternative. *Id.* at 312–13. However, it held that increasing the proportion of promotions based on nominations would cause problems with the nomination procedure, and that plaintiff had not made the required showing of substantially equal validity. *Id* at 314–15. Nor was there evidence that an increased level of merit-based promotions would have had less adverse impact. Finally, the court rejected plaintiff's suggestion that defendants drop the qualifying examination that was a prerequisite to the merit-based promotions. There was no evidence that the nominators could assess the same factors as the qualifying examination. *Id.* at 316–17.

D. Retaliation

1. Protected Conduct

Slagle v. County of Clarion, 435 F.3d 262, 97 FEP Cases 386 (**3d Cir.** 2006), affirmed the grant of summary judgment to the Title VII retaliation defendant, holding that filing a

facially invalid charge with the EEOC is not activity protected by § 704. His charge stated that "the Respondent discriminated against me because of whistleblowing, in violation of my Civil Rights, and invasion of privacy." The Commission dismissed the charge for failure to state a claim, and the court of appeals agreed.

Kasper v. Federated Mutual Insurance Co., 425 F.3d 496, 503 n.3, 96 FEP Cases 961 (**8th Cir.** 2005), affirmed the grant of summary judgment to the Title VII retaliation defendant, holding that plaintiff did not engage in protected activity by urging another employee to file a harassment complaint when the other employee told her about her practice of sharing dirty jokes with her male supervisor.

- The court did not discuss whether any reasonable person could think the practice was unlawful and the conduct therefore arguably protected. The decision could be read as saying that urging a real victim to complain is not protected activity, but such a reading of the statute is doubtful. It is likely that the court simply did not advert to the implications of its language, given that the case had little merit under and standard.

2. Retaliatory Harassment

Jensen v. Potter, 435 F.3d 444, 97 FEP Cases 555 (**3d Cir.** 2006) (Alito, J.), reversed the grant of summary judgment to the Title VII retaliation defendant U.S. Postal Service. Plaintiff was assigned to the unit formerly headed by the supervisor who was fired after he sexually propositioned her and she complained of it. The employees in the area began to harass her by a variety of means, including threats, vandalism to her car, obnoxious statements, and physically intimidating behavior. She complained repeatedly and her supervisors took no action for nineteen months. The court held that co-worker harassment can constitute an actionable form of retaliation. "If harassment can alter the terms or conditions of employment under § 2000e-2, then *Robinson* teaches that the same is true under § 2000e-3." *Id.* at 449. The court defined the elements of such a claim: "Thus, Jensen must prove that (1) she suffered intentional discrimination because of her protected activity; (2) the discrimination was severe or pervasive; (3) the discrimination detrimentally affected her; (4) it would have detrimentally affected a reasonable person in like circumstances; and (5) a basis for employer liability is present." *Id.* (citations and footnotes omitted). The court held that the focus must not be on specific incidents in isolation, but on "'the overall scenario.'" *Id.* at 450. See the discussion of this case below, in the section on "Employer's Duty to Cure Any Harassment That Does Occur."

3. Determinations of Actionable Conduct

Burlington Northern and Santa Fe Ry. Co. v. White, __ **U.S.** __, 126 S. Ct. 2405, 2409, 165 L. Ed. 2d 345, 98 FEP Cases 385 (2006), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff. The Court summarized its holding:

> We conclude that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that

> they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

Rochon v. Gonzales, 438 F.3d 1211, 1219, 97 FEP Cases 944 (**D.C. Cir.** 2006), reversed the dismissal of plaintiff's Title VII retaliation claim and held that actionable retaliation is not limited to work-related actions: "We therefore agree with several other circuits that in order to support a claim of retaliation a plaintiff must demonstrate the 'employer's challenged action would have been material to a reasonable employee,' which in this context means it well might have "dissuaded a reasonable worker from making or supporting a charge of discrimination." (Citations omitted.)

Jensen v. Potter, 435 F.3d 444, 97 FEP Cases 555 (**3d Cir.** 2006) (Alito, J.), reversed the grant of summary judgment to the Title VII retaliation defendant U.S. Postal Service. Plaintiff was assigned to the unit formerly headed by the supervisor who was fired after he sexually propositioned her and she complained of it. The employees in the area began to harass her by a variety of means, including threats, vandalism to her car, obnoxious statements, and physically intimidating behavior. She complained repeatedly and her supervisors took no action for nineteen months. The court stated that it is particularly important in cases of alleged retaliatory harassment to distinguish between the inevitable strain caused by whistleblowing and actionable conduct. "When one employee makes a charge under Title VII against another, some strain on workplace relationships is inevitable. . . . Sides will be chosen, lines will be drawn, and those who were once the whistleblower's friends may not be so friendly anymore. . . . But what the statute proscribes is retaliation, not loyalty to an accused coworker or a desire to avoid entanglement in workplace controversy." *Id.* at 451 (citations omitted). The court stated: "A cold shoulder can be hurtful, but it is not harassment." *Id.* (citation omitted). It held that expressions of opinion, including that the alleged harasser did nothing wrong, were also not actionable but could help show an unlawful motive for conduct that is actionable: "These statements are useful to Jensen because they tend to show that a retaliatory motive animated other behavior by Sickler and Jones. But they have no independent weight in our "severe or pervasive" analysis. If Jones thought Waters had been treated harshly, he was entitled to express his opinion; if Sickler wanted to start a petition, he had every right to do so. Title VII prohibits retaliation against accusers, not support for the accused." *Id.* The court held that plaintiff had shown enough conduct that a reasonable jury could find it had permeated the workplace:

> Nonetheless, the record contains evidence of harassment that a jury might well find severe or pervasive. First, Sickler berated Jensen with retaliatory insults two to three times per week for 19 months, and the significance of these remarks lies in their pounding regularity. . . . Second, the record contains evidence of more than just insults. Jensen also testified to an unspecified number of physical threats by Ed Jones and at least four instances of property damage to her vehicle. These incidents' severity and the insults' frequency combine to raise a material question of fact as to whether retaliatory harassment "permeated" the workplace and changed the terms or conditions of Jensen's employment.

Id. (citation omitted). See the discussion of this case below, in the section on "Employer's Duty to Cure Any Harassment That Does Occur."

4. Causation

Jensen v. Potter, 435 F.3d 444, 450–51, 97 FEP Cases 555 (**3d Cir.** 2006) (Alito, J.), reversed the grant of summary judgment to the Title VII retaliation defendant U.S. Postal Service. Plaintiff was assigned to the unit formerly headed by the supervisor who was fired after he sexually propositioned her and she complained of it. The employees in the area began to harass her by a variety of means, including threats, vandalism to her car, obnoxious statements, and physically intimidating behavior. She complained repeatedly and her supervisors took no action for nineteen months. The court relied on the context of the co-worker harassment to establish the causal link between her complaint and their actions:

> The prime antagonist in Jensen's retaliation claim is letter carrier Joe Sickler. Shortly after Waters's transfer to the Ashley office, Sickler called Jensen "the [obscenity] who got [Waters] in trouble;" he also stated that when a new supervisor came Jensen would have to get off her "fat [obscenity]." . . . Because these insults directly relate to Jensen's complaint against Waters, they raise an obvious inference of retaliatory animus. . . . More important, these statements may provide a window into Sickler's thinking throughout the 19-month barrage of offensive comments. If Sickler's conduct were viewed in isolation, his motives would be unclear, but his earlier statements provide a reasonable basis for thinking that the later abuse resulted from latent hostility to Jensen's whistleblowing. Thus, the record as a whole supports a finding that all of Sickler's harassment was based on a retaliatory animus.
>
> Jensen also alleges physical threats by letter carrier Ed Jones. Like Sickler's loud and frightening clap, Jones's alleged assaults are facially neutral. Nonetheless, the record contains other evidence from which a factfinder could infer motive. First, before the Waters incident, Jensen and Jones were friends; shortly after it, Jones menaced her with heavy equipment. This temporal proximity between the protected activity and Jones's changed behavior is probative of a retaliatory intent. . . . Second, the record contains evidence that Jones expressed disagreement with the decision to remove Waters. This statement, when combined with the sudden shift in behavior, permits an inference that Jones's newfound hostility resulted from Jensen's protected activity.
>
> In addition to Sickler's habitual insults and Jones's threatening use of postal equipment, Jensen alleges that vandals twice keyed her car, spit on it, and spilled coffee on it. Standing alone, these acts of vandalism contain no indicia of retaliation. But as with the other events, the analysis changes significantly upon consideration of the overall scenario. . . . Though the vandalism did not begin until approximately one year after Jensen reported Waters, Sickler's berating of Jensen allegedly continued even 19 months after the Waters incident. If true, and we assume it to be so on summary judgment, this intervening antagonism tends to show that these seemingly unrelated incidents were components of an integrated pattern of retaliation. . . . In sum, a reasonable jury could find that all the alleged coworker harassment-namely, Sickler's insults, Jones's physical threats, and vehicle damage caused by unknown vandals-were the product of intentional discrimination because of Jensen's protected activity.

(Citations omitted.) See the discussion of this case below, in the section on “Employer’s Duty to Cure Any Harassment That Does Occur.”

Laber v. Harvey, 438 F.3d 404, 97 FEP Cases 846 (**4th Cir.** 2006) (*en banc*), affirmed the grant of summary judgment to the U.S. Department of the Army, holding that plaintiff could not establish his prima facie case because the decisionmaker did not know of plaintiff’s prior EEO activity until after he had made the decision.

- **Comment:** This ruling is difficult to defend: The court’s *own statement of facts* shows that plaintiff’s evidence included everything necessary to establish a prima facie case: “Scott examined Laber’s Form 2302 and concluded, like the personnel office, that Laber was “minimally qualified” for the position. (J.A. at 426.) Scott therefore called Laber to request that he supplement his Form 2302 with additional information regarding his qualifications for the particular position. Laber avers that during this conversation, Scott, who knew that Laber was a priority candidate, asked him whether he had prior EEO activity in order to determine why he had received priority status. Laber further alleges that he informed Scott that he had prior EEO activity and that Scott immediately became short with him and quickly ended the conversation. After reviewing Laber’s supplemental information, Scott determined that Laber was not qualified for the particular job. Instead, Scott chose a male candidate under 40 years of age who was not on the priority candidate list.”

Judge Wilkinson concurred. *Id.* at 432–33. Judge Widener concurred in part and dissented in part. *Id.* at 433. Judge Niemeyer concurred in part and dissented in part. *Id.* at 433–37.

Kasper v. Federated Mutual Insurance Co., 425 F.3d 496, 503–04, 96 FEP Cases 961 (**8th Cir.** 2005), affirmed the grant of summary judgment to the Title VII retaliation defendant, holding that plaintiff could not show a causal connection between her protected activity of filing an internal complaint and her termination a year later. “Although not dispositive, the length of time between Kasper’s protected activity and her discharge further weakens Kasper’s claim of causation.” *Id.* at 503 (citation omitted). The court also relied on the fact that plaintiff’s second-level manager raised important concerns about plaintiff’s skills and competence, and suggested she might need to be moved to another job, prior to her complaint. It stated: “Evidence of an employer’s concerns about an employee’s performance before the employee’s protected activity undercuts a finding of causation.” *Id.* at 504 (citation omitted).

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.

Cross v. New York City Transit Authority, 417 F.3d 241, 249–50, 96 FEP Cases 239 (**2d Cir.** 2005), affirmed the judgment on a jury verdict for the ADEA plaintiffs. Plaintiffs were Maintainer Helpers who were promoted to Maintainers at union assistance, were denied the necessary manual, equipment, and training to perform their jobs, and were then demoted because of poor performance. The court noted that decades-younger employees were treated much more favorably, and held that this was adequate evidence of discrimination. "As this court has recognized, a showing of disparate treatment is 'a common and especially effective method of establishing [an] inference of discriminatory intent.' . . . In this case, plaintiffs did not simply show disparate treatment in demotion; they showed that their demotions were the inevitable consequence of disparate treatment in training. Significantly, defendants did not acknowledge or offer a nondiscriminatory explanation for the training disparity. Instead, throughout trial, they insisted that there was no such disparity.". *Id.* at 250.

F. Comparative Qualifications and Evidence Bearing on Employee Performance

Ash v. Tyson Foods, Inc., __ **U.S.** __, 126 S. Ct. 1195, 1197–98, 97 FEP Cases 641 (2006) (*per curiam*), summarily vacated and remanded the Eleventh Circuit's affirmance of the grant of summary judgment to the Title VII and § 1981 racial discrimination defendant. The Court rejected thelowercourt's holding that evidence of superior qualifications, by itself, was not probative of discrimination unless the superiority was so evident that it jumps off the page and slaps one in the face. The Court explained:

> Under this Court's decisions, qualifications evidence may suffice, at least in some circumstances, to show pretext. See *Patterson v. McLean Credit Union*, 491 **U.S.** 164, 187–188, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989) (indicating a plaintiff "might seek to demonstrate that respondent's claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position"), superseded on other grounds by 42 U.S.C. § 1981(b); *Texas Dept. of Community Affairs v. Burdine*, 450 **U.S.** 248, 259, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) ("The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be

> probative of whether the employer's reasons are pretexts for discrimination”); *cf. Reeves v. Sanderson Plumbing Products, Inc.*, 530 **U.S.** 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (“[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated”).
>
> The visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications. Federal courts, including the Court of Appeals for the Eleventh Circuit in a decision it cited here, have articulated various other standards, *see*, *e.g.*, *Cooper*, *supra*, at 732 (noting that “disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question” (internal quotation marks omitted)); *Raad v. Fairbanks North Star Borough School Dist.*, 323 F.3d 1185, 1194 (**C.A.9** 2003) (holding that qualifications evidence standing alone may establish pretext where the plaintiff's qualifications are “ ‘clearly superior’ ” to those of the selected job applicant); *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1294 (**C.A. D.C.** 1998) (*en banc*) (concluding the factfinder may infer pretext if “a reasonable employer would have found the plaintiff to be significantly better qualified for the job”), and in this case the Court of Appeals qualified its statement by suggesting that superior qualifications may be probative of pretext when combined with other evidence, see 129 Fed.Appx., at 533. This is not the occasion to define more precisely what standard should govern pretext claims based on superior qualifications. Today's decision, furthermore, should not be read to hold that petitioners' evidence necessarily showed pretext. The District Court concluded otherwise. It suffices to say here that some formulation other than the test the Court of Appeals articulated in this case would better ensure that trial courts reach consistent results.

- **Comment:** This continues what has become clear as the Court’s multi-year, multi-decision campaign to root out all the artificial legal presumptions adopted by the courts to make the great summary judgment engine whittle down their civil rights dockets. The more multifaceted evidentiary showings that are possible, the greater is the likelihood that plaintiffs will get their days in court before a jury.

See the discussion of *Cross v. New York City Transit Authority*, 417 F.3d 241, 249–50, 96 FEP Cases 239 (**2d Cir.** 2005), immediately above.

Bender v. Hecht’s Dept. Stores, 455 F.3d 612, 626–27 (**6th Cir.** 2006), affirmed the grant of summary judgment to the ADEA RIF defendant, and held that *Ash* did not require reversal where there was no evidence of discrimination other than evidence that a plaintiff’s qualifications were equal to those of an employee not laid off. Pointing out that *Ash* did not articulate a standard to replace the Eleventh Circuit’s standard, the court declared its own standard:

> Whether qualifications evidence will be sufficient to raise a question of fact as to pretext will depend on whether a plaintiff presents other evidence of discrimination. In the case in which a plaintiff does provide other probative evidence of discrimination, that

> evidence, taken together with evidence that the plaintiff was as qualified as or better qualified than the successful applicant, might well result in the plaintiff's claim surviving summary judgment. . . . On the other hand, in the case in which there is little or no other probative evidence of discrimination, to survive summary judgment the rejected applicant's qualifications must be so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former. In negative terms, evidence that a rejected applicant was as qualified or marginally more qualified than the successful candidate is insufficient, in and of itself, to raise a genuine issue of fact that the employer's proffered legitimate, non-discriminatory rationale was pretextual.

(Citation omitted.)

G. Statistics

Pippin v. Burlington Resources Oil and Gas Co., 440 F.3d 1186, 1198, 97 FEP Cases 745 (**10th Cir.** 2006), affirmed the grant of summary judgment to the ADEA RIF defendant. The court stated: "'Statistical evidence which fails to properly take into account nondiscriminatory explanations does not permit an inference of pretext.' . . . A 'plaintiff's statistical evidence must focus on eliminating nondiscriminatory explanations for the disparate treatment by showing disparate treatment between comparable individuals.' . . . Statistical evidence that does not adjust 'for the various performance evaluations and departmental rankings of the employees included in the statistical pool' does not compare 'similarly situated' employees and therefore 'fails to eliminate nondiscriminatory explanations for disparate treatment.'" (Citations omitted.)

H. Discriminatory Statements

1. Statements Probative of Unlawful Motive

Ash v. Tyson Foods, Inc., **__ U.S. __**, 126 S. Ct. 1195, 1197, 97 FEP Cases 641 (2006) (*per curiam*), summarily vacated and remanded the Eleventh Circuit's affirmance of the grant of summary judgment to the Title VII and § 1981 racial discrimination defendant. Plaintiffs were African-American. The court rejected the lower court's holding that the decisionmaker's references to each plaintiff as "boy" were not probative of racial discrimination unless the term was modified by another term, such as a racial reference. "Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous."

- **Comment:** The Court's insistence on consideration of context will in most cases mean that such remarks must be evaluated by juries.

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.

Cross v. New York City Transit Authority, 417 F.3d 241, 249–50, 96 FEP Cases 239 (**2d Cir.** 2005), affirmed the judgment on a jury verdict for the ADEA plaintiffs. Plaintiffs were Maintainer Helpers who were promoted to Maintainers at union assistance, were denied the necessary manual, equipment, and training to perform their jobs, and were then demoted because of poor performance. In holding that there was sufficient evidence to support the jury's determination, the court relied in part on age-discriminatory remarks made by the decisionmakers.

2. Speakers Who Were Not Formal Decisionmakers

Ledbetter v. Goodyear Tire and Rubber Co., Inc., 421 F.3d 1169, 1188–89 (**11th Cir.** 2005), *petition for cert. filed*, 74 USLW 3487 (**U.S.**, Feb. 17, 2006) (No. 05–1074), reversed the denial of judgment as a matter of law to the Title VII pay discrimination defendant. The court held that sexist comments were not probative of discrimination where plaintiff made no showing that the declarants were involved in the challenged decision.

I. Harassment

1. Conduct Neutral in Form

Maldonado v. City of Altus, 433 F.3d 1294, 1304–05, 97 FEP Cases 257, 23 IER Cases 1706 (**9th Cir.** 2006), reversed the grant of summary judgment to the Title VII defendant on plaintiffs' claim that defendant's English-only rule had a disparate impact on Hispanic employees by creating a hostile working environment. See the discussion of this case under "Title VII," in the section on "English-Only Rules."

2. Severe or Pervasive

Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., 434 F.3d 75, 87–88, 17 AD Cases 769 (**1st Cir.** 2006), affirmed the judgment for the ADA harassment plaintiff on a jury verdict for $76,000 in compensatory damages and $160,000 in punitive damages and held that the lower court did not abuse its discretion in denying defendant's motion for a new trial. Quoting the lower court with approval, the court of appeals stated: "[T]here was evidence presented as to the constant mockery and harassment that Arrieta was subjected to by fellow co-workers and supervisors alike due to his condition; there was evidence presented that this harassment was constant and

unbearable, leading to Arrieta's resignation; and there was evidence that Arrieta's supervisors knew about the harassing conduct and rather than stop it, participated in it."

El-Hakem v. BJY Inc., 415 F.3d 1068, 96 FEP Cases 84, 10 WH Cases 2d 1313 (**9th Cir.** 2005), *cert. denied*, **__ U.S. __**, 126 S. Ct. 1470, 164 L.Ed.2d 248 (2006), affirmed the judgment for the § 1981 and Title VII plaintiff for $15,000 in compensatory damages and $15,000 in punitive damages because of a hostile working environment based on race and national origin, arising from defendant's manager's insistence on using the nickname "Manny" for plaintiff. "Despite El-Hakem's strenuous objections, Young insisted on using the non-Arabic name rather than 'Mamdouh,' El-Hakem's given name. In Young's expressed view, a 'Western' name would increase El-Hakem's chances for success and would be more acceptable to BJY's clientele." *Id.* at 1071. The court rejected defendant's argument that the conduct was not severe or pervasive. The lower court held that the conduct would be severe or pervasive to "the reasonable Arab." On appeal, plaintiff conceded the conduct was not severe. The court found it actionable because of its frequency and consistency:

> "The required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct." . . . Although Young's conduct may not have been especially severe, there was unrefuted evidence of its frequency and pervasiveness. The jury heard testimony that Young continued to use the name "Manny" over El-Hakem's repeated objections. El-Hakem first objected to Young's use of "Manny" in a marketing meeting. Despite El-Hakem's objection, Young insisted on calling him "Manny" in a subsequent telephone conversation and e-mail. Approximately one month later, El-Hakem proposed in an e-mail that Young use Hakem, his last name, if he found Mamdouh difficult to pronounce. Rather than call him Hakem, Young suggested in his reply e-mail that El-Hakem be called "Hank." El-Hakem objected again. Despite El-Hakem's continued objections, Young persisted in calling El-Hakem "Manny" once a week in the Monday marketing meeting for approximately two months, and in e-mails at least twice a month thereafter. The conduct continued for almost a year, from May, 1999 to April, 2000. Because these incidents were frequent and consistent rather than isolated, a reasonable juror could conclude that El-Hakem's work environment was hostile.

Id. at 1073–74 (citation and footnote omitted).

- **Comment:** This is an extreme decision, but while it lasts it opens up new possibilities for employees. It is not uncommon for supervisors to insist on using nicknames or terms of address that are offensive to the employee. These are often tied to ethnicity or gender. Many women intensely dislike being called "honey," "sweetheart," or "dearie" at work. Many Hispanics dislike being called by ethnic nicknames, or more Hispanic-sounding nicknames. References in nicknames to Greek or Italian ancestry are common. None of this should occur in a workplace that actually treats employees with respect, instead of the common practice of burying the noble sentiment in a policy that never makes a difference in actual practices. Employers should include the concept of this case in their training programs for supervisors.

3. Employer's Duty to Prevent Harassment

Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., 434 F.3d 75, 87, 17 AD Cases 769 (**1st Cir.** 2006), affirmed the judgment for the ADA harassment plaintiff on a jury verdict for $76,000 in compensatory damages and $160,000 in punitive damages. Plaintiff was repeatedly mocked by his supervisors and co-workers because of his appearance after receiving a penile implant. The rejected defendant's argument that it was prejudiced by the lower court's refusal to give an instruction on the affirmative defense:

> The court found, in essence, that no reasonable jury could have concluded that either element of the defense had been met. First, the court noted that the open door policy existed on paper, but had not been put into practice. Indeed, when Arrieta complained to the Personnel Department and to several supervisors, no corrective actions were taken and his complaints were not even recorded. Second, the evidence was that Arrieta had reasonably availed himself of the procedures and the company had more than sufficient notice of the problems. We can find no reversible error; as in *Faragher,* the evidence did not support giving the instruction, irrespective of whether Wal-Mart's conduct amounted to a tangible employment action.

In connection with punitive damages, the court stated: "On these facts, a jury could easily conclude that the open door policy was a sham designed to give the appearance, but not the reality, of an effort to comply with the law, and that Wal-Mart acted with reckless disregard of Arrieta's rights." *Id.* at 90 (citation omitted).

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

See the discussion of *Arrieta-Colon v. Wal-Mart Puerto Rico, Inc.*, 434 F.3d 75, 87, 17 AD Cases 769 (**1st Cir.** 2006), immediately above.

Jensen v. Potter, 435 F.3d 444, 97 FEP Cases 555 (**3d Cir.** 2006) (Alito, J.), reversed the grant of summary judgment to the Title VII retaliation defendant U.S. Postal Service. Plaintiff was assigned to the unit formerly headed by the supervisor who was fired after he sexually propositioned her and she complained of it. The employees in the area began to harass her by a variety of means, including threats, vandalism to her car, obnoxious statements, and physically intimidating behavior. She complained repeatedly and her supervisors took no action for nineteen months. The court held that the delay established the basis for employer liability:

> In order to establish employer negligence, the plaintiff must show that management knew or should have known about the harassment, but "failed to take prompt and adequate remedial action." . . . An effective remedy—one that stops the harassment—is adequate per se. . . . Even if not effective, an employer's remedial measure is nonetheless adequate if "reasonably calculated" to end the harassment. . . . Moreover, the remedy need not include discipline to be adequate. In *Knabe*, for example, the employer found insufficient evidence of harassment to justify disciplinary measures against the offending employee. . . . Nonetheless, because the employer promptly met with the alleged harasser and informed him of the company's strong policy against sexual harassment, we found the remedy adequate as a matter of law.

> Here, as in *Knabe*, the defendant held a meeting with the principal harasser and discussed the allegations. . . . Furthermore, this meeting was effective—it stopped the harassment. . . . But to be reasonable the remedy must be both adequate and prompt. . . . Though Moss and Honeychurch claim to have had informal discussions with Sickler, the formal meeting between management, union officials, and Sickler did not occur until April or May of 2003. The effectiveness of so modest a remedial measure raises a question as to why, despite Jensen's repeated complaints, it took 19 months of harassment and the intervention of a new supervisor to make it happen. Because of this delay, we cannot deem the Postal Service's response prompt and adequate as a matter of law.

5. Consent is Not a Defense if Victim is Under Age of Consent

Doe v. Oberweis Dairy, 456 F.3d 704, 713–15, 98 FEP Cases 958, 98 FEP Cases 1022 (**7th Cir.** 2006), reversed the grant of summary judgment to the Title VII sexual harassment defendant, holding that the then 16-year-old plaintiff's consent to intercourse and other sexual acts with her then 25-year-old supervisor, was not a defense to the harassment claim. The sexual conduct originated in the workplace, and other teen-age female employees were also the subjects of the supervisor's gropes and other conduct.

> The district judge ruled that the plaintiff was not harassed, because she welcomed Nayman's advances. . . . In so ruling, however, the judge stepped out of the proper role of a judge asked to decide a motion for summary judgment and made findings on contested factual issues relating to the plaintiff's dealings with Nayman, as when the judge said that "once, Nayman gave Plaintiff a hug and kiss in an effort to make Plaintiff happy," or that "Nayman also 'playfully' hit Plaintiff on the behind with a rag on one occasion."
>
> What is uncontested is that Nayman did not commit forcible rape. But he committed statutory rape, that is, intercourse with an underage person, which is made a crime because of a belief that below a certain age a person cannot (more realistically, is unlikely to be able to) make a responsible decision about whether to have sex. . . . In Illinois as elsewhere the crime is considered more serious the greater the disparity in ages between the parties. The theory is that a young girl (or boy) is likely to have particular difficulty resisting the blandishments of a much older man. . . . Nayman was nine years older than Jane Doe when they had sex.
>
> "The age of consent fixed by a state represents a legislative judgment about the maturity of girls in matters of sex." . . . To avoid undermining valid state policy by reclassifying sex that the state deems nonconsensual as consensual, to simplify employment-discrimination litigation, and to avoid intractable inquiries into maturity that legislatures invariably pretermit by basing entitlements to public benefits (right to vote, right to drive, right to drink, right to own a gun, etc.) on specified ages rather than on a standard of "maturity," federal courts, rather than deciding whether a particular Title VII minor plaintiff was capable of "welcoming" the sexual advances of an older man, should defer to the judgment of average maturity in sexual matters that is reflected in the age of consent in the state in which the plaintiff is employed. That age of consent should thus be the rule of decision in Title VII cases. . . .

We realize that as a consequence of our approach the protection that Title VII gives teenage employees will not be uniform throughout the country, since the age of consent is different in different states, though within a fairly narrow band. Uniformity would require federal courts either to specify an age at which American teenagers shall be deemed capable of consenting to sexual advances in the workplace or to determine the individual plaintiff's maturity in each case. Neither of these alternatives is satisfactory; both in their different ways are arbitrary. Deferring to each state's determination of the age of consent not only makes the litigation of cases such as this much simpler and no more arbitrary; it also reflects the differences among the states in judgments about the maturity of teenagers in sexual matters.

For completeness we add that although consent to sexual relations with a coworker or supervisor is not a defense in a Title VII suit for sexual harassment brought by a plaintiff who was underage when the conduct alleged to constitute harassment occurred, this does not mean that the conduct of the plaintiff can never be used to reduce the defendant's damages in such a case. In a negligence case brought by an exchange student against the company that had placed her with a couple and the husband raped her, we said that "it would have been error to instruct the jury that because Kristin was below the age of consent her comparative fault must be reckoned at zero. That would have given too much force to the criminal statute in this civil case, for the statute cannot be considered a legislative judgment that minors are utterly incapable of avoiding becoming ensnared in sexual relationships." . . . *Beul* was a common law negligence case, however; this is a Title VII case and we cannot find a case under Title VII in which comparative fault was recognized as a complete or partial defense to liability.

* * *

This case, however, is unusual because the plaintiff was an active participant in, rather than a passive victim of, the principal discriminatory act of which she complains—the act of sexual intercourse with Nayman. At the damages stage of this proceeding, should it get that far, the defendant—who is not Nayman, but Nayman's employer—should be permitted to put Nayman's conduct in perspective. If Doe was sneaking around behind her mother's—and her employer's—back and thus facilitating Nayman's behavior, the employer may be able to show that the harm she suffered that was caused by its violation of Title VII (if such a violation is found on remand), rather than by Nayman, was minimal.

That would be a straightforward application of the principle that a plaintiff may recover from a defendant only those compensatory damages that can fairly be traced to the defendant's conduct. "The normal measure of tort damages is the amount which compensates the plaintiff for all of the damages proximately caused by the defendant's negligence" . . . ; see also RESTATEMENT (SECOND) OF TORTS § 917, comment c (1979) ("the rules that determine the causal relation necessary to liability are as fully applicable to establish the extent of liability as to establish its existence")—that is, caused by the defendant's failure to exercise the degree of care that the law requires. What that degree of care is in a case such as the present one is taken up later in this opinion. Though inquiries into the maturity of individual minors are, as we said earlier, bound to be

fraught with uncertainty, a jury should be able to sort out the difference between an employer's causal contribution to the statutory rape by its employee of a 16-year-old siren (if that turns out to be an accurate description of Doe) and to similar conduct toward, say, a 12-year-old.

6. Constructive Discharge and Failure to Complain

Patton v. Keystone RV Co., 455 F.3d 812, 98 FEP Cases 937 (7th Cir. 2006), reversed the grant of summary judgment to the Title VII sexual harassment defendant. Plaintiff alleged that her supervisor was obsessed with her, and stalked and harassed her for a month. In one instance, he put his hand under her shorts and up her thigh until he reached her underwear. The court held that she was entitled to quit immediately after she asked for a higher-level supervisor to come to the gate so that she could talk with him, he refused, and the harasser appeared instead. The court held that "a reasonable fact finder could agree with Patton's fear that her supervisor was an obsessed man who—based on previous acts showing no regard for Patton's right to control who could touch intimate areas of her body—was capable of, and desirous of, physically assaulting her in a serious way. We need not conclude that a rape or other assault was likely, but only whether a reasonable fact finder could find that Patton should have quit immediately to protect herself. We think the answer is yes." *Id.* at 818.

V. Litigation

A. Exhaustion

Woodman v. WWOR-TV, Inc., 411 F.3d 69, 95 FEP Cases 1601 (**2d Cir.** 2005), noted without comment that the lower court had barred plaintiff's ADEA disparate-impact claim because of a failure to raise the theory before the EEOC.

- **Comment:** It seems to me that the lower court was wrong, and that the court of appeals should have gone out of its way to disapprove this ruling. Charging parties are usually unrepresented by counsel, and it destroys the purposes of Title VII to require them to advance every possible legal theory in their charges. Counsel themselves would have had no notice of such an expansion of the exhaustion requirement, would normally only get information showing the possible existence of a new claim after the case is filed in court and new information is obtained in discovery, and cannot thereafter re-open the EEOC charge.

B. Timeliness

1. When Does the Cause of Action Accrue?

Thorn v. Jefferson-Pilot Life Insurance Co., 445 F.3d 311, 320 (**4th Cir.** 2006), involved racially discriminatory industrial life insurance policies. The court affirmed the denial of class certification. In discussing the borrowed State-law periods of limitations for § 1981 and § 1982 claims, the court stated: "We have held that a cause of action accrues under a borrowed statute of limitations 'either when the plaintiff has [actual] knowledge of his claim or when he [has constructive knowledge of his claim]—*e.g.,* by the knowledge of the fact of injury and who

caused it—to make reasonable inquiry and that inquiry would reveal the existence of a colorable claim."

Henderson v. Ford Motor Co., 403 F.3d 1026, 1032, 95 FEP Cases 970, 16 AD Cases 1025 (**8th Cir.** 2005), affirmed the grant of summary judgment to the ADA and Minnesota Human Rights Act defendant. The court held that plaintiff's charge was untimely. It stated: "These causes of action accrue the date on which the adverse employment action is communicated to the employee. . . . The limitations periods begin to run even if the employee is not aware of the discriminatory effect or the employer's discriminatory motivation in taking the adverse employment action." *Id.* at 1032 (citations omitted). The court held that equitable estoppel "does not apply in this case because Henderson presented no evidence that she was induced not to timely file her ADA claims due to any affirmative actions by Ford." *Id.* at 1033. The court held that equitable tolling was unavailable because plaintiff had all the facts she needed to file a charge, and had grown suspicious about possible discrimination, at a time when filing a charge would have been timely. "At this time Henderson may not have had knowledge of all the facts related to the purported discrimination, but she had knowledge of facts that were sufficient to apprise her of the purported discrimination. Certainty is not the standard. '[I]f a plaintiff were entitled to have all the time [she] needed to be *certain* [her] rights had been violated, the statute of limitations would never run—for even after judgment, there is no certainty.'" *Id.* (citation omitted).

2. Pay Discrimination

Ledbetter v. Goodyear Tire and Rubber Co., Inc., 421 F.3d 1169 (**11th Cir.** 2005), *petition for cert. filed*, 74 USLW 3487 (**U.S.**, Feb. 17, 2006) (No. 05–1074), reversed the denial of judgment as a matter of law to the Title VII pay discrimination defendant. Plaintiff had been denied a number of merit raises in her annual reviews. The court held that disparate treatment in pay arising under a system of annual reviews is covered by the "discrete acts" holding of *Morgan*, and accordingly held that the only annual review on which relief could be granted was the review that occurred during or after the 180-day charge-filing period:

> In a case in which the plaintiff complains of discriminatory pay, there are only two possible sources of such conduct: the decisions setting the plaintiff's salary level or pay rate, and the issuance of paychecks reflecting those decisions. Whether it is a pay-setting decision or the issuance of a confirming paycheck that is viewed as the operative act of discrimination, the act is, like "termination, failure to promote, denial of transfer, or refusal to hire," *Morgan,* 536 U.S. at 114, 122 S. Ct. at 2073, discrete in time, easy to identify, and—if done with the requisite intent—independently actionable. If an employee is denied a raise, given a pay cut, or hired at a deflated pay grade because of a prohibited consideration, the statute is violated and the employee can file suit the moment the decision is made. The decision would be no less unlawful if the employee were to quit the next day in exasperation and never receive a paycheck reflecting her unlawful pay rate; proving damages might be problematic, but establishing liability would not. Similarly, if the act complained of is the issuance of a discrete discriminatory paycheck (or paychecks), then the issuance of the challenged paycheck completes the "alleged unlawful employment practice" for purposes of the timely-filing requirement. Pay claims do not, therefore, have those characteristics that led the Court to devise a separate rule

> governing the timing of hostile work environment claims: The "unlawful employment practice" *can be* said to occur on a particular day (though it may be repeated on multiple days), and a single discriminatory act *is* actionable on its own. The alleged discriminatory behaviors need not accumulate to some critical mass to become actionable.

Id. at 1179–80 (footnote omitted; emphasis in original.) The court rejected plaintiff's argument that post-*Bazemore* decisions entitled her to challenge her end-of-career pay rates in comparison with those of males regardless of when the pay decisions were made, and entitled her to show sexual animus by the decisionmakers on her pay going back for nineteen years.

> It is one thing to say that a claim is not entirely time-barred because the discriminatory decision being challenged continued to be periodically implemented through paychecks issued within the limitations period. It is quite another to say that the bare issuance of a lower-than-wished-for paycheck within the limitations period opens the door for a full inquiry into the motivations of every person who ever made a decision contributing to the plaintiff's pay level as it existed during the limitations period. In other words, the cases on which Ledbetter relies hold simply that pay claims are not *time-barred* if (allegedly) unlawful paychecks were issued within the limitations period; they do not speak to how far back in time the plaintiff may reach in looking for the intentionally discriminatory act that is the central, requisite element of every successful disparate treatment claim.

Id. at 1182 (citation omitted; emphasis in original). The court held that "the necessary implication of these cases is that a plaintiff whose claim is preserved by the continued issuance of improperly low paychecks can look some distance back in time for the underlying, intentionally discriminatory decision," but that there had to be a limit. *Id.* at 1182. It continued: "We think, therefore, that at least in cases in which the employer has a system for periodically reviewing and re-establishing employee pay, an employee seeking to establish that his or her pay level was unlawfully depressed may look no further into the past than the last affirmative decision directly affecting the employee's pay immediately preceding the start of the limitations period. Other, earlier decisions may be relevant, but only to the extent they shed light on the motivations of the persons who last reviewed the employee's pay, at the time the review was conducted." *Id.* at 1182–83 (citation omitted). The court cautioned that "the employee is limited to recovering for those paychecks received within the limitations period." *Id.* at 1183 n.3. Even in the absence of annual reviews, the court suggested that pre-*Morgan* case law may need to be reviewed. *Id.* at 1184. The court held that plaintiff could only challenge the1997 and1998 decisions not to give her a merit increase, that the inferential model applied to those decisions, and that plaintiff could not show defendant's reasons to be pretextual.

C. <u>Adequacy of Pleading</u>

Rochon v. Gonzales, 438 F.3d 1211, 1220, 97 FEP Cases 944 (**D.C. Cir.** 2006), reversed the dismissal of plaintiff's Title VII retaliation claim and held that plaintiff was required only to plead that he was retaliated against for engaging in protected activity, and was not required to plead facts negating the government's not-yet-identified defenses.

D. Jurisdiction

1. Title VII Suits for Fees and Costs, or for Additional Relief

The Fourth Circuit previously decided in *Chris v. Tenet*, 221 F.3d 648, 652 (**4th Cir.** 2000), that Title VII does not confer jurisdiction on Federal courts to hear suits involving only claims for attorneys' fees and costs. In *Laber v. Harvey*, 438 F.3d 404, 97 FEP Cases 846 (**4th Cir.** 2006) (*en banc*), the court rejected defendant's argument that this holding must be extended to claims for additional relief for an administrative finding of discrimination. The court distinguished *Chris* because that case involved only the Title VII jurisdictional provision. The plaintiff in *Laber* cited an additional basis of jurisdiction, 28 U.S.C. § 1331, which the court of appeals had previously held available as an additional basis of jurisdiction for Title VII cases. The court stated at 425–26:

> Moreover, since *Chris* was decided we have held that § 1331 provides an additional jurisdictional basis for suits arising under Title VII, *see Venkatraman v. REI Sys., Inc.,* 417 F.3d 418, 420 (**4th Cir.** 2005), and a strong majority of our sister circuits has held the same, *see Burgh v. Borough Council of Borough of Montrose,* 251 F.3d 465, 469 (**3d Cir.** 2001); *Smith v. Ashland, Inc .,* 250 F.3d 1167, 1169 (**8th Cir.** 2001); *English v. Colo. Dept. of Corr.,* 248 F.3d 1002, 1007 (**10th Cir.** 2001); *Rutherford v. City of Cleveland,* 137 F.3d 905, 908 (**6th Cir.** 1998); *Saunders v. Venture Stores, Inc.,* 56 F.3d 771, 772 (**7th Cir.** 1995); *Vera-Lozano v. Int'l Broad.,* 50 F.3d 67, 68 (**1st Cir.** 1995); *Intlekofer v. Turnage,* 973 F.2d 773, 774 (**9th Cir.** 1992); *Palmer v. Dist. Bd. of Tr. of St. Petersburg Junior Coll.,* 748 F .2d 595, 596 (**11th Cir.** 1984). A district court has subject-matter jurisdiction under § 1331 when "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Bell v. Hood,* 327 **U.S.** 678, 681, 685 (1946). Because, as this opinion reveals, resolution of Laber's claim for additional relief required interpretation of Title VII, a federal law, the district court had subject matter jurisdiction over Laber's claim under § 1331. Of course, district courts may lack jurisdiction over future claims similar to Laber's claim under the insubstantiality doctrine. *See Hagans,* 415 U.S. at 536–37 ("[F]ederal courts are without power to entertain claims otherwise within their jurisdiction if they are so attenuated and unsubstantial as to be absolutely devoid of merit, wholly insubstantial, obviously frivolous, plainly insubstantial, or no longer open to discussion." (internal citations and quotation marks omitted)).

Judge Wilkinson concurred. *Id.* at 432–33. Judge Widener concurred in part and dissented in part. *Id.* at 433. Judge Niemeyer concurred in part and dissented in part. *Id.* at 433–37.

E. Length of Time to Decide Case

International Bhd. of Elec. Workers, AFL-CIO, Local Unions Nos. 605 & 985 v. Mississippi Power & Light Co., 442 F.3d 313, 316 n.7, 97 FEP Cases 1501 (**5th Cir.** 2006), reversed the judgment after a bench trial for the Title VII plaintiffs, and entered judgment for defendant. The court stated: "Neither party was able to explain the district court's delay of more

than five years between the date of trial and the day on which the district court rendered its decision, a delay which seems to us to be wholly unacceptable."

F. Arbitration

1. Severability

Booker v. Robert Half International, Inc., 413 F.3d 77, 95 FEP Cases 1841 (**D.C. Cir.** 2005) (Roberts, J.), affirmed the order compelling arbitration of plaintiff's D.C. Human Rights Act employment dispute despite an improper provision barring punitive damages. The court held that the parties had already agreed, in the agreement, to severance of unenforceable provisions, and held that the offending provision would be severed. The court rejected plaintiff's argument that his consent is required to waive any provision, and that his lack of consent doomed the agreement. It explained that "the district court's severance was a contingency contemplated by the parties at the time of formation, rather than a modification subject to the requirements of the waiver clause." *Id.* at 83. Similarly, the court held that plaintiff's earlier consent to the severability clause made any waiver unnecessary. Plaintiff argued that using severance as an option gives employers an incentive to overreach:

> Booker next argues that enforcing the remainder of the arbitration clause contravenes the federal policy interest in ensuring the effective vindication of statutory rights. He contends that responding to illegal provisions in arbitration agreements by judicially pruning them out leaves employers with every incentive to "overreach" when drafting such agreements. If judges merely sever illegal provisions and compel arbitration, employers would be no worse off for trying to include illegal provisions than if they had followed the law in drafting their agreements in the first place. On the other hand, because not every claimant will challenge the illegal provisions, some employees will go to the arbitral table without all their statutory rights.

Id. at 84. The court recognized that a number of courts have relied on such reasoning to strike down agreements rather than sever offending provisions, and attempted to reconcile the decisions:

> The differing results may well reflect not so much a split among the circuits as variety among different arbitration agreements. Decisions striking an arbitration clause entirely often involved agreements without a severability clause, *see, e.g., Perez,* 253 F.3d at 1286, or agreements that did not contain merely one readily severable illegal provision, but were instead pervasively infected with illegality, *see, e.g., Graham Oil,* 43 F.3d at 1248-49; *Hooters v. Phillips,* 173 F.3d 933, 938-39 (4th Cir. 1999). Decisions severing an illegal provision and compelling arbitration, on the other hand, typically considered agreements with a severability clause and discrete unenforceable provisions, *see, e.g., Morrison,* 317 F.3d at 675; *Gannon,* 262 F.3d at 680.
>
> A critical consideration in assessing severability is giving effect to the intent of the contracting parties. . . . That was also the "preeminent concern of Congress in passing the [FAA]"—"to enforce private agreements into which parties had entered." . . . If illegality pervades the arbitration agreement such that only a disintegrated fragment

> would remain after hacking away the unenforceable parts . . . the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties. . . . Thus, the more the employer overreaches, the less likely a court will be able to sever the provisions and enforce the clause, a dynamic that creates incentives against the very overreaching Booker fears.
>
> We agree with the district court that severing the punitive damages bar and enforcing the arbitration clause was proper here. Not only does the agreement contain a severability clause, but Booker identifies only one discrete illegal provision in the agreement. We have rejected his argument that the agreement does not allow adequate discovery, and Booker himself acknowledges that "the severance of one provision may be based on sound case law" and that "the District Court's decision to sever the punitive damages provision may be sound." . . . This one unenforceable provision does not infect the arbitration clause as a whole. The district court did not unravel "a highly integrated" complex of interlocking illegal provisions . . . but rather removed a punitive damages bar that appears to have been grafted onto an intact and functioning framework, for the AAA commercial rules—incorporated by reference in the clause—already contain provisions on remedies that do not prohibit punitive damages. *See* Commercial Rules 43-48. Indeed, by severing a remedial component of the arbitration clause, the district court removed a provision generally understood as not being essential to a contract's consideration, and thus more readily severable.

Id. at 84–85 (citations omitted).

2. AAA Commercial Rules

Booker v. Robert Half International, Inc., 413 F.3d 77, 81–82, 95 FEP Cases 1841 (**D.C. Cir.** 2005) (Roberts, J.), affirmed the order compelling arbitration of plaintiff's D.C. Human Rights Act employment dispute under an agreement specifying that the AAA commercial rules be used, agreeing that an improper clause barring punitive damages was unenforceable, and holding that the agreement had a severability clause and that the offending provision would be severed. After defendant first informally demanded arbitration under the agreement, the parties discussed the terms. "In subsequent negotiations with Booker's counsel over the structure of arbitral proceedings, RHI's attorney stipulated that arbitration would not bar an award of punitive damages, indicated that RHI would agree to 'reasonable discovery,' and suggested that the parties follow the American Arbitration Association ('AAA') employment arbitration rules because they provide 'greater detail' on available discovery tools than the commercial rules specified in the agreement." *Id.* at 80. Plaintiff argued that the commercial rules were not suitable for the resolution of employment disputes because they did not require that the arbitrator be familiar with employment law, did not require a case management conference, did not contain the assurances as to adequate discovery that are contained in the employment rules, and did not require the same allocations of burdens as would be applied in court. *Id.* at 81–82. The court rejected these arguments:

> Although the AAA employment rules specify the discovery mechanisms available in somewhat greater detail than do the commercial rules, both sets of rules leave the decision about which discovery tools to use, and in what manner, to the discretion of the

> arbitrator. Booker is concerned that he will not have "a fair opportunity to present [his] claims" . . . because the arbitrator *might* provide inadequate discovery, *might* not order a needed conference, *might* assign burdens of production or proof that do not vindicate statutory rights, and so on. Under the approach set forth in *PacifiCare, Green Tree*, and *Vimar,* such speculation about what *might* happen in the arbitral forum is plainly insufficient to render the agreement to arbitrate unenforceable. At no point does Booker claim that the agreement prohibits the arbitrator from affording what Booker asserts is required; RHI's offer to follow the AAA employment rules suggests there is no such ban. The relative silence of the commercial rules on the details of available discovery or other procedural questions cannot alone invalidate the agreement. . . . To invalidate the agreement on the basis of Booker's speculation would reflect the very sort of "suspicion of arbitration" the Supreme Court has condemned as "'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'"

Id. at 82 (citations omitted). The court noted that the timing of the agreement supported the good faith with which the agreement was drafted: "At the time the parties signed the agreement—almost a year before *Cole*—the law of this circuit was unclear as to whether bars on punitive damages in arbitration clauses were enforceable in this context. Moreover, the AAA did not promulgate the employment arbitration rules favored by Booker—and assented to by RHI in pre-litigation negotiations—until after the parties signed the employment agreement." *Id.* at 85.

- **Comment #1:** Courts rejecting attacks on arbitration as involving speculative risks do not discuss whether the plaintiff can obtain expanded review of the arbitral award, or a post-arbitration determination that the agreement is unenforceable, if the feared consequences become actual.

- **Comment #2:** It is critical to provide a record to the court showing what has happened in prior arbitrations, to provide concrete evidentiary support for the concerns courts will otherwise dismiss out offhand.

3. California Ethics Standards

Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119, 1121, 22 IER Cases 774 (**9th Cir.** 2005), held that California's newly-adopted Ethics Standards for Neutral Arbitrators in Contractual Arbitration could not be applied to NASD arbitrations: "We conclude that the California legislature intended the new ethics standards to apply to NASD-appointed neutral arbitrators. We hold, however, that the Securities and Exchange Act of 1934 ("Exchange Act"), as amended, preempts application of California's ethics standards to NASD arbitrations. In so holding, we further conclude that NASD rules approved by the Securities and Exchange Commission have preemptive force over conflicting state law." The court affirmed the injunction barring plaintiff from arbitrating his claims before the AAA.

G. Bars to Actions

1. Claim Preclusion

Wilkes v. Wyoming Department of Employment Division of Labor Standards, 314 F.3d 501, 90 FEP Cases 835 (**10th Cir.** 2002), *cert. denied*, 540 **U.S.** 826 (2003), affirmed the grant

of summary judgment to defendant on the ground of claim preclusion. Plaintiff filed a Title VII retaliation charge with the EEOC on March 21, 2000. Twenty days later, she filed an Equal Pay Act suit against defendant and her supervisor. The court accepted that she could not have filed a Title VII claim in court at that time, because of the lack of a Notice of Right to Sue. She accepted an offer of judgment on October 16, 2000, as to the Equal Pay Act claim, and filed a satisfaction of judgment on November 9, 2000. When she ultimately filed her Title VII action, the lower court dismissed it because of claim preclusion. The court of appeals held that res judicata applied to claims that were, or could have been, raised in the prior action, and stated: "'To apply the doctrine of res judicata, three elements must exist: (1) a [final] judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits.'" *Id.* at 504 (citation omitted). The court held that the first two elements were satisfied. Although some other Circuits have held that the cause of action is identical if it arises from the same facts, the court of appeals relied on prior case law and held that the cause of action is identical if it arises from employment with the same employer. It explained that in 1988 it had "adopted the transactional approach of RESTATEMENT (SECOND) OF JUDGMENTS to determine what constitutes a 'cause of action' for claim preclusion purposes," and that under this approach "a final judgment extinguishes . . . 'all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.'" It continued, quoting earlier case law: "'What factual grouping constitutes a 'transaction,' and what groupings constitute a 'series,' are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, [and] whether they form a convenient trial unit." *Id.* (citation omitted). The court continued:

> This court repeatedly has held that "all claims arising from the same employment relationship constitute the same transaction or series of transactions for claim preclusion purposes." . . . In *Clark* and *Yapp,* the plaintiffs brought actions against their former employers under the Fair Labor Standards Act, 29 U.S.C. § 216(b), for unpaid overtime compensation, and later brought second actions against their former employers for wrongful discharge. On appeal, this court held that plaintiffs' second suits were precluded since they were based upon the same transactions, i.e., the employment relationships.

Id. (citations omitted). The court recognized that there was a split among the Circuits. *Id.* at 505. It held that it made no difference whether plaintiff was able to obtain a Notice of Right to Sue at the time she filed her original suit. The court explained how plaintiff could have avoided this result:

> Wilkes filed her charge of discrimination on March 21, 2000. The 180-day investigation period expired on September 17, 2000. Wilkes accepted the offer of settlement on October 16, 2000. Wilkes could have requested a right-to-sue notice after September 17, 2000, and amended her complaint to add her Title VII claim. Alternatively, Wilkes could have filed her equal pay claim against the Wyoming DOE and then sought a stay in the district court until completion of the EEOC administrative process. After receiving her right-to-sue letter, Wilkes could have added her Title VII claim to her initial lawsuit by amending her complaint pursuant to Federal Rule of Civil Procedure 15.

Id. at 506.

- **Comment:** The rules of procedure are supposed to assist in obtaining justice, and the rules of claim preclusion are intended to avoid re-litigation of matters once there has been a fair litigation of them. No purpose is served by the Tenth Circuit's setting this kind of bear trap for plaintiffs. The rule is draconian, harshly unjust, and in direct conflict with the notion of legal protections. Unless the court decides to set a limit in the future, an employer that has weathered one suit by the employee on any matter, no matter how limited, will be completely unaccountable for whatever it does in the future, however much harm it inflicts. Surely, such a rule should be re-examined.

2. Bankruptcy and Judicial Estoppel

Cannon-Stokes v. Potter, 453 F.3d 446, 18 AD Cases 201 (**7th Cir.** 2006), affirmed the grant of summary judgment to the Rehabilitation Act defendant U.S. Postal Service, holding that plaintiff's concealment of her employment discrimination causes of action in her bankruptcy filings judicially estopped her from proceeding on those claims. "All six appellate courts that have considered this question hold that a debtor in bankruptcy who denies owning an asset, including a chose in action or other legal claim, cannot realize on that concealed asset after the bankruptcy ends." *Id.* at 448 (citations omitted).

3. Releases

Syverson v. International Business Machines Corp., 461 F.3d 1147, 98 FEP Cases 1345 (**9th Cir.** 2006), reversed the grant of summary judgment to the ADEA collective action defendant and held that IBM's release and covenant not to sue did not meet the requirement of the OWBPA. The flaw in question was that IBM's severance package required that employees sign a document containing a release of all claims, including ADEA claims, and also containing a covenant not to sue that expressly excluded claims under the ADEA. Judge Berzon summarized the panel ruling at 1149:

> Under the Older Workers Benefit Protection Act ("OWBPA"), employees may not waive rights or claims arising under the Age Discrimination in Employment Act ("ADEA") unless the waiver is "knowing and voluntary." 29 U.S.C. § 626(f)(1) (2000). To qualify as "knowing and voluntary," a waiver included in an agreement between an employer and its employees must, among other things, be "written in a manner calculated to be understood" by the average employee eligible to participate in the agreement. Id. § 626(f)(1)(A). This appeal presents the question whether a waiver form used by International Business Machines Corp. ("IBM") in connection with a severance benefit package meets that standard. We hold that it does not and was therefore not "knowing and voluntary." *Id.* § 626(f)(1).

The court further elaborated on the OWBPA requirements in referring with approval, at 1152, to the U.S. Department of Labor's explication:

> To satisfy the "manner calculated" requirement, "[w]aiver agreements must be drafted in plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate" in a group termination plan. 29

> C.F.R. § 1625.22(b)(3) (2005). Employers are thus instructed to "take into account such factors as the level of comprehension and education of typical participants." *Id.* These considerations "usually will" require the limitation or elimination of technical jargon and of long, complex sentences." *Id.*

(Footnote omitted.) Because the court held that the basic requirements of the statute were not met, it saw no reason to decide whether to adopt the "totality of the circumstances" approach for deciding matters as to which the basic requirements are met. *Id.* at 1152 n.7. The court held that the apparent conflict between the release and the covenant not to sue would be confusing to the ordinary reader, and that IBM's business purpose in adding the covenant not to sue—to ensure its ability to collect damages if a signing employee sued on a waived claim—did not save the provision:

> Given this substantive overlap between releases and covenants not to sue, that fact that the MERA Agreement's covenant not to sue contains an exception for ADEA claims necessarily creates potential confusion, as it appears to lift any barrier from proceeding to court with an ADEA claim. The confusion ensues, in part, from including in a single document two concepts that, technically speaking, cannot coexist. Under the classic definitions contained in Black's Law Dictionary and in the case law quoted above, a covenant not to sue is pertinent only if the underlying right is not extinguished, while a release extinguishes any underlying right. Where both nonetheless appear in the same document, the covenant not to sue largely swallows the release—and the negation of the covenant not to sue can therefore be read as negating the release as well.
>
> IBM stresses that without the covenant not to sue it would have been deprived of the "full benefit of its bargain" with those employees who signed on to the MERA Agreement, because without the covenant, although "IBM could raise the Release as an affirmative defense and obtain a dismissal of the suit, it still would be out its costs and attorneys' fees." IBM also maintains that the covenant not to sue was drafted to comply with the EEOC regulation that provides: "[n]o ADEA waiver agreement, covenant not to sue, or other equivalent arrangement may impose any . . . penalty, or any other limitation adversely affecting any individual's right to challenge the agreement . . . . [including] provisions allowing employers to recover attorneys' fees and/or damages because of the filing of an ADEA suit." 29 C.F.R. § 1625.23(b).
>
> It very well may have been IBM's intention to draft an agreement that would preserve the right of an employee to challenge without penalty his waiver of ADEA claims as not knowing or voluntary. *See Thomforde II*, 406 F.3d at 504 (observing that "[t]he intended effect of the Agreement was to release the employee's substantive claims under the ADEA, while preserving the employee's right to challenge the validity of the release through a lawsuit, as provided by the regulations" (citing 29 C.F.R. § 1625.23(b))). If that was IBM's intention, it would have been quite easy to have accomplished this purpose directly. The MERA Agreement, by contrast, uses a term unfamiliar to lay people,"covenant not to sue," and does not explain how the release and the covenant not to sue dovetail, either in general or as they relate to the ADEA claims. *See id.* (noting that "the Agreement does not explain how the provisions relate to each other or the limited nature of the exception to the covenant not to sue in light of the

> release of claims"); *see also* 29 C.F.R. § 1625.22(b)(3) ("Consideration [of the need to draft waiver agreements in plain language] . . . usually will require the limitation or elimination of technical jargon and of long, complex sentences.").
>
> Indeed, far from explaining the intended, independent functions of the release and of the covenant not to sue, the MERA Agreement muddles the matter by referring to both provisions with the same shorthand name—"Release"—indicating interchangeability, not distinction. *See Thomforde II*, 406 F.3d at 504 (noting same). Adding to the confusion, the paragraph containing the covenant not to sue in fact refers to the covenant and the broader "Release" as if the terms were completely interchangeable. *See id.* (noting same).

Id. at 1160–61.

Thomforde v. International Business Machines Corp., 406 F.3d 500, 95 FEP Cases 1145 (**8th Cir.** 2005), also held that these aspects of IBM's release and covenant not to sue were too confusing to meet the OWBPA requirements.

4. <u>Waiver of Arguments on Appeal</u>

Rodriguez-Marin v. Rivera-Gonzalez, 438 F.3d 72, 84 (**1st Cir.** 2006), held that defendants could not argue several points because they were briefed in only a conclusory manner.

> Defendants contend that the compensatory damages award lacked evidentiary support and also that it was excessive. In making these claims, they do not cite any First Circuit precedent. They do cite a Fourth Circuit case . . . which they miscite as a First Circuit case, and an unpublished decision from the District of Puerto Rico . . . . They also cite three Supreme Court cases for the proposition that actual injury is required for an award of compensatory damages. Further, in making this argument, defendants were obliged to present the facts in the light most favorable to the verdict but failed to do so. . . . Given the defendants' failure to specify the applicable law and their failure to present the facts in the light most favorable to the verdict, this argument is not sufficiently developed and thus waived. . . .

Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., 434 F.3d 75, 87–88, 17 AD Cases 769 (**1st Cir.** 2006), affirmed the judgment for the ADA harassment plaintiff on a jury verdict for $76,000 in compensatory damages and $160,000 in punitive damages. Plaintiff was repeatedly mocked by his supervisors and co-workers because of his appearance after receiving a penile implant. The court refused to consider defendant's argument that plaintiff had not shown he had a disability: "Were we forced to squarely confront it, the question of whether Arrieta suffered from a disability or was regarded as having a disability within the meaning of the ADA, as found by the jury, would be a difficult one. However, Wal-Mart failed to preserve appellate review of the issue by failing to renew its Rule 50 motion at the close of all the evidence." *Id.* at 87–88 (citations omitted). The court rejected defendant's argument that the court should exercise its discretion to waive the procedural default; holding that such discretion is "exceedingly narrow," and should be exercised in "'only very unusual circumstances,'" and that "[S]uch extraordinary

review is not warranted in this complicated case."

Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1250 n.1, 16 AD Cases 1197 (**10th Cir.** 2005), affirmed the judgment on a jury verdict for the ADA plaintiff. The court held that defendant waived its arguments as to jury instructions by failing to raise them until the appeal.

H. Complications Affecting Settlement Agreements

Apparent Authority: *Makins v. District of Columbia*, 861 A.2d 590, 596 (**D.C.** 2004), resolved a question certified to it by the U.S. Court of Appeals for the D.C. Circuit, and held that a client was not bound by an agreement at a mediation at which she was not present, but at which her attorney represented that he had authority and that she agreed to the settlement. The court explained:

> Applying these principles, we conclude that the two client manifestations contained in the certified question—ending the attorney to the court-ordered settlement conference and permitting the attorney to negotiate on the client's behalf—were insufficient to permit a reasonable belief by the District that Harrison had been delegated authority to conclude the settlement. Some additional manifestation by Makins was necessary to establish that she had given her attorney final settlement authority, a power that goes beyond the authority an attorney is generally understood to have. The District, in its briefs, points only to actions and representation of record by Harrison, not Makins, as support for the reasonableness of its belief. Thus, it asserts that "Mr. Harrison represented that Ms. Makins was available by telephone and that he would consult with her when appropriate"; that "Mr. Harrison spoke on his cell phone with plaintiff at least three times during the conference"; and that "[a]t one point, Mr. Harrison left the room to phone plaintiff about the defendant's latest settlement proposal, and returned, phone in hand, to accept the proposal with one new condition regarding amendment of personnel forms." All of this information (including information purportedly about the client, Makins) was known to the District of Columbia only through representations made by Harrison, the attorney.

(Footnote omitted.)

Limits on Nondisclosure: D.C. BAR ETHICS OPINION 335 (May 16, 2006), stated that a client may instruct his or her attorney not to disclose publicly available information about a case, and the lawyer must then comply with the client's wishes. However, such a restriction cannot be part of a settlement agreement, and it is improper either to request or agree to such a commitment. The ethics committee explained:

> If a client withholds permission for her lawyer to disclose public information, we agree that the lawyer must keep the information secret and that D.C. Rule 1.6 applies. A plaintiff settling a sexual harassment claim, for example, may wish to protect her privacy by not allowing her lawyer to publicize further any information about her case. A settlement agreement may require a lawyer to keep non-public information confidential. It is well established that non-public information, such as the terms of a settlement, may remain confidential. In addition to settlement terms, other non-public matters can be kept

> confidential, such as disputes that are never made public but which are decided through confidential arbitration procedures. The line that we draw is that the confidentiality of otherwise public information cannot be part of a settlement agreement even if the lawyer's client agrees that such a provision be included. Once the matter is public, a settlement agreement may not impose confidentiality on otherwise public matters without violating D.C. Rule 5.6(b). A lawyer may not propose or agree to such a confidentiality provision. In drawing this line we are striking a balance consistent with the rationale of the Rules and with widely accepted practices. . . . On the other hand, if the parties can agree to keep all public information about all cases confidential, clients' ability to identify qualified lawyers would be greatly restricted. A reasonable resolution is to draw a line between information that is public at the time of settlement and information that remains confidential. New York seems to have taken a similar approach. This balance between the well-accepted practice of keeping non-public settlements confidential, with the concomitant effect on the willingness of parties to settle, and allowing clients to identify experienced counsel by prohibiting confidentiality clauses in settlement agreements of otherwise public information, strikes us as a reasonable application of Rule 5.6(b). It also has the virtue of offering clear guidance to practitioners.

(Footnotes omitted.)

I. Enforcement of Settlement Agreements

Rivera v. Baker West, Inc., 430 F.3d 1253, 97 FEP Cases 4 (**9th Cir.** 2005), affirmed the dismissal of the Title VII plaintiff's claims pursuant to a settlement agreement, rejecting plaintiff's argument that defendant had not complied with the settlement agreement because it withheld taxes despite his being a former employee, holding that the recovery should be construed as a back-pay recovery, and rejecting his argument that his back pay recovery was a tort recovery in a personal-injury case.

J. Class Actions

1. General

Thorn v. Jefferson-Pilot Life Insurance Co., 445 F.3d 311 (**4th Cir.** 2006), involved racially discriminatory industrial life insurance policies. The court affirmed the denial of Rule 23(b)(3) class certification because of the predominance and superiority requirements. In discussing the borrowed State-law periods of limitations for § 1981 and § 1982 claims, the court stated: "We have held that a cause of action accrues under a borrowed statute of limitations 'either when the plaintiff has [actual] knowledge of his claim or when he [has constructive knowledge of his claim]—*e.g.,* by the knowledge of the fact of injury and who caused it—to make reasonable inquiry and that inquiry would reveal the existence of a colorable claim." *Id.* at 320. The court explained further: "Our circuit's accrual rule, which focuses on the contents of the plaintiff's mind, is not readily susceptible to class-wide determination. Examination of whether a particular plaintiff possessed sufficient information such that he knew or should have known about his cause of action will generally require individual examination of testimony from each particular plaintiff to determine what he knew and when he knew it." *Id.* The court held that it did not matter if defendant had the burden of persuasion on limitations, because plaintiffs

have the burden of showing that class certification is appropriate. The court explained:” There is no reason to believe that the defendant is any better-suited than the named plaintiffs to prove whether an issue is common to the class simply because the defendant bears the burden of proving the merits of that issue. We therefore continue, as we must, to allocate to the plaintiff the burden of proving compliance with Rule 23.” *Id.* at 322. As to the superiority question, the court stated:

> Rather, the district court also found that because each class member suffered unique damages, the class's claim for equitable restitution was likewise not susceptible to class-wide determination. Moreover, the district court found that allowing the case to proceed as a class action would present substantial manageability problems at trial. In particular, it focused on the facts that (1) at the individual hearings required for resolution of the statute of limitations defense, the fact-finder would have to apply one of four different states' laws (and, to some of the claims, possibly even federal law, *see* footnote 10) to supply the limitations period and the rules of equitable tolling, and (2) that the fact finder would be unable to evaluate the class's damages on a common basis. Finally, the district court found that the class action device was not necessarily superior to individual trials. Significantly, the district court noted that the small amount of each class member's claim would not dissuade an attorney from taking class member's individual cases because 42 U.S.C.A. § 1988 (West 2003) allows prevailing plaintiffs in §§ 1981 and 1982 actions to recover attorney's fees.

Id. at 327–28 (footnote omitted). The court stated at 328 n. 20: “While we are empathetic to Appellants' plight, even assuming that the class-action device is more favorable to Appellants than individual actions would be, it is not the task of the federal court to create class-action rules that favor those with whom we empathize.”

2. <u>Multi-Facility Classes</u>

Love v. Johanns, 439 F.3d 723 (**D.C. Cir.** 2006), affirmed the denial of class certification to a disparate-impact sex discrimination class under the Equal Credit Opportunity Act for lack of commonality, where litigation of the case would require examination of decisions made at thousands of local FHA offices.

The August 8, 2005, oral argument in *Dukes v. Wal-Mart Stores, Inc.*, No. 04–16688, can be heard on-line at the Impact Fund web page http://www.walmartclass.com/public_home.html and clicking on the link to the audio recording of the document. It is a fascinating recording, including the discussion of aggregate statistics versus location-by-location statistics, and a judge's objection to what the judge described as the arrogance with which the lower court was treated, the street- and alley-fighting tone of defendant's opening brief, and the suggestion that defense counsel should apologize to the district court.

3. <u>Claims for Equitable Relief</u>

Thorn v. Jefferson-Pilot Life Insurance Co., 445 F.3d 311 (**4th Cir.** 2006), involved racially discriminatory industrial life insurance policies. The court affirmed the denial of Rule 23(b)(2) class certification because defendant mooted the claim for injunctive relief by declaring

all of the policies in question "paid up," so that no disparate premiums were being collected. The court rejected plaintiffs' argument that Rule 23(b)(2) allows a claim for restitution because that is equitable relief. The court held that "certification under Rule 23(b)(2) is improper when the predominant relief sought is not injunctive or declaratory, even if the relief is equitable in nature." *Id.* at 331. The court distinguished Title VII claims:

> Appellants seek to counter this conclusion by arguing that such a holding is incompatible with Title VII case law where courts, including our own, have found certification proper under Rule 23(b)(2) despite the fact the prevailing plaintiffs are entitled to monetary relief in the form of backpay, which the courts have characterized as a form of equitable relief. *See, e.g., Albemarle Paper Co. v. Moody,* 422 **U.S.** 405, 416 (1975); *Robinson v. Lorillard Corp.,* 444 F.2d 791 (**4th Cir.** 1971). But this argument misconstrues our holding: we do not hold, nor have we ever held, that monetary relief is fundamentally *incompatible* with Rule 23(b)(2). Instead, we hold only that relief that is neither injunctive nor declaratory may not *predominate* over the injunctive and declaratory relief in a proper Rule 23(b)(2) action. This holding necessarily contemplates that some non-injunctive or non-declaratory relief, be it equitable or, possibly, legal, may be proper under Rule 23(b)(2), so long as it does not predominate. And in the Title VII context, awards of backpay do not predominate over the injunctive remedies available because the "calculation of back pay generally involves [relatively un]complicated factual determinations and few[ ] individualized issues." *Coleman v. Gen. Motors Acceptance Corp.,* 296 F.3d 443, 449 (6th Cir. 2002). In other words, our prior cases have held that Rule 23(b)(2) class certification is proper in the Title VII context not *because* backpay is an equitable form of relief, but because injunctive or declaratory relief predominates *despite* the presence of a request for back pay.[26]
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>
> [26] Even *Monumental,* on which Appellants so heavily rely in support of their Rule 23(b)(3) arguments, did not hold that Rule 23(b)(2) authorizes class-action suits that only seek equitable relief. Rather, in *Monumental,* the court found that injunctive relief predominated because the plaintiffs sought to compel the defendants to stop collecting premiums, and the record showed that 1 million to 4.5 million of the 5.6 million policies issued were still in effect. 365 F.3d at 418–19.
>
> On remand, the insurance companies in *Monumental* submitted evidence showing that only 2%, or approximately 112,000 of the policies at issue in that case were still in force and less than 1/10th of 1%, or fewer than 5,600 of those policies were still collecting premiums. *In re: Industrial Life Ins. Litigation,* MDL No. 1371 and consolidated MDLs, slip. op. at 4–5. The district court credited this evidence, and denied certification under Rule 23(b)(2) in part because of its finding that the injunctive relief sought by a "statistically insignificant" number of plaintiffs did not predominate over non-injunctive and non-declaratory relief. *Id* . at 9.

Id. at 331–32. The court held that claims for restitution can be either legal or equitable, and explained: "It is a legal remedy where the plaintiff cannot 'assert title or right to possession of particular property, but [he] might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him.' . . . It is an equitable remedy, by contrast, 'where money or property identified as belonging in good conscience to the plaintiff could

clearly be traced to particular funds or property in the defendant's possession. . . . But where the property sought to be recovered or its proceeds have been dissipated so that no product remains, the plaintiff's claim is only that of a general creditor' and the restitution claim is a legal one." *Id.* at 332. The court stated that there was no evidence here that the disparate premiums were traceable, so the restitution in question here was a legal, not equitable, remedy. Judge Michael dissented. *Id.* at 332–39.

4. <u>Class Action Fairness Act</u>

Hart v. FedEx Ground Package System Inc., 457 F.3d 675 (**7th Cir.** 2006), a challenge to the asserted independent-contractor status of defendant's drivers, held that a plaintiff seeking remand of a case removed to Federal court under CAFA has the burden of persuasion as to whether the home-state or local-controversy exceptions to the Act apply, but is entitled to discovery to assist in making that showing.

K. <u>Theory of the Case: Which Story Fits Best?</u>

The Supreme Court's decisions in *Reeves* and *Miller-El* teach that courts should view the facts of a case in terms of whether they best fit the plaintiff's story or the defendant's story.

Rodriguez-Marin v. Rivera-Gonzalez, 438 F.3d 72, 80–81 (**1st Cir.** 2006), affirmed the § 1983 judgment on a jury verdict for the political-discrimination plaintiffs. The court's treatment of the facts illustrates the "best fit" approach:

> First, plaintiffs presented ample evidence that their demotions were improper and the result of discrimination. Rodríguez and Escobar were long-standing employees of the AOC—Rodríguez since 1994 and Escobar since 1986—and both were considered competent employees. It is suspicious that both of them were demoted without being given any notice or opportunity to defend their promotions, especially since the initial explanation offered for the demotions was simply missing documentation. One would expect that Rodríguez and Escobar would first be consulted to determine if the necessary documentation had been misplaced. Further, these missing documents mysteriously reappeared after Rodríguez and Escobar presented their copies of the missing documents, and Rodríguez threatened an investigation over the missing documents. Even after the missing documents were replaced, Rodríguez and Escobar were not reinstated; rather, other justifications were given for their demotions. Finally, Rodríguez and Escobar's demotions appeared to be punitive. Rodríguez—despite her competency, experience, law degree, and notary certification—was reinstated into the low position of Social-Penal Technician I and placed in a dangerous environment at the maximum security prison in Ponce. Similarly, Escobar—despite her 14 years of experience with the AOC and having nearly finished her probationary period as Regional Head—was demoted to Social-Penal Technician IV.

The court ended with the following observation: "At the conclusion of the trial, the district court stated 'it is incredible that anybody would believe that there was not the slightest political motivation in what happened in this case. It is just unbelievable. It is an insult to the intelligence of the human being to think otherwise.' We agree." *Id.* at 85–86.

L. Amendment

Laber v. Harvey, 438 F.3d 404, 97 FEP Cases 846 (**4th Cir.** 2006) (*en banc*), held that the lower court abused its discretion in denying plaintiff's post-summary judgment motion for leave to amend to state a claim for religious discrimination. The court stated: "Delay alone, however, is an insufficient reason to deny the plaintiff's motion to amend. . . . For this reason, a district court may not deny such a motion simply because it has entered judgment against the plaintiff—be it a judgment of dismissal, a summary judgment, or a judgment after a trial on the merits." *Id.* at 427 (citations omitted). The court continued:

> We believe that under the unusual circumstances presented here, Laber's motion to amend must be granted. First, and most important here, there is no indication that Laber's omission from his original complaint of the legal theory he now seeks to pursue was in bad faith. In fact, Laber's original complaint was arguably proper under *Pecker* and *Morris.* Laber's case is not a run-of-the-mill case where the plaintiff's first theory of recovery is based on *his own* reading of our cases and it turns out that he misinterpreted how that theory would apply to the facts of his case. Instead, while Laber indeed misinterpreted how we would rule, his theory presented a close enough question under our prior cases that *we* deemed it necessary to grant rehearing en banc to overrule those cases. Moreover, Laber's diligence in filing his motion to amend after the district court entered summary judgment dispels any inference of bad faith.

Id. at 428. The court found a lack of prejudice, because the claim arose out of the same facts as plaintiff's other claims and the administrative record provided the necessary discovery. It also held that the amendment would not be futile. The court rejected defendant's argument as to timeliness: "While the Army now argues that Laber's religious discrimination claim is untimely because he filed his complaint more than 90 days after the OFO's April 10, 2000 denial of Laber's motion for reconsideration, it did not raise this argument in opposing Laber's motion to amend below. In the absence of exceptional circumstances, none of which the Army argues are present here, nonjurisdictional arguments not made to the district court are waived on appeal." *Id.* at 428–29 (footnotes omitted). Judge Wilkinson concurred. *Id.* at 432–33. Judge Widener concurred in part and dissented in part. *Id.* at 433. Judge Niemeyer concurred in part and dissented in part. *Id.* at 433–37.

M. Summary Judgment

Zambetti v. Cuyahoga Community College, 314 F.3d 249, 259–61, 90 FEP Cases 846 (**6th Cir.** 2002), reversed the grant of summary judgment to the Title VII and State-law defendants. Plaintiff was white and complained of racial discrimination favoring African-Americans in promotions. One successful candidate did not have three internal references. The lower court held that there was no evidence the Campus Police Chief was aware of the requirement, and the court of appeals held that his knowledge was a genuine issue of material fact. "Taking the evidence in the light most favorable to plaintiff, the memo establishes that the company policy required three references, even for inside candidates, and Chief Harris might have just conveniently ignored a company policy when it suited him." *Id.* at 260. The court held that the lower court erred in explaining away an unsatisfactory evaluation of a successful candidate just prior to her promotion by saying that she had not been placed on probation,

because the significant fact was the evaluation itself. *Id.* Similarly, the court held that the view of the SAC that security guard experience was not the same as police experience created a genuine issue of fact as to Chief Harris's testimony that he talked with the successful candidate's supervisor and was satisfied they were the same. "It appears that the district court took the testimony in the light most favorable to defendants on this issue. In the light most favorable to plaintiff, however, the SAC correctly believed that security guard experience is not police experience, and Chief Harris disregarded the requirement so that he could hire an African-American." *Id.* The SAC recommended plaintiff and Isiac Jones, an African-American who was promoted, but Jones lacked the required qualification of shooting-range qualification in the year of the promotion. Jones had not range-qualified in two years. The court of appeals disapproved the lower court's approach to this evidence, which was to grant summary judgment on the basis that plaintiff had not proven Chief Harris knew about the lack of qualification. The court held that this approach involved impermissible determinations of credibility:

> However, taking the facts in the light most favorable to the plaintiff, the document shows that Mr. Jones was not range-qualified on a weapon, and, therefore, did not meet the minimum requirements for the position. Or at worst for plaintiff, while not conclusively showing that Mr. Jones was not qualified, it shows that a person reviewing candidates' qualifications should have noted the omission and inquired about the reasons Mr. Jones's qualifications were not indicated. Instead, the district court simply credited Chief Harris's testimony that he did not know about the lack of range qualification and found that just because Harris's subordinates knew about the lack of range qualification did not give rise to an inference that Mr. Harris knew.

Id. at 260. The court further held that, although the SAC did not mention Jones' lack of range qualification, because "Chief Harris was responsible for recommending qualified candidates, a jury could reasonably conclude that Harris did know about the lack of qualification and decided to overlook it in favor of hiring an African-American candidate." *Id.* at 260–61.

N. Pretrial Order

El-Hakem v. BJY Inc., 415 F.3d 1068, 1077, 96 FEP Cases 84, 10 WH Cases 2d 1313 (**9th Cir.** 2005), *cert. denied*, __ **U.S.** __, 126 S. Ct. 1470, 164 L.Ed.2d 248 (2006), affirmed the judgment for the § 1981 and Title VII plaintiff for $15,000 in compensatory damages and $15,000 in punitive damages because of a hostile working environment based on race and national origin. The court held that defendant is required to list all of its defenses in the pretrial order, whether or not plaintiff has the burden of proof. Here, it was sufficient that defendant listed the defense with respect to a different claim.

O. Evidentiary Rulings Through Trial

1. Preemptive Use of Evidence to Which the Court Has Denied a Motion *in Limine*

Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc., 439 F.3d 894, 904, 17 AD Cases 1153 (**8th Cir.** 2006), affirmed the judgment on a jury verdict to the ADA plaintiff on all issues other than punitive damages. The court held that the contents of a letter sent by defense counsel

were admissible if detached from the letterhead showing it was from counsel, because it was an admission and not an offer of compromise. In examining a witness, defendant used the contents of the letter preemptively. The court held that defendant thereby waived its objection to the admission of the letter: "'Generally, a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted.' *Ohler v. United States*, 529 **U.S.** 753, 755, 120 S. Ct. 1851, 146 L. Ed. 2d 826 (2000). Dr Pepper cannot avoid the consequence of its own trial tactic by arguing it was forced to introduce the evidence during the direct examination of Dixson to diminish the prejudice." (Citation omitted.)

2. Ethnic References in a Sexual Harassment Case

Farfaras v. Citizens Bank and Trust of Chicago, 433 F.3d 558, 564–65, 97 FEP Cases 391 (**7th Cir.** 2006), affirmed the judgment on a jury verdict for the Title VII and State-law sex discrimination and sexual harassment plaintiff for $200,000 in compensatory damages and $100,000 in punitive damages against the individual State-law defendants, $50,000 against the corporate Title VII defendant, $9,314.48 in lost wages, and $436,766.75 in attorneys' fees and costs. The court rejected defendant's argument that the lower court erroneously admitted evidence of ethnic references in a case in which no ethnic discrimination was claimed, because the ethnic references were demeaning, were intertwined with the sexually harassing statements and actions, and served to "legitimize" in defendants' eyes the targeting of plaintiff for their lewd conduct. The court stated:

> In the instant case, however, the comments concerning Farfaras's Greek ancestry were intertwined with sexual harassment. The defendants used her heritage as a qualifier in the course of their harassment ("[H]e would tell me again about me being the most beautiful Greek woman that he's ever met, and he told me that, again, most Greek women are—look like Greek men [.]"), as a method of belittling Farfaras and leaving her susceptible to sexual attacks (insulting Greek Town directly before crudely propositioning Farfaras to have sex on the defendant's boat), and claiming that her country of origin was the only thing keeping her from him ("[I]f only I was a little younger and Greek."). We find that the district court acted properly in allowing this testimony.

The court also relied on the fact that the ethnic references were not as bad as the sexually harassing statements and conduct, and stated that it was unlikely that the remarks would have substantially swayed the jury. Finally, the court held that the ethnic references were relevant to plaintiff's claim for the intentional infliction of emotional distress.

3. Lay Testimony that Plaintiff Seemed Depressed

Farfaras v. Citizens Bank and Trust of Chicago, 433 F.3d 558, 565, 97 FEP Cases 391 (**7th Cir.** 2006), affirmed the judgment on a jury verdict for the Title VII and State-law sex discrimination and sexual harassment plaintiff for $200,000 in compensatory damages and $100,000 in punitive damages against the individual State-law defendants, $50,000 against the corporate Title VII defendant, $9,314.48 in lost wages, and $436,766.75 in attorneys' fees and costs. The court rejected defendant's argument that the lower court erroneously admitted lay witness testimony that plaintiff was depressed: "Not only was Yonan's description of Farfaras

elicited from the defendants' own cross-examination . . . but there is nothing in the record to indicate the jury would have believed Yonan was offering a clinical opinion or professional evaluation." The court added: "While 'depressed' does have a medical definition, a reasonable jury can be expected to understand the difference between lay use of an adjective and an expert's use of the same word to describe a specific psychological condition." (Footnote omitted.) For the same reasons, the court held that the lower court did not abuse its discretion in refusing to give defendant's proposed instruction that the jury should disregard the term, and rejected "the defendants' claim that the use of the word 'depressed' represented an outcome-determinative legal conclusion on the issue of intentional infliction of emotional distress." *Id.* at 466.

4. Privilege

Willy v. Administrative Review Board, 423 F.3d 483, 495, 23 IER Cases 554 (**5th Cir.** 2005), reversed the ARB's dismissal of petitioner's 1984 whistleblower complaint. Petitioner contended that he was fired because he had prepared an internal report, as in-house counsel, finding significant environmental problems at a facility. The ARB found that the report was protected by attorney-client privilege and dismissed petitioner's complaint because it could not be proven without the report. The court held that Federal law governed the question of attorney-client privilege: "As Willy's claims arise under federal law—and are before us on federal question jurisdiction under 28 U.S.C. § 1331—the federal common law of attorney-client privilege governs our analysis." *Id.* at 495. The court held that the "breach of duty" exception to attorney-client privilege applies. The court explained the exception: "Supreme Court Standard 503(d) states that no attorney-client privilege exists '[a]s to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to the lawyer. . . .'" *Id.* at 496 (footnote omitted). The court also relied on Rule 1.6(b)(2) of the Model Rules of Professional Conduct, which it quested as follows:

> A lawyer may reveal ... information [relating to representation of a client] to the extent the lawyer reasonably believes necessary ... to establish *a claim* or defense *on behalf of the lawyer in a controversy between the lawyer and the client,* to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, *or to respond to allegations in any proceeding concerning the lawyer's representation of the client.*

Id. (emphasis supplied by the court. The court pointed out that DR 4–101(c) also recognizes the exception. The court rejected the ARB's and the First Circuit's view that the exception applies only to defensive use of the privileged materials:

> The case law amply demonstrates the narrower proposition that the attorney-client privilege only prohibits a party from *simultaneously* using confidential information as both a shield and a sword. Stated differently, the "shield *and* sword" analogy is conjunctive: it does not stand broadly for the proposition that an attorney may never use confidential information offensively. That analogy is a product of our parallel reasoning behind the doctrine of implied waiver: a party may not use privileged information both offensively and defensively at the same time. In other words, when a party entitled to claim the attorney-client privilege uses confidential information against his adversary (the sword), he implicitly waives its use protectively (the shield) under that privilege.

Id. at 497 (footnotes omitted). The court limited its holding to administrative proceedings: "What is *not* before us is a suit involving a jury and public proceedings, so we leave that possibility for another day. Today, we merely hold that no rule or case law imposes a *per se* ban on the offensive use of documents subject to the attorney-client privilege in an in-house counsel's retaliatory discharge claim against his former employer under the federal whistleblower statutes when the action is before an ALJ." *Id.* at 500–01(emphasis in original).

5. Applications for Disability Coverage

Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1253–54, 16 AD Cases 1197 (**10th Cir.** 2005), affirmed the judgment on a jury verdict for the ADA plaintiff. The court held that the lower court did not abuse its discretion in refusing to admit most of plaintiff's applications for disability coverage. The court explained: "While we agree with Rubbermaid that *Cleveland* does not mandate exclusion of the disability documents at trial, we also conclude that *Cleveland* does not necessarily mandate their admission. We recognize, as the district court did, that given the different types of disabilities relevant in various contexts, the documents in question might have created jury confusion, at least in the circumstances of this case, so that it was not an abuse of discretion to exclude them. We also conclude that no showing has been made that admission of the documents would have resulted in a different verdict."

6. Evidence Not Previously Disclosed

Hammel v. Eau Galle Cheese Factory, 407 F.3d 852, 16 AD Cases 1185 (**7th Cir.**), *cert. denied*, __ **U.S.** __, 126 S. Ct. 746, 163 L. Ed. 2d 572 (2005), affirmed the judgment after a bench trial for the ADA defendant, and held that the lower court did not abuse its discretion in refusing to allow plaintiff's expert to testify about opinions that were not disclosed in an expert report ninety days before the trial, as required by Rule 26(a)(2)(C), FED. R. CIV. PRO., when there was no explanation for the failure. "The court accordingly limited Davis's testimony to those assertions that had been disclosed in a timely-filed affidavit attached to Hammel's motion for summary judgment." *Id.* at 869. The court held that the lower court did not abuse its discretion in allowing defendant to introduce testimony not previously disclosed, to when it was introduced to impeach plaintiff's statements in cross-examination at trial. The court stated that the exception for impeachment evidence may not apply where the impeachment evidence also goes to substance, but held that plaintiff's failure to develop his argument made it unnecessary to decide the issue. *Id.* at 870 n.13.

P. Evidence to Be Considered on JMOL

Springer v. Henry, 435 F.3d 268, 281, 23 IER Cases 1658 (**3d Cir.** 2006), affirmed the judgment on a jury verdict for the First Amendment retaliation plaintiff. Defendant appealed the award of compensatory damages. The court held that the jury was entitled to rely on the calculations of plaintiff's expert, and that the testimony of defendant's expert was not to be considered.

Q. Verdicts and Verdict Forms

El-Hakem v. BJY Inc., 415 F.3d 1068, 1074–75, 96 FEP Cases 84, 10 WH Cases 2d 1313 (**9th Cir.** 2005), *cert. denied*, __ **U.S.** __, 126 S. Ct. 1470, 164 L.Ed.2d 248 (2006), affirmed the

judgment for the § 1981 and Title VII plaintiff for $15,000 in compensatory damages and $15,000 in punitive damages because of a hostile working environment based on race and national origin, arising from defendant's manager's insistence on using the nickname "Manny" for plaintiff. "Despite El-Hakem's strenuous objections, Young insisted on using the non-Arabic name rather than 'Mamdouh,' El-Hakem's given name. In Young's expressed view, a 'Western' name would increase El-Hakem's chances for success and would be more acceptable to BJY's clientele." *Id.* at 1071. The jury found defendant Young liable, but not the defendant company. The lower court found the special verdicts inconsistent and reconciled them by finding the company liable. The court stated that a trial court faced with seemingly inconsistent responses has a duty to harmonize the verdict when possible, *id.* at 1074, and held that the lower court had properly done so here:

> In this case, the district court recognized that its failure to give a requested vicarious liability instruction led to the inconsistent responses from the jury. Because the evidence established that Young was acting in the scope of his employment at all pertinent times, BJY was liable for Young's acts as a matter of law, and the district court properly amended the judgment to include BJY's vicarious liability for race discrimination. Because the jury was not instructed that it must find against BJY if it found against Young, the jury responses could be reconciled by considering the probable effect on the jury of not having the benefit of the correct instructions. The district court reasonably concluded that the special verdicts were inconsistent due to the lack of appropriate instructions. Having concluded that inclusion of the vicarious liability instruction would have inevitably resulted in consistent verdicts of liability against both defendants, the district court did not abuse its discretion by amending the judgment to impose vicarious liability upon BJY.

Id. at 1074–75 (footnote omitted).

Bains LLC v. Arco Products Co., 405 F.3d 764, 770–71 (**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 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.

R. <u>Back Pay</u>

1. <u>Causation</u>

Voeltz v. Arctic Cat, Inc., 406 F.3d 1047, 16 AD Cases 1208 (**8th Cir.** 2005), vacated the back pay award on plaintiff's ADA failure-to-accommodate claim, because there was no evidence that plaintiff lost his job as a result of defendant's failure to engage further in the interactive process, and the jury had rejected his disparate-treatment claim by finding that defendant would have made the same decision regardless of plaintiff's multiple sclerosis.

2. Unconditional Offers of Reinstatement

Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc., 439 F.3d 894, 905, 17 AD Cases 1153 (**8th Cir.** 2006), affirmed the judgment on a jury verdict to the ADA plaintiff on all issues other than punitive damages. The court rejected defendant's argument that plaintiff's back pay should have ended because of its reinstatement letter, citing the district court's actions with approval: "The district court also remarked Dr Pepper's July 30 offer was not an unconditional offer of reinstatement, because the offer was conditioned on Canny arranging his own transportation, making wage concessions, and relocating. The district court further reasoned Dr Pepper failed to engage in discussion with Canny regarding the accommodations of that position."

3. Mitigation

Borges Colon v. Roman-Abreu, 438 F.3d 1 (**1st Cir.** 2006), affirmed the judgment for the First Amendment political-affiliation plaintiffs, holding that there was sufficient evidence that defendants' privatization of the municipal sanitation department was motivated by discrimination. The court rejected defendants' argument that plaintiffs failed to mitigate by failing to apply for jobs in two municipal departments: "When there was evidence the Mayor instructed ARB and municipal officials not to hire the laid-off employees in San Lorenzo, he is ill-situated to argue that the employees should have, despite the demonstrated futility of requesting jobs, made the requests anyway." *Id.* at 21.

4. Jury Determinations

Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., 434 F.3d 75, 91, 17 AD Cases 769 (**1st Cir.** 2006), affirmed the judgment for the ADA harassment plaintiff on a jury verdict for $76,000 in compensatory damages and $160,000 in punitive damages. The court rejected plaintiff's argument that the lower court erred in denying his post-verdict motion for back pay and front pay in addition to the compensatory-damage award:

> As the district court correctly noted, in this circuit when the jury is asked, as here, to resolve issues of liability and compensatory damages, the issue of back pay is normally decided by the jury as well. . . . Here, Arrieta did not advise the court before the jury was instructed that he wished to reserve the issue of back pay from the compensatory damages calculation by the jury, nor did he object to the instructions on compensatory damages. So the district court was not put on notice that Arrieta wished to have the issue of back pay decided by the court. We are not inclined to hold the plaintiff harmless from the foreseeable consequences of his actions.

(Citations omitted.) The court did not mention the provisions of the Civil Rights Act of 1991 that effectively reserve back pay for the court and allow jury trials only of common-law damage claims. 42 U.S.C. §§ 1981a(b)(2) and (c). It did, however, state that plaintiff failed to present evidence of his efforts to mitigate his back pay by seeking other employment, but did not explain why it placed the burden of showing mitigation on plaintiff, instead of placing the burden on defendant of showing failure to mitigate.

5. **Calculation**

Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1250 n.1, 16 AD Cases 1197 (**10th Cir.** 2005), affirmed the judgment on a jury verdict for the ADA plaintiff. The court held that there was sufficient evidence of back pay and front pay to support the jury award of compensatory damages, once the value of fringe benefits—an additional 40% of pay—was taken into account. *Id.* at 1252. The court rejected defendant's attack on the award based on an asserted failure to mitigate: "The evidence of Ms. Praseuth's efforts by way of mitigation of damages (evidence that she applied for several jobs, searched classified job advertisements, and made monthly visits to the Kansas Job Services Offices) was sufficient to preclude interference with the jury's determination, with the aid of the trial court's instruction on mitigation, of the amount of her compensatory damages." *Id.* at 1253.

S. **Front Pay**

Voeltz v. Arctic Cat, Inc., 406 F.3d 1047, 16 AD Cases 1208 (**8th Cir.** 2005), vacated the front pay award on plaintiff's ADA failure-to-accommodate claim, because there was no evidence that plaintiff lost his job as a result of defendant's failure to engage further in the interactive process, and the jury had rejected his disparate-treatment claim by finding that defendant would have made the same decision regardless of plaintiff's multiple sclerosis.

T. **Reinstatement**

Borges Colon v. Roman-Abreu, 438 F.3d 1, 20 (**1st Cir.** 2006), affirmed the judgment for the First Amendment political-affiliation plaintiffs, holding that there was sufficient evidence that defendants' privatization of the municipal sanitation department was motivated by discrimination. The court affirmed the reinstatement order:

> Plaintiffs presented strong evidence of a First Amendment violation, and many of the career plaintiffs have not found work in the aftermath. The possibility of workplace antagonism, and the upheaval that will be caused by finding jobs for the fired workers, are the "foreseeable sequelae of defendant[s'] wrongdoing," *Rosario-Torres,* 889 F.2d at 322. Nor do the damage awards obviate the need for reinstatement. *See Hiraldo-Cancel,* 925 F.2d at 13 (noting that often, "[w]hen a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole," because "[t]he psychological benefits of work ... are real and cannot be ignored") (first alteration in original) (internal quotation marks omitted) (quoting *Allen v. Autauga County Bd. of Educ.,* 685 F.2d 1302, 1306 (11th Cir. 1982)). Defendants' last argument, that the career plaintiffs do not have "clean hands," is without merit. On the evidence at trial, those plaintiffs who did not apply for jobs had good reason for their decisions both as to ARB, where working conditions were poor, and as to the Municipality, where they had every reason to believe they were unwelcome.

U. **Liquidated Damages**

Cross v. New York City Transit Authority, 417 F.3d 241, 252–57, 96 FEP Cases 239 (**2d Cir.** 2005), held that defendant's status as a public agency did not exempt it from an award of liquidated damages. *Id.* at 256–57. The court rejected defendant's argument that liquidated

damages are unavailable unless plaintiffs show that a decisionmaker had actual knowledge of the ADEA, holding that "reckless disregard" is an alternative basis for finding liability. The court stated:

> In this case, the evidence was sufficient to support a jury finding that the defendants recklessly disregarded federal law prohibiting age discrimination. Viewed in the light most favorable to the plaintiffs, the evidence shows that Transit Authority supervisors who made age-hostile remarks to and about Cross and Francis deliberately afforded these men less training than younger provisional Maintainers in order to have an excuse to demote them. The creation of a calculated subterfuge to support an adverse employment action supports an inference that the employer knew or recklessly ignored the fact that their real reason for demoting the plaintiffs—age—was unlawful.

Id. at 253 (citations omitted). The court also relied on the fact that the union had complained of racial discrimination against these older African-American employees:

> Further supporting this inference is evidence that the union specifically complained to defendants that their treatment of Cross and Francis was impermissibly discriminatory. Although these complaints apparently focused on plaintiffs' race rather than age, the fact that defendants ignored the warning and proceeded to demote plaintiffs, to replace them with younger Helpers, and to place these younger hires in a structured training program strengthens the inference that the defendants were "indifferent" to whether federal law proscribed age discrimination; their "calculated" purpose was to develop a corps of young Maintainers.

Id. (citation omitted).

V. Compensatory Damages

1. Amount

Rodriguez-Marin v. Rivera-Gonzalez, 438 F.3d 72 (**1st Cir.** 2006), affirmed the damages awarded by the jury: "The jury awarded Rodríguez back pay of $3,500 per month, $180,000 in compensatory damages, and $120,000 in punitive damages against Dávila. The jury awarded Escobar back pay of $3,306 per month, $105,000 in compensatory damages, and $195,000 in punitive damages against Dávila." *Id.* at 79. The court rejected defendants' argument that the compensatory damages were excessive. The court stated that "defendants were obliged to present the facts in the light most favorable to the verdict but failed to do so," and failed to cite the appropriate law. *Id.* at 84. The court held: "Given the defendants' failure to specify the applicable law and their failure to present the facts in the light most favorable to the verdict, this argument is not sufficiently developed and thus waived." *Id.* The court then added that the verdict was supported by the record, and stated at 84 n.6: "Rodríguez testified that as a result of her demotion and transfer to a dangerous, high-security prison, she sought emotional therapy through state insurance. Defendants stated that Rodríguez voluntarily decided to seek state benefits and was not compelled to do so. Escobar testified that as a result of her demotion she was forced to seek psychological help, she needed medication to sleep well, and her credit was

harmed. Defendants argue, without any evidentiary support, that Escobar's emotional condition was not the result defendants' actions but caused by her poor credit history and divorce."

Farfaras v. Citizens Bank and Trust of Chicago, 433 F.3d 558, 565, 97 FEP Cases 391 (**7th Cir.** 2006), affirmed the judgment on a jury verdict for the Title VII and State-law sex discrimination and sexual harassment plaintiff for $200,000 in compensatory damages and $100,000 in punitive damages against the individual State-law defendants, $50,000 against the corporate Title VII defendant, $9,314.48 in lost wages, and $436,766.75 in attorneys' fees and costs. The compensatory damages included $100,000 for pain and suffering and $100,000 for the loss of dignity. The court held that the award was not excessive despite the lack of expert testimony, because there was adequate evidence of the effect of defendants' harassment on plaintiff. The court described the evidence: "Farfaras and other witnesses testified that as a result of the defendants' actions, Farfaras lost self-esteem, gained weight, had problems sleeping, changed demeanor, and became nervous. Although Farfaras never consulted a medical professional about her unhappiness, Farfaras's friend Yonia Yonan testified that Farfaras had been 'very depressed' beginning early in the year 2000." *Id.* at 563. The court held that the award was roughly comparable to awards in similar cases, and explained:

> Although we cannot completely analogize the damage award in this case to an identical case with either a similar or dissimilar verdict, such an exact analogy is not necessary. "Awards in other cases provide a reference point that assists the court in assessing reasonableness; they do not establish a range beyond which awards are necessarily excessive. Due to the highly fact-specific nature of Title VII cases, such comparisons are rarely dispositive." . . . Some of the cases presented by the defendants appear more egregious with lower damages, while some of the cases presented by Farfaras appear less egregious with higher damages. Our responsibility, however, is not to fit this case into a perfect continuum of past harms and past awards. Rather, our role in reviewing awards for abuse of discretion is to determine if the award in this case was roughly comparable to similar cases, such that the instant award was not so beyond the pale as to constitute an abuse of discretion.

Id. at 565–67.

2. Mitigation

Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., 434 F.3d 75, 91, 17 AD Cases 769 (**1st Cir.** 2006), affirmed the judgment for the ADA harassment plaintiff on a jury verdict for $76,000 in compensatory damages and $160,000 in punitive damages. The court relied on plaintiff's repeated internal complaints in rejecting defendant's argument that plaintiff failed to mitigate his damages.

W. Punitive Damages

1. Entitlement

United States v. Space Hunters, Inc., 429 F.3d 416, 427–28 (**2d Cir.** 2005), reversed the denial of punitive damages under the Fair Housing Act, holding that there was ample evidence of malice or reckless indifference in defendant's recidivism, erasing tape recordings of calls, use of

vulgarity to drive away disabled applicants, and likelihood of future violations. The court explained:

> *First,* there can be no dispute that McDermott was generally—indeed acutely—aware of the FHA. A consent judgment had been previously entered against him in which he was "personally" enjoined from violating the FHA, expressly including discriminating in housing on the basis of a disability. And the State of New York revoked his real estate license in 1997, in part because of FHA violations. Moreover, McDermott's letters to HUD during the course of its investigation into Toto's complaint demonstrate a vast, if skewed, awareness of the FHA. Thus, McDermott cannot argue that he did not know about the FHA. . . .
>
> *Second,* the Government presented evidence that defendants "discriminate[d] in the face of a perceived risk that [their] actions ... violate[d]" the FHA. . . . For example, the jury could have inferred that McDermott knew he was acting improperly based on the fact that he erased his recordings of the telephone conversations at issue in this case—recordings that he purportedly made to protect himself from allegations of misconduct. *Cf. EEOC v. Wal-Mart Stores, Inc.,* 156 F.3d 989, 993 (**9th Cir.** 1998) (stating that evidence of a defendant's actions to cover up discriminatory conduct can support an inference that the defendant acted with reckless indifference to a federally protected right).
>
> *Third,* the record is awash with evidence of "egregious" and "outrageous" acts by defendants that could support an inference of the requisite "'evil motive.'" . . . McDermott did not simply hang up on relay calls. He used profanity "to chase them away from continuing to call back." . . . He told Toto to "eat shit, asshole"—not the most judicious of remarks—and that Space Hunters does not do business with disabled people. . . . McDermott also threatened Toto with harassment charges if he called Space Hunters again. And McDermott told the HUD investigator that "if a disabled person, a hearing impaired person would come to [his] office . . . they would not gain entry into the building."
>
> *Finally,* given McDermott's history, this case is particularly appropriate for consideration of punitive damages. "[T]he purpose of punitive damage awards is to punish the defendant and to deter him and others from similar conduct in the future." . . . McDermott is an FHA recidivist.

(Citations omitted.)

Springer v. Henry, 435 F.3d 268, 281, 23 IER Cases 1658 (**3d Cir.** 2006), affirmed the judgment on a jury verdict for the First Amendment retaliation plaintiff. Defendant appealed the award of punitive damages. The court held that the requirements for punitive damages are disjunctive, and that plaintiff's evidence of Henry's displays of emotion adequately showed that her conduct was callous or malicious:

> The jury finding of callous or malicious behavior also is supported by Henry's attitude toward Dr. Springer and the medical staff in general. Dr. Sylvester testified that

> Henry viewed her interactions with the medical staff, including Dr. Springer, as "adversarial." . . . Three witnesses—Henry, Dr. Sylvester, and Dr. Springer—testified that Henry was upset and unhappy with Dr. Springer. Dr. Springer testified that during meetings of the DPC Governing Body Henry was "angry and spoke [to him] with a lot of emotion," . . . Based on its observations at trial, the jury could have concluded that Henry acted vindictively.

Le v. University of Pennsylvania, 321 F.3d 403, 407–09, 91 FEP Cases 310 (**3d Cir.** 2003), affirmed the judgment for plaintiff, and held that punitive damages were appropriately awarded where plaintiff claimed that his supervisor was racially biased and the decisionmaker reassigned the same supervisor to plaintiff after satisfying himself the supervisor was not racist by watching his interactions on the basketball court with a racially diverse team. The court stated: "The decisionmaking process used by Dr. Palladino could easily have been viewed by the jury as demonstrating 'reckless indifference' towards Le's federally protected rights. Also, there was additional evidence that Le presented a lengthy rebuttal in response to a bad performance review, which was then cursorily handled by the University's administration. Further, the District Court noted that upon receiving Le's complaint, and before concluding its investigation, the administration failed to counsel and advise Le's supervisors and colleagues about the evils of discrimination. In all, sufficient evidence exists to support the jury's verdict."

Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc., 439 F.3d 894, 903–04, 17 AD Cases 1153 (**8th Cir.** 2006), reversed the punitive damages award on a jury verdict to the ADA plaintiff. The court stated that Federal law imposes "'a formidable burden'" on plaintiffs seeking punitive damages, and continued:

> Although we concluded sufficient evidence supports the jury's finding Dr Pepper intentionally and unlawfully discriminated against Canny by failing to accommodate him, Dr Pepper's conduct did not, as a matter of law, rise to the level of malice or reckless indifference.
>
> Dr Pepper did not offer Canny reassignment to an available position in the warehouse because Dr Pepper believed Canny's poor vision created a safety risk to Canny and to others. Dixson based that safety concern on a serious arm injury sustained by another employee in the warehouse just six months earlier. Dixson also testified she had "very, very serious concerns about [Canny's] safety if he was operating . . . a forklift." Dixson said she logically equated Canny's inability to operate a motor vehicle, with an inability to operate motorized equipment in the plant. Dixson testified, "I believe that the basis of our decision to disallow [Canny] to drive a forklift would be substantiated by an OSHA investigator or by [a] medical professional as putting [Canny] and the other employees at undue risk." Dr Pepper reasonably perceived itself caught between federal regulations under the Occupational Safety and Health Administration and federal law under the ADA, and made a culpable, but not malicious or reckless, decision based upon safety concerns.
>
> Although these reasons are not enough to escape liability under the ADA, they do not constitute the type of malicious intent or reckless indifference required to support an award of punitive damages.

(Citations omitted.)

Bains LLC v. Arco Products Co., 405 F.3d 764, 774 (**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.

(Footnote omitted).

2. Evidence

Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., 434 F.3d 75, 90, 17 AD Cases 769 (**1st Cir.** 2006), affirmed the judgment for the ADA harassment plaintiff on a jury verdict for $76,000 in compensatory damages and $160,000 in punitive damages. The court rejected defendant's argument that there was no evidence supporting vicarious liability, where plaintiff had repeatedly

complained to store-level officials:" Wal-Mart argues that any conscious wrongdoing by supervisors could not be imputed to Wal-Mart because there was a lack of evidence that the managers who taunted Arrieta and ignored his complaints were acting within the scope of their employment. We reject this argument; we agree with the district court that, on these facts, a reasonable jury could have found that the supervisors were acting in the scope of their employment."

3. <u>Affirmative Defense</u>

Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., 434 F.3d 75, 90, 17 AD Cases 769 (**1st Cir.** 2006), affirmed the judgment for the ADA harassment plaintiff on a jury verdict for $76,000 in compensatory damages and $160,000 in punitive damages. The court rejected defendant's argument that any evidence of good faith bars punitive damages: "Wal-Mart's position is wrong and would allow companies to pay lip service to the law while blatantly violating it." The court added: "On these facts, a jury could easily conclude that the open door policy was a sham designed to give the appearance, but not the reality, of an effort to comply with the law, and that Wal-Mart acted with reckless disregard of Arrieta's rights."

4. <u>Instructions</u>

Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., 434 F.3d 75, 89–90, 17 AD Cases 769 (**1st Cir.** 2006), affirmed the judgment for the ADA harassment plaintiff on a jury verdict for $76,000 in compensatory damages and $160,000 in punitive damages. The court held that the following instruction was close enough to *Kolstad* to be permissible:

> In order to find punitive damages, you must find that the acts of the Defendant which proximately caused actual damages to the Plaintiff were maliciously or wantonly done. If you so find, you may add to the award of actual damages such amount as you shall agree to be proper as punitive damages.
>
> An act or failure to act is maliciously done if prompted or accompanied by ill-will, spite or grudge, either toward the injured person individually or towards all persons in one or more groups or categories of which the injured person is a member. An act or failure to act is wantonly done if done in reckless or callous disregard of, or indifference to the rights of one or more persons, including the injured person.

5. <u>Punitive-Damage Amounts After *State Farm*: Civil Rights Cases</u>

Rodriguez-Marin v. Rivera-Gonzalez, 438 F.3d 72, 84 (**1st Cir.** 2006), affirmed the punitive damages awarded by the jury: "The jury awarded Rodríguez back pay of $3,500 per month, $180,000 in compensatory damages, and $120,000 in punitive damages against Dávila. The jury awarded Escobar back pay of $3,306 per month, $105,000 in compensatory damages, and $195,000 in punitive damages against Dávila." *Id.* at 79. The court held that the award was reasonable:

> The jury found that Dávila intentionally demoted plaintiffs because of their political affiliation. Dávila's act also jeopardized plaintiffs' livelihood. As a result of their demotions, Rodríguez's salary was reduced by 60 percent and Escobar's salary was

> reduced by 43 percent. Both plaintiffs suffered harms to their professional careers, were unable to meet their financial obligations because of their reduced salaries, and suffered emotional distress for which they sought medical attention.

Id. at 85. In addition, the multiple of compensatory damages, and their magnitude, was favorable.

Farfaras v. Citizens Bank and Trust of Chicago, 433 F.3d 558, 567, 97 FEP Cases 391 (**7th Cir.** 2006), affirmed the judgment on a jury verdict for the Title VII and State-law sex discrimination and sexual harassment plaintiff for $200,000 in compensatory damages and $100,000 in punitive damages against the individual State-law defendants, $50,000 against the corporate Title VII defendant, $9,314.48 in lost wages, and $436,766.75 in attorneys' fees and costs. The court rejected defendants' attack on the punitive-damage award. "The defendants openly boasted of their substantial wealth and indicated their belief that this wealth allowed them to flout the law and harass a young woman. One purpose of punitive damages is to dissuade defendants who are unaffected by compensatory damages from the misapprehension that they are beyond the reach of civil penalties." The court also relied on the fact that the punitive-damages award was only half of the compensatory-damages award.

Bains LLC v. Arco Products Co., 405 F.3d 764, 770–71 (**9th Cir.** 2005), affirmed the judgment of liability and the award of $50,000 in compensatory damages for losses caused by breach of contract and $1 in nominal damages for racial discrimination pursuant to the rule that a corporation cannot claim emotional distress 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 limited its prior holdings:

> Flying B argues that we should sustain the $5 million amount under *Swinton,* because there we upheld a $1 million punitive damages for racial harassment where the compensatory damages award was $35,600. That argument is not persuasive for several reasons. First, *Swinton* involves a much lower award, $1 million instead of $5 million, and less than one-third the ratio—punitive damages that were only 28, not 100, times the compensatory damages. Second, we decided *Swinton* before the Supreme Court decided *State Farm,* which limits *Swinton. State Farm* emphasizes and supplements the *BMW* limitation by holding 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." In *Zhang v. American Gem Seafoods, Inc.,* a post-*State Farm* § 1981 race discrimination case, we took note that "few awards exceeding a single digit ratio" will satisfy due process, although this is not a "brightline rule," and upheld the award because it was only seven times the amount of compensatory damages.
>
> We need not rely solely on the ratio, because the third *BMW* guidepost—which looks to the difference between the amount of punitive damages awarded and the civil penalties authorized or imposed in comparable cases—provides us with another measure that restrains the permissible amount. Both pre-*State Farm* in *Swinton,* and post-*State Farm* in *Zhang,* we noted that the $300,000 statutory limitation on punitive damages in Title VII cases was an appropriate benchmark for reviewing § 1981 damage awards, even though the statute did not apply to § 1981 cases.

> Flying B argues that the huge corporate assets of ARCO justify a higher award than might be justified for a defendant less able to pay it. A punitive damages award is supposed to sting so as to deter a defendant's reprehensible conduct, and juries have traditionally been permitted to consider a defendant's assets in determining an award that will carry the right degree of sting. But there are limits. "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award," and "cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct."
>
> Thus what we are left with is a case of highly reprehensible conduct, though not threatening to life or limb, that caused economic harm to a corporation. The jury found $50,000 of actual harm, and, as this is not the "rare case" for which *State Farm* leaves room, the ratio approach suggests that punitive damages could not, consistent with due process, exceed $450,000. Comparing the award to the civil penalty authorized in Title VII for comparable harm suggests that Congress regards $300,000 as the highest appropriate amount in somewhat comparable cases. The conclusion we reach is that the district court must, to comply with *State Farm* (which came down after the district court had ruled) and *BMW,* reduce the amount of punitive damages to a figure somewhere between $300,000 and $450,000.

Id. at 776–77 (footnotes omitted).

- **Comment:** *State Farm* refused to establish the bright line the panel in this case sees, and the panel overlooked important qualifications in *State Farm* precluding the panel's insistence on a ratio of less than ten. The panel also ignored the Congressional purpose in enacting a damages cap exclusively for Title VII and some ADA and Rehabilitation Act cases, while failing to do so for § 1981, a statute amended by the Civil Rights Act of 1991 but left without a damages cap. Plaintiffs' attorneys should seek en banc review of any decision following the reasoning above, and should in the meantime be careful to preserve their arguments for larger damages in the event that this aspect of *Flying B* is overruled.

6. Claims Not Involving Discrimination

Romanski v. Detroit Entertainment, L.L.C., 428 F.3d 629 (6th Cir. 2005), was a § 1983 unlawful arrest case. Plaintiff was visiting the Motor City Casino, found a nickel in slot machine tray, and tried to use it to play on another machine. She was arrested. The jury awarded $279.05 in compensatory damages, and $875,000 in punitive damages against the casino. The court required a remittitur to $600,000 or a new trial, saying that $600,000 was enough to deter similar conduct and was in line with similar awards.

X. Attorneys' Fees

Farfaras v. Citizens Bank and Trust of Chicago, 433 F.3d 558, 569, 97 FEP Cases 391 (**7th Cir.** 2006), affirmed the judgment on a jury verdict for the Title VII and State-law sex discrimination and sexual harassment plaintiff for $200,000 in compensatory damages and

$100,000 in punitive damages against the individual State-law defendants, $50,000 against the corporate Title VII defendant, $9,314.48 in lost wages, and $436,766.75 in attorneys' fees and costs. The court rejected defendants' objections to plaintiff's counsel's time records:

> We begin our analysis of the defendants' claim for a reduction by noting that the parties did not comply with Local Rule 54.3 of the Northern District of Illinois. Defendants' counsel claimed before the district court that its billing records were irrelevant. This position is inconsistent with the letter and spirit of Local Rule 54.3. The rule's purpose is to avoid exactly the type of hypocritical objections presented by the defendants. Although the defendants object to the use of block billing and "vague" descriptions by Farfaras's counsel, the defendants' counsel used similarly vague descriptions and block billing. Although "block billing" does not provide the best possible description of attorneys' fees, it is not a prohibited practice.

El-Hakem v. BJY Inc., 415 F.3d 1068, 1076, 96 FEP Cases 84, 10 WH Cases 2d 1313 (**9th Cir.** 2005), *cert. denied*, **__ U.S. __**, 126 S. Ct. 1470, 164 L.Ed.2d 248 (2006), affirmed the judgment for the § 1981 and Title VII plaintiff for $15,000 in compensatory damages and $15,000 in punitive damages because of a hostile working environment based on race and national origin. The court affirmed the lower court's decision not to apportion attorneys' fees. It explained: "There was no gross disproportion in the time expended by El-Hakem's counsel as between BJY and Young because the claims against the two defendants were virtually interchangeable. Neither was there a need to apportion the fee award as to the respective claims, because only a small percentage of the total hours expended was attributable to the state law wage claim, a portion of which was successful." (Citation and footnote omitted.)

Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1257–60, 16 AD Cases 1197 (**10th Cir.** 2005), affirmed the fee award to the ADA plaintiff notwithstanding the 35 points of error raised by one side or the other. "Ms. Praseuth filed a motion seeking attorneys' fees in the amount of $1,011,280.00 plus expenses in the amount of $132,639.00. The district court reduced the amounts requested by approximately two-thirds, awarding Ms. Praseuth attorneys' fees of $336,025.50 and expenses of $97,581.11." *Id.* at 1249. The court stated: "The fee applicant should exercise billing judgment with respect to the number of hours worked and billed. . . . Billing judgment consists of winnowing hours actually expended down to hours reasonably expended." *Id.* at 1257. The court objected to the huge chunks of time charged by plaintiffs' counsel for extremely basic research:

> Ms. Praseuth's attorneys requested fees for over 200 hours spent during the six months prior to the commencement of this litigation doing background research and educating themselves generally about the ADA. These hours included time for work described as follows: "Skimmed and reviewed first six chapters of Cal Practice Guide, Federal Civil Procedure Before Trial, to refresh on federal rules and law," and "Reviewed Chapters 7 through 10 and Chapter 11 in the Rutter Group Treatise Federal Civil Procedure in Before Trial ... preparation for litigation." Ms. Praseuth's attorneys devoted 50 hours to drafting the EEOC charge. They spent 160 hours drafting the complaint. They then filed a motion to amend the complaint, expending over 42 hours on the amendment."

Id. at 1257–58. The court held that "time spent reading background material designed to familiarize an attorney with an area of law is presumptively unreasonable. . . . When counsel is inexperienced, a losing party should not be obligated to pay for that counsel's legal education." *Id.* at 1258 (citations omitted). The court held that local rates in Wichita, Kansas, were properly applied to counsel from California: "While a party is free to select counsel from any locality, absent a clear showing that the matter could not reasonably have been handled by counsel from the locality, rates above the prevailing local hourly rates should not be applied." *Id.* at 1259 (citations omitted). The court then addressed the question of competing excesses:

> As already noted, Ms. Praseuth's attorneys sought compensation for enormous amounts of time, including a truly remarkable number of hours spent on relatively straightforward tasks. Rubbermaid's attorneys, on the other hand, defended this action very aggressively on every conceivable front. After protracted proceedings memorialized by 531 docket entries in the district court record, the district judge found that "both the plaintiff and the defendants have engaged in an extreme and unnecessary amount of briefing" in this case. Our own, first-hand knowledge of the parties' approach to this appeal amply supports the correctness of that finding.
>
> Given the excesses on both sides of this case, the district court was called upon to avoid penalizing Rubbermaid by awarding fees for the huge amounts of time devoted to the matter by Ms. Praseuth's counsel; at the same time, the district court was called upon to avoid penalizing Ms. Praseuth by denying compensation for legal services necessitated by Rubbermaid's noticeably aggressive defense. We conclude that the district court's fee award appropriately balanced these competing considerations. An aggressive litigation strategy carries with it certain risks, one of which is that a party pursuing an aggressive strategy may, if it loses, find itself required to bear a portion of the attorneys' fees incurred by the *other* party in responding to that aggressiveness.

Id. at 1260. Finally, the court held that the trial court did not abuse its discretion in denying prejudgment interest on the fees. *Id.*

VI. Sanctions

Claiborne v. Wisdom, 414 F.3d 715 (**7th Cir.** 2005), *cert. dismissed*, __ **U.S.** __, 126 S. Ct. 12 (2006), affirmed a sanction of $1 against the Fair Housing Act plaintiff, and $107,845.77 against her attorney under 28 U.S.C. § 1927, for unreasonably and vexatiously multiplying the proceedings, and reversed the order finding counsel's law firm jointly and severally liable. Plaintiff voluntarily dismissed her claim with prejudice. The court held that a dismissal with prejudice was an adjudication on the merits, and met the *Buckhannon* test for a change in the underlying legal relationship. *Id.* at 720. The court rejected plaintiff's argument that § 1927 requires a finding of subjective bad faith, and held that § 1927 authorizes sanctions in situations "'situations in which counsel acted recklessly, counsel raised baseless claims despite notice of the frivolous nature of these claims, or counsel otherwise showed indifference to statutes, rules, or court orders.'" *Id.* at 721 (citation omitted). The court stated: "The absence of subjective bad faith is therefore not enough to avoid a sanction under § 1927, if the attorney's actions otherwise meet the standard of objective unreasonableness we have described." *Id.* The court relied on several instances of improper behavior, including failing to respond adequately to discovery

requests, failing to make a reasonable inquiry before filing serious allegations with the court, failure to respond adequately to a summary judgment motion, engaging in dilatory tactics, and filing three of her four claims without a basis. *Id.* at 721–22. The court held that a law firm may not be directly sanctioned under § 1927 as vicariously liable. *Id.* at 722–73. However, the court stated that there may be exceptions:

> This does not mean that courts are powerless to impose sanctions on law firms that bear some responsibility for an individual attorney's conduct. First, it still may be possible as a matter of Indiana common law to hold the firm vicariously liable for the injuries inflicted by the individual attorney's conduct. Indiana, like most states, imposes vicarious liability on employers for the acts of employees taken within the scope of their employment. . . . The only question we have been considering is the firm's direct liability for the sanctions; we have no comment here on any possible vicarious liability if Boyd fails to satisfy the judgment. Second, Rule 11 now expressly permits sanctions against "the attorneys, law firms, or parties" that have violated the rule. On top of all that, the court retains inherent power to impose sanctions when the situation is grave enough to call for them and the misconduct has somehow slipped between the cracks of the statutes and rules covering the usual situations. *Chambers v. NASCO, Inc.,* 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). Interestingly, the defendants' brief appears to eschew reliance on Rule 11 as an alternate ground for supporting the district court's order; it argues instead that " § 1927 and Rule 11 were enacted for different purposes." It appears also that the district court did not direct the parties to brief the question of Rule 11 sanctions, and thus that the Lee firm never had an opportunity to defend itself against that theory of liability. Finally, the defendants never mention the court's inherent power.

Id. at 723–24. The court then ordered plaintiff's counsel and the partner supervising her to show cause why they should not both be sanctioned by the court of appeals, suggested that the lower court do likewise, and ordered the Clerk "to send a copy of this opinion to the Indiana Supreme Court Disciplinary Commission for whatever actions that body thinks appropriate." *Id.* at 724.

Amlong & Amlong, P.A. v. Denny's, Inc., 457 F.3d 1180 (11th Cir. 2006), reversed $400,000 in sanctions against counsel for plaintiff in an unsuccessful sexual harassment lawsuit, because the lower court engaged in plenary review of findings of fact made by a magistrate judge who had conducted an evidentiary hearing, and did not conduct an evidentiary hearing of her own. The court stated at *1: "After thorough review, we conclude that the district court committed reversible error when, after referring the issue of sanctions to a magistrate judge for an evidentiary hearing and Report and Recommendation, the district court discarded numerous findings of fact and credibility determinations made by the magistrate judge and substituted its own findings of fact on bad faith, without conducting any evidentiary hearing. The district court also abused its discretion in ordering the Amlongs to pay 10 percent back interest on a portion of the sanctions, and we, therefore, reverse that portion of the sanctions award too."

VII. Taxes

A. The Civil Rights Tax Fairness Act Glitch

The Civil Rights Tax Fairness Act has a technical glitch in its wording. It defines adjusted gross income as not including "Any deduction allowable under this chapter for attorney fees and court costs paid by, or on behalf of, the taxpayer in connection with any action involving a claim of unlawful discrimination . . . . The preceding sentence shall not apply to any deduction in excess of the amount includible in the taxpayer's gross income for the taxable year on account of a judgment or settlement (whether by suit or agreement and whether as lump sum or periodic payments) resulting from such claim."

The first sentence seems to require an "action," but the second sentence also refers to suits and agreements.

The question is whether the CRTRA protects attorneys' fees paid in connection with a settlement or arbitration or mediation or even an EEOC conciliation before a lawsuit is filed.

The IRS has not yet come up with any regulations.

- Plaintiffs' attorneys should urge clients with pre-suit settlements about this question, give them information in writing, and urge them to consult a tax adviser.

1. The *Murphy* Decision

Murphy v. Internal Revenue Service, 460 F.3d 79 (**D.C. Cir.** 2006), *petition for rehearing en banc filed* (Oct. 5, 2006), *response requested from appellants* (Oct. 11, 2006), held that the Sixteenth Amendment to the Constitution does not allow imposition of the income tax on emotional-distress damages unrelated to earnings. The court stated its conclusion at 92:

> Albert Einstein may have been correct that "[t]he hardest thing in the world to understand is the income tax," THE MACMILLAN BOOK OF BUSINESS AND ECONOMIC QUOTATIONS 195 (Michael Jackman ed., 1984), but it is not hard to understand that not all receipts of money are income. Murphy's compensatory award in particular was not received "in lieu of" something normally taxed as income; nor is it within the meaning of the term "incomes" as used in the Sixteenth Amendment. Therefore, insofar as § 104(a)(2) permits the taxation of compensation for a personal injury, which compensation is unrelated to lost wages or earnings, that provision is unconstitutional. Accordingly, we remand this case to the district court to enter an order and judgment instructing the Government to refund the taxes Murphy paid on her award plus applicable interest.

The case applies to a broad range of emotional-distress damages independent of the employer-employee relationship, and the government is likely to seek further review.

- Practitioners should advise clients to pay the taxes and then seek a refund, in order to avoid the imposition of penalties and interest that may ultimately be larger than the underlying award. Many ADEA plaintiffs were assessed penalties and interest larger than their underlying back pay awards, when the Supreme

> Court held that ADEA back pay awards were taxable. There is no point in repeating the pain.

VIII. Special Problems with the Federal Government as Employer

Rochon v. Gonzales, 438 F.3d 1211, 1215–16, 97 FEP Cases 944 (**D.C. Cir.** 2006), reversed the dismissal of plaintiff's Title VII retaliation claim and held that Congress waived the sovereign immunity of the United States in Title VII retaliation cases. The court also stated that claims for breach of a settlement agreement are contract claims subject to the Tucker Act and, where the jurisdictional amount is present, can be brought in the Court of Federal Claims. The court noted that the Court of Federal Claims does not have authority to enter equitable relief or to award compensatory damages for emotional distress, and stated that the reinstatement of the statutory retaliation claim may give the district court ancillary jurisdiction over the contract claim. Spot cites are not yet available.

Laber v. Harvey, 438 F.3d 404, 97 FEP Cases 846 (**4th Cir.** 2006) (*en banc*), overruled prior Circuit case law and held that a Federal-sector plaintiff who prevails administratively but is dissatisfied with the relief cannot sue only as to the adequacy of the remedy but must place liability at issue in order to gain a better remedy. The court stated that not even an extrajudicial admission of liability is sufficient, if plaintiff did not put liability in issue. *Id.* at 421 n.17. Concurring, Judge Widener suggested that accepting the benefits of some of the administrative remedy might waive a claim as to more. The court stated at 419: "By authorizing the district court to award equitable remedies only if *it* makes certain findings, Title VII contemplates that the civil action authorized therein requires the agency's underlying discrimination to be an issue in the case." In note 14, the court reserved the question whether the language requiring a court finding would be satisfied as to equitable relief if a jury found intentional discrimination. The court assumed without deciding that Title VII waived sovereign immunity as to retaliation claims. *Id.* at 432 n.30. Judge Wilkinson concurred. *Id.* at 432–33. Judge Widener concurred in part and dissented in part. *Id.* at 433. Judge Niemeyer concurred in part and dissented in part. *Id.* at 433–37.

IX. Appellate Tips for Effective Advocacy

See the discussion of the August 8, 2005, oral argument in *Dukes v. Wal-Mart Stores, Inc.*, No. 04–16688, in the section above on "Multi-Facility Classes."

Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1254 n.2, 16 AD Cases 1197 (**10th Cir.** 2005), affirmed the judgment on a jury verdict for the ADA plaintiff. The court did decide the issues plaintiff presented for review, but was unhappy with her brief:

> Ms. Praseuth only vaguely describes the specific rulings of the district court which she now claims were error. For example, she refers to rulings as dismissals, although the record indicates the challenged rulings were granted motions for judgment as a matter of law. Furthermore, her appeal brief does not propose any standard for reviewing the challenged rulings. This failure to state contentions with particularity and to propose the appropriate standard of review is sufficient grounds, standing alone, to

deny Ms. Praseuth's cross-appeal. *See,* FED. R. APP. P. 28(a)(9)(B), requiring, "for each issue, a concise statement of the standard of review."

Rodriguez-Marin v. Rivera-Gonzalez, 438 F.3d 72, 85–86 (**1st Cir.** 2006), affirmed the § 1983 judgment on a jury verdict for the political-discrimination plaintiffs. The court ended with the following observation: "At the conclusion of the trial, the district court stated 'it is incredible that anybody would believe that there was not the slightest political motivation in what happened in this case. It is just unbelievable. It is an insult to the intelligence of the human being to think otherwise.' We agree."