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Arizona State Bar  
2007 Annual Fall Seminar**

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**Trends in Employment  
Discrimination Law**

**by**

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"We represent the dispossessed of the Earth, and executives recently shown the door."

Mediation

Arbitration: Listed on American Arbitration Association Commercial Arbitration Roster and Employment Panel Roster.

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## I. The Statistics

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

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

There has been a 40.6% decline since 1997 in the number of new fair-employment cases filed in Federal district courts. From the third calendar quarter of 2005 to the third calendar quarter of 2006, there has been a 2.5% increase in general civil filings but a 15.2% 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 259,541 new civil cases were filed in Federal courts during the twelve months ending September 30, 2006. EEO cases were therefore 5.5% of all civil filings in Federal court, compared with 6.7% one year earlier. This is one of every 18.1 civil filings, compared to one of every 15 civil filings a year earlier. Federal-question EEO cases are 9.6% of all Federal-question cases, compared with 12.5% a year earlier. These are one in every 10.4 Federal-question cases, compared with one in every 8.0 such cases a year earlier.

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, 12,771 civil and criminal trials were conducted in 2005, with 678 authorized judgeships. That is 18.8 trials per judgeship. In 1990, the Federal courts conducted 20,393 civil and criminal trials, with only 575 authorized judgeships. That was 35.5 trials per judgeship. These figures were taken from Administrative Office Tables 6.2 and 6.4, accessed on February 16, 2007, from the url address at <http://www.uscourts.gov/judicialfactsfigures/contents.html>.

The pace of litigation is also declining in the Courts of Appeals. A total of 561 Federal-question EEO cases were decided after oral argument in the twelve months ending September 30, 2006; compared with 611 a year earlier. This is the category of cases most likely to result in published opinions. In the twelve months ending September 30, 2006, EEO cases were 17.6% of all civil Federal- question cases decided after oral argument, or one in every 5.7 civil Federal-question cases decided after oral argument.

Federal-question fair-employment cases are substantially more likely than general Federal- question civil cases to reach oral argument: 27.0% of EEO federal-question appeals filed during this period made it to oral argument, compared with only 15.3% 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: 1,192 employment discrimination cases were decided on the merits in the twelve months ending September 30, 2006, and another 894 employment discrimination appeals were resolved on procedural grounds during that period. On September 30, 2006, a total of 1,744 Federal-question employment discrimination cases were pending action in the U.S. courts of appeals, down 66 cases from the prior year.

## **II. EEOC Charge Statistics**

The following figures were downloaded from the EEOC web site, [www.eeoc.gov](http://www.eeoc.gov):

<b><u>Type</u></b>	<b><u>FY 1997</u></b>	<b><u>FY 2006</u></b>	<b><u>Difference</u></b>	<b><u>Change</u></b>
Race	29,199	27,328	-1,871	-6.4%
Sex	24,728	23,247	-1,481	-6.0%
National Origin	6,712	8,327	1,615	24.1%
Religion	1,709	2,541	832	48.7%

<b><u>Type</u></b>	<b><u>FY 1997</u></b>	<b><u>FY 2006</u></b>	<b><u>Difference</u></b>	<b><u>Change</u></b>
Retaliation—All Statutes	18,198	22,555	4,357	23.9%
Retaliation—Title VII	16,394	19,560	3,166	19.3%
Age	15,785	16,548	763	4.8%
Disability	18,108	15,575	-2,533	-14.0%
Equal Pay Act	1,134	861	-273	-24.1%

### III. **Legislation and Rules Changes**

#### A. **Lilly Ledbetter Fair Pay Act of 2007, H.R. 2831**

Passed the House, and is now in the Senate.

#### B. **Employee Free Choice Act of 2007, H.R. 800**

Passed the House, and is now in the Senate.

#### C. **Arbitration Fairness Act of 2007, H.R. 3010**

Introduced in the House on July 12, 2007.

#### D. **Whistleblower Protection Enhancement Act of 2007, H.R. 985**

Passed the House, and is now in the Senate.

#### E. **Civil Rights Tax Relief Act, H.R. 1540 and S. 1689**

Pending in both chambers.

#### F. **Rules Changes Probably Going into Effect December 1, 2007**

##### 1. **Privacy: Fed. R. Civ. Pro. 5.2**

Civil Rule 5.2. Privacy Protection For Filings Made with the Court (eff. 12/1/2007).

(a) **Redacted Filings.** Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

**(b) Exemptions from the Redaction Requirement.**

The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 5.2(c) or (d); and

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.

**(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases.** Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to: **(A)** the docket maintained by the court; and **(B)** an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

**(d) Filings Made Under Seal.** The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

**(e) Protective Orders.** For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

**(f) Option for Additional Unredacted Filing Under Seal.** A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

**(g) Option for Filing a Reference List.** A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

**(h) Waiver of Protection of Identifiers.** A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

F.R.A.P. Rule 25(a)(5): In cases subject to Civil Rule 5.2, these protections will apply on appeal as well.

## **2. E-Mail Addresses**

Civil Rule 11(a) will state in part: "The paper must state the signer's address, **e-mail address**, and telephone number."

Civil Rule 26(g)(1): This will do the same, for discovery papers.

## **3. Depositions on Written Questions**

New Civil Rule 31(c) will state in part that the party noticing deposition on written questions must notify the parties when the deposition is complete, and when the transcript is filed.

## **G. Open and Closed Questions as to F.R.E. 502**

1. The new draft no longer purports to govern State law.

2. The new draft limits subject matter waivers.

3. The new draft says that inadvertent disclosures should not constitute waiver if the holder took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error.

4. There is a bracketed provision on selective waiver, to indicate that there is no Committee position.

5. Parties should be able to protect against waiver by seeking a confidentiality order, and that order must bind non-parties in any federal or state court.

6. The parties can contract around common-law waiver rules, but cannot bind non-parties without a court order.

## **H. Coming Up**

### **1. Possible Changes in Rule 56**

It is reported that the initial changes being looked at would involve a standard three documents per side: disputed facts, undisputed facts, and argument. The response would have to track the movant's documents.

The opposing party would have 21 days to file an opposition.

Judges would have expanded authority to initiate summary judgment.

### **2. Possible Changes in Rule 30(b)(6)**

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

## **IV. Look-Out List for the Supreme Court**

The Court granted review on January 7, 2014, in *Federal Express Corporation v. Holowecki*, No. 06–1322, an ADEA case raising the question whether an EEOC intake questionnaire is an EEOC charge even where the EEOC did not treat it as a charge by investigating it or serving it on the employer. It is scheduled to be argued November 6. This is the petitioner's "question presented":

Whether the Second Circuit erred in concluding, contrary to the law of several other circuits and implicating an issue this Court has examined but not yet decided, that an "intake questionnaire" submitted to the Equal Employment Opportunity Commission ("EEOC") may suffice for the charge of discrimination that must be submitted pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), even in the absence of evidence that the EEOC treated the form as a charge or the employee submitting the questionnaire reasonably believed it constituted a charge.

The Court granted review on June 11, 2007, in *Sprint/United Management Co. v. Mendelsohn*, No. 06–1221, an ADEA raising the question whether the district court must admit evidence of what happened to other employees. The decision below was reported at 466 F.3d 1223. This is the petitioner's "question presented":

This case presents a recurring question of proof in employment discrimination cases: whether a district court must admit "me, too" evidence—testimony, by nonparties, alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff.

The Court granted review, and the petitioner then withdrew its petition, in *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 487–88, 98 FEP Cases 571 (10th Cir. 2006), *cert. dismissed*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 1931, 167 L.Ed.2d 583 (2007), a case involving an employer’s liability for the bias of a person who affected the challenged decision but was not the formal decision-maker. There has been a wide divergence among the Circuits in their approach to this issue. The employer withdrew its petition the week before oral argument, and the Court has denied certiorari in the other two cases on its docket raising some of the same issues.

## **V. The Constitution and Statutes**

### **A. The First Amendment**

*Casey v. West Las Vegas Independent School District*, 473 F.3d 1323, 1332–33 (10th Cir. 2007), reversed the grant of summary judgment to the First Amendment retaliation defendants as to the plaintiff former Superintendent’s communications with the New Mexico Attorney General’s office about the Board’s violations of the New Mexico Open Meetings Act, because this communication, unlike all others, did not involve her responsibility to advise the Board or to report to other governmental agencies, and thus met the *Garcetti* test.

### **B. The Fifth Amendment**

**Private-Sector CBA Can Create Due Process Rights as to Government Interference:** *Wilson v. MVM, Inc.*, 475 F.3d 166, 178, 18 AD Cases 1711 (3d Cir. 2007), affirmed the dismissals of some of the Rehabilitation Act and due process plaintiffs’ claims, and the grant of summary judgment to defendants on others. The court held that “a private employment contract with a ‘just cause’ termination clause can create a constitutionally protected property interest” when the government interferes with that right. Plaintiffs were Court Security Officers working for a private security company under contract with the U.S. Marshals Service. Plaintiffs were covered by a CBA allowing discharge only for just cause. “In 2001, the USMS, which reserved by contract the right to incorporate revised medical standards, implemented a new physical examination for CSOs, adding to the list of medically disqualifying conditions use of a hearing aid, diabetes and certain heart conditions.” *Id.* at 171. They were fired after the Marshals Service determined they were medically unqualified for duty, and MVM determined that no alternative positions were available. The court held, however, that the Marshals Service had provided an adequate process, which plaintiffs did not utilize:

The appellants had a clear interest in continued employment, which must be balanced against the government’s interest in providing healthy, physically qualified security to protect its court houses and employees. After the appellants were termed medically disqualified, but before they were terminated, they were provided with notice of their medical disqualification and offered an opportunity to respond with medical documentation from their own doctors regarding their ability to perform their positions. While this is not a traditional hearing, the process afforded the appellants is sufficient given the balance of their interest in maintaining employment and the government’s



interest in security. A more rigorous process would not significantly enhance the accuracy of the medical qualification process.

*Id.* at 178–79 (citation omitted).

### **C. The Fourteenth Amendment**

#### **1. Ministerial Exception**

*Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 18 AD Cases 1510 (6th Cir. 2007), affirmed the Rule 12(b)(6) dismissal of plaintiff’s ADA claim because, as “a resident in the hospital’s Clinical Pastoral Education program,” she was covered by the First Amendment ministerial exception. The court stated:

The ministerial exception, a doctrine rooted in the First Amendment’s guarantees of religious freedom, precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees, based on the institution’s constitutional right to be free from judicial interference in the selection of those employees. . . . Although the ministerial exception is often raised in response to employment discrimination claims under Title VII of the Civil Rights Act . . . which specifically bars discrimination on the basis of religion, it has also been applied to claims under the ADA and the Age Discrimination in Employment Act (ADEA) . . . as well as common law claims brought against a religious employer. . . .

In order for the ministerial exception to bar an employment discrimination claim, the employer must be a religious institution and the employee must have been a ministerial employee. But, in order to invoke the exception, an employer need not be a traditional religious organization such as a church, diocese, or synagogue, or an entity operated by a traditional religious organization. Examining cases decided in all of the circuit courts, the Fourth Circuit found that the exception has been applied to claims against religiously affiliated schools, corporations, and hospitals by courts ruling that they come within the meaning of a “religious institution.” . . . Its investigation led the Fourth Circuit to conclude that a religiously affiliated entity is considered” a ‘religious institution’ for purposes of the ministerial exception whenever that entity’s mission is marked by clear or obvious religious characteristics.” . . .

In this circuit, we have thus far applied the ministerial exception only to ordained ministers. However, other circuits have extended the doctrine to bar employment discrimination claims brought by other employees of a religious institution. These courts have considered a particular employee to be a “minister” for purposes of the ministerial exception based on the function of the plaintiff’s employment position rather than the fact of ordination. . . . As a general rule, the ministerial exception will be invoked if “the employee’s primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.” . . . We agree with this extension of the rule beyond its application to ordained ministers and hold that it applies to the plaintiff in this case, given the pastoral role she filled at the hospital.

*Id.* at 225–26 (citations omitted).

**D. 42 U.S.C. § 1981**

*Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 126 S. Ct. 1246, 1249–50, 99 FEP Cases 36 (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, 301–06, 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, even where a manager in the United States takes racially discriminatory action affecting an American employee working outside the United States. 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.

*Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 391–403, 99 FEP Cases 872 (**7th Cir.** 2007), reversed the grant of summary judgment to defendant on plaintiff’s § 1981 retaliation claim. The court held that § 1981 bars retaliation for complaining of racial or ethnic discrimination. It overruled *Hart v. Transit Management of Racine, Inc.*, 426 F.3d 863, 866, 96 FEP Cases 1095, 178 LRRM 2324 (**7th Cir.** 2005). Judge Easterbrook dissented in part. *Id.* at 408–11.

**E. Equal Pay Act**

*Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 697, 99 FEP Cases 577 (**7th Cir.** 2006), affirmed the grant of summary judgment to the Title VII and Equal Pay Act defendant, holding in part that the higher pay rate of Craig Wehr, who was hired to fill a new position with some duties in common with plaintiff’s, was justified by his superior education, job-related experience, and market forces. As to the latter, the court cautioned:

Metal Spinners also submits that Wehr’s salary was determined by market forces. Mr. Wiland noted that, when he decided to create the position of Vice President of Procurement and Materials Management, he enlisted the help of a search firm and was informed that the market rate for such a position was \$65,000-\$75,000. Mr. Wiland also consulted trade journals to determine the appropriate market rate for such a position. We have held that an employer may take into account market forces when determining the salary of an employee. . . .<sup>6</sup>

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<sup>6</sup> We recognize that we must be cautious when analyzing an employer’s claim that “market forces” justify a higher salary, as companies may use such a theory “to justify lower wages for female employees simply because the market might bear such wages.”

. . . The record does not support the inference that Metal Spinners took advantage of any kind of market forces that would permit different pay for a male and a female for the same position.

(Citations omitted.)

## **F. Remainder of Civil Rights Tax Relief Proposal Introduced**

On March 15, Rep. Lewis and a bipartisan group of co-sponsors introduced the H.R. 1540, the Civil Rights Tax Relief Act of 2007. If passed, the bill would exempt compensatory damages for emotional distress from income tax, and allow income-averaging of back-pay and front-pay awards.

## **G. Federal Whistleblower Legislation**

H.R. 985, the Whistleblower Protection Enhancement Act, was passed by the House of Representatives on March 14 by a 331 to 94 vote. It now goes to the Senate. All Democrats, and 102 Republicans, voted in favor. The bill covers Federal employees, and private employees working for contractors paid with Federal funds. All lawful communications of misconduct are covered, making *Garcetti* inapplicable.

Other bills covering private employees are pending in the House.

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

### **1. Coverage**

**Reflexive Decisions Discouraged:** *De Jesus v. LTT Card Services, Inc.*, 474 F.3d 16, 99 FEP Cases 1048, 18 AD Cases 1505 (1st Cir. 2007), vacated the grant of summary judgment to the Title VII and ADA defendant, holding that the lower court improperly held that two directors of the company who were on the payroll were not employees, without examining the six *Clackamas* factors.

**Who's an Agent of an Employer?** *Muhammad v. Dallas County Community Supervision And Corrections Dept.*, 479 F.3d 377, 99 FEP Cases 1281 (5th Cir. 2007), reversed the Rule 12(b)(6) dismissal of plaintiff's Title VII claims, holding that the question whether the defendant, or Dallas County judges, were plaintiff's employer. The court held at 380 that the lower court should have engaged in the hybrid economic realities analysis, which it described as follows:

To determine whether an employment relationship exists within the meaning of Title VII, "we apply a 'hybrid economic realities/common law control test.'" The most important component of this test is "[t]he right to control [the] employee's conduct." "When examining the control component, we have focused on whether the alleged employer has the right" to hire, fire, supervise, and set the work schedule of the employee. "State law is relevant insofar as it describes the plaintiff's position, including his duties and the way he is hired, supervised and fired." The economic realities component of the test focuses on "whether the alleged employer paid the employee's

salary, withheld taxes, provided benefits, and set the terms and conditions of employment.”

(Footnotes omitted.) Instead of conducting such an analysis, the lower court simply examined the Complaint. The court held that a factual inquiry was necessary, and held that defendant could be properly in the case either as an employer or as an agent of the employer. It stated at 383:

As previously noted, Title VII defines an “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person . . . .” Title VII does not define an “agent.” However, this court has held that the agent “must be an agent with respect to employment practices” and would be limited to supervisory or managerial employees to whom employment decisions have been delegated. Muhammad could establish that DCCSCD falls within Title VII’s definition of an “employer” by either showing that DCCSCD is: (1) itself “a person engaged in an industry affecting commerce who has fifteen or more employees” or (2) an agent of the Dallas County district judges who are themselves “person[s] engaged in an industry affecting commerce who ha[ve] fifteen or more employees.”

(Footnotes omitted.)

## **2. Pregnancy Discrimination**

*Asmo v. Keane, Inc.*, 471 F.3d 588, 592–94, 99 FEP Cases 678 (6th Cir. 2006), reversed the grant of summary judgment to the Title VII pregnancy discrimination defendant, holding that defendant’s selection of plaintiff for termination in a RIF two months after learning of her pregnancy with twins gave rise to an inference of a causal link, both for purposes of plaintiff’s *prima facie* case and for purposes of showing pretext. Judge Griffin dissented. *Id.* at 598–601.

*In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936, 100 FEP Cases 185 (8th Cir. 2007), reversed the grant of partial summary judgment to the Title VII plaintiffs, holding that defendant’s exclusion of contraception from its health care benefits for both genders did not violate Title VII or the Pregnancy Discrimination Act. Judge Bye dissented.

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

#### **1. Leave Banks**

**Rule Based on Combined Age and Retirement Eligibility = Age Discrimination:**  
*EEOC v. City of Independence*, 471 F.3d 891, 896, 99 FEP Cases 770 (8th Cir. 2006), reversed the grant of summary judgment to the ADEA defendant, holding that the EEOC showed a genuine issue of material fact as to whether defendant discriminated against the charging party because of his age by its rule that retirement-eligible employees could not draw on donated leave in defendant’s leave-bank program. Retirement-eligible employees were those who were at least 60 years old and were vested in the retirement system by having five or more years of service. The court held that this was a direct-evidence case, and rejected the argument that the decision

could not have been based on age because some persons other than employees over the age of 60 were also barred:

The city and the district court ignore that the “correlated” language in Hazen applies only where the employer’s decision is “wholly” motivated by factors other than age. . . . The key is what the employer supposes about age: “Pension status may be a proxy for age . . . in the sense that the employer may suppose a correlation between the two factors and act accordingly.” . . .

Based on the direct evidence that the city’s Human Resources Administrator and other personnel decisionmakers said the disqualification was because of age and acted accordingly, Hopkins raises a genuine issue of material fact as to what the employer supposed about age. In this case, unlike *EEOC v. McDonnell Douglas*, the discriminatory acts were not “isolated” but were the standard operating procedure for the Leave Donation Program.

(Citations omitted.)

## 2. Constructive Discharge

**Denial of Car Allowance and Use of Company Car Not Enough to Show Constructive Discharge:** *Velazquez-Fernandez v. NCE Foods, Inc.*, 476 F.3d 6, 13, 99 FEP Cases 1031, 12 WH Cases 2d 417 (1st Cir. 2007), affirmed the grant of summary judgment to the ADEA and Puerto Rican law defendants on plaintiff Velazquez’s claim of constructive discharge because of the elimination of his car allowance and use of a company car. The court explained: “Generally, a constructive discharge claim cannot be based solely on the elimination of an allowance, where the job duty that was funded by the allowance was also eliminated based on a legitimate business judgment. This is so because elimination of such an allowance usually will not change working conditions so significantly that a reasonable person would feel compelled to resign.” (Citations omitted.)

*EEOC v. City of Independence*, 471 F.3d 891, 896, 99 FEP Cases 770 (8th Cir. 2006), affirmed the grant of summary judgment to the ADEA defendant on plaintiff’s constructive-discharge claim, holding that the EEOC showed a genuine issue of material fact as to whether defendant discriminated against the charging party because of his age by its rule that retirement-eligible employees could not draw on donated leave in defendant’s leave-bank program.

## 3. Federal Employees Unprotected from Retaliation for ADEA Activities

*Gomez-Perez v. Potter*, 476 F.3d 54, 59–60, 99 FEP Cases 1185 (1st Cir. 2007), affirmed the grant of summary judgment to the Postmaster and Postal Service ADEA defendants, holding that the extension of the ADEA to Federal employment did not include the ADEA’s prohibition of retaliation. Thus, only non-Federal employees are protected from retaliation.

## J. The Americans with Disabilities Act and Rehabilitation Act

### 1. Sovereign Immunity under Title II of the ADA

*United States v. Georgia*, 546 U.S. 151, 126 S. Ct. 877, 881–82, 163 L.Ed.2d 650, 17 AD Cases 673 (2006) (pagination in the U.S. Reports not yet available), 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. Broad Class of Jobs

**Where Job Had Only General Duties, Employer’s Belief that Plaintiff Could Not Perform It Meant that Employer Believed Plaintiff Could Not Perform “Broad Class of Jobs”:** *Chalfant v. Titan Distribution, Inc.*, 475 F.3d 982, 989, 18 AD Cases 1601 (8th Cir. 2007), affirmed the judgment on a jury verdict for the ADA plaintiff, who claimed that defendant regarded him as disabled because of his heart condition and arthritis. The court stated:

While Chalfant only applied for the second shift supervisor position, that position did not require unique or strenuous lifting. Titan employees testified that there was no lifting requirement, or even a job description, for the second shift supervisor position. Chalfant also testified that he had not been required to do any heavy lifting when he was the second shift supervisor for Quintak and Labor Ready. In the absence of any job description by Titan, Chalfant’s vocational expert relied on the occupational literature’s classification of a second shift supervisor and testified that if Titan believed Chalfant was unable to perform the duties of a second shift supervisor, a job that is classified as having light to medium strength demands, Chalfant would have been prevented from performing 70 percent of the jobs in the Dictionary of Occupational Titles. Thus, there was sufficient evidence from which a reasonable jury could have found that Titan did not believe that a person with Chalfant’s medical impairments could work in a class of jobs or a broad range of jobs in various classes.

## 3. “Qualified” Individuals

**“Completely Disabled” Letter Plaintiff Obtained from Reluctant Physician Did Not Bind Him Where USPS Pressured Him to Take Permanent Disability:** *Wishkin v. Potter*, 476 F.3d 180, 187, 18 AD Cases 1719 (3d Cir. 2007), reversed the grant of summary judgment to the Rehabilitation Act defendant U.S. Postal Service. Plaintiff’s supervisor pressured him and other disabled employees to take disability retirement, telling them that the bag room where they worked was going to be mechanized. Plaintiff was mentally disabled, and worked under restrictions because of a job-related hernia injury. He pressured his very reluctant doctor to provide a letter stating that he was unfit for duty, and provided it to Mary Green, his supervisor, in response to her pressure. He was ordered to submit to a fitness-for-duty examination by a USPS doctor, who pronounced him fit. His supervisor angrily demanded that he return and get an “unfit” letter. He did, and she then pressured him to sign disability retirement papers. He refused because he wanted to continue working, and his supervisor barred him from working for a year. The bag room was in fact closed in 2000, but plaintiff transferred to a different position. The lower court held that plaintiff could not show he was qualified because of the summary-judgment letter. Reversing, the court of appeals held that the unusual character of the events, the targeting of disabled employees, the union’s testimony about the unprecedented character of the proceedings, and the supervisor’s intervention in the medical determination created a genuine issue of material fact:

Furthermore, Wishkin had been performing the essential functions of the job for nearly twenty years, and there was no evidence of recent changes to his health status or ability to work that might have precipitated Wishkin's request for a physician's letter, other than Wishkin's stated reason that he felt pressure to protect himself from unemployment. For summary judgment purposes, the District Court should not have accepted the USPS's characterization of Wishkin as not qualified based solely on the letter that he procured from a physician reluctant to grant it. A trier of fact could accept Wishkin's evidence supporting his contention that USPS's efforts to force him to take permanent disability were motivated by discrimination against its disabled employees. Wishkin contends that his supervisor continually targeted disabled employees working in the bag room by conducting "circle meetings," involving only disabled employees, during which they were often told that the bag room would be closing, that their jobs would no longer be needed, that they were unable to be trained for a different position, and that it would be best if they took permanent disability. . . . Many disabled employees did in fact leave USPS as a result. . . . Moreover, many of the disabled employees were scheduled for fitness for duty examinations on the same day, which, according to Union Chief Shop Steward Gerry Redd, was unheard of. Typically, employees are only given fitness for duty examinations if there is a specific instance of questionable behavior; they are not considered a routine procedure. *Id.* The unusual circumstances surrounding the fitness for duty examinations of all the disabled employees and the consistent and routine warnings given to the disabled employees regarding their job status could support Wishkin's contention that the adverse employment action in question was motivated by discrimination. For purposes of summary judgment, he has presented a genuine issue of material fact.

Despite the fact that Wishkin procured Dr. Yorker's letter, which was the basis for the District Court's grant of summary judgment, there is substantial evidence, particularly when the evidence is viewed in the light most favorable to Wishkin, the non-moving party, to support his argument that the letter was only procured under duress and as a result of a calculated attempt to force similarly situated disabled employees to take permanent disability retirement.

**Restrictions Described by Plaintiff's Physician Did Not Bind Him:** *Chalfant v. Titan Distribution, Inc.*, 475 F.3d 982, 990, 18 AD Cases 1601 (8th Cir. 2007), affirmed the judgment on a jury verdict for the ADA plaintiff, who claimed that defendant regarded him as disabled because of his heart condition and arthritis. Plaintiff's physician stated that he could not lift more than five pounds, and could not walk more than half a mile a day. Plaintiff routinely did much more than that, and explained that he only called the physician to testify about his arthritis, and relied on the vocational expert as to his limitations. The court held that the evidence was sufficient to justify the verdict.

#### **4. Regarded As Disabled**

*Wilson v. MVM, Inc.*, 475 F.3d 166, 179, 18 AD Cases 1711 (3d Cir. 2007), affirmed the dismissals of some of the Rehabilitation Act, ADA, and due process plaintiffs' claims, and the grant of summary judgment to defendants on others. Plaintiffs were Court Security Officers working for a private security company under contract with the U.S. Marshals Service. Plaintiffs

were covered by a CBA allowing discharge only for just cause. “In 2001, the USMS, which reserved by contract the right to incorporate revised medical standards, implemented a new physical examination for CSOs, adding to the list of medically disqualifying conditions use of a hearing aid, diabetes and certain heart conditions.” *Id.* at 171. They were fired after the Marshals Service determined they were medically unqualified for duty, and MVM determined that no alternative positions were available. The court rejected plaintiffs’ claim that MVM regarded them as disabled. “The undisputed evidence shows that MVM did not consider the appellants in any way disabled and would have reinstated them immediately if the USMS would have determined the appellants were medically qualified.”

## 5. Direct Threat

**Direct Threat Cannot Be Based on Naked Speculation At Variance With the Facts:** *EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 18 AD Cases 1793 (5th Cir. 2007) (F.3d pagination not yet available), affirmed the judgment of ADA liability, rejecting at p. \*5 the defendant’s assertion that plaintiff was a “direct threat” to herself and others because she assertedly could not evacuate the building safely: “Despite her medical restriction from walking, Barrios safely ambulated the evacuation route without assistance in 2003, and testimony at trial supported that she could safely evacuate without threatening the safety of others.” (Citations omitted.)

**Direct Threat Cannot Be Based on Assumption that Plaintiff Would Not Have Accommodation:** *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 572, 18 AD Cases 1697 (8th Cir. 2007), reversed the grant of summary judgment to the ADA defendant, holding that it could not establish as a matter of law the affirmative defense that the charging party would pose a direct threat where defendant’s expert based his entire opinion on the charging party’s standing on crutches while working as a greeter or cashier, and the charging party could simply use a wheelchair instead. The court stated: “Furthermore, Wal-Mart has failed to explain how Bradley, using a wheelchair or other similar device, poses any more of a threat than Wal-Mart customers who shop using such devices.”

## 6. Accommodations

**Waiver by Failure to Press Accommodation Claim Explicitly:** *Timmons v. General Motors Corp.*, 469 F.3d 1122, 18 AD Cases 1281 (7th Cir. 2006), affirmed the grant of summary judgment to the ADA defendant, holding that plaintiff waived any failure-to-accommodate claim by pleading and pressing only his disparate-treatment claims.

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

*West v. AK Steel Corp.*, 484 F.3d 395, 40 EB Cases 1769 (6th Cir. 2007), affirmed the grant of partial summary judgment to the ERISA plaintiff retiree class on liability, the award of more than \$37 million in damages and \$9 million in prejudgment interest. Plaintiffs claimed that the AK Steel Plan’s failure to use what is known as the “whipsaw calculation” when determining the value of the lump-sum cash benefit distributions for these early retirees caused a forfeiture of benefits in violation of ERISA. The court explained the calculation:



The most litigated aspect of cash balance plans has proven to be the so-called “whipsaw calculation.” This calculation arises when participants opt to “cash out” their hypothetical accounts before they reach normal retirement age. To comply with ERISA, lump-sum payments such as the ones received by the plaintiffs in the present case must be the actuarial equivalent of the normal accrued pension benefit. . . . The actuarial equivalent is calculated in two steps. First, a participant’s hypothetical account balance is projected forward to normal retirement age—in the AK Steel Plan, age 65—using the rate at which future interest credits would have accrued if the participant had remained in the AK Steel Plan until that time. Second, that projected amount is discounted back to its present value on the date of the actual lump-sum distribution.

If the interest rate used in Step 1 is greater than the discount rate used in Step 2, the amount of the participant’s lump-sum disbursement will be larger than his or her hypothetical account balance. This two-step process is commonly referred to as the “whipsaw calculation.” In the present case, Opening Accounts receive interest credits at a minimum annual rate of 7.5%, while the statutory discount rate for calculating the present value of a lump-sum distribution has been invariably lower (5.1 % in 2002, for example). This causes the value of the pension benefit under the whipsaw calculation to be greater than the simple value of the account balance at the time of the lump-sum distribution. The IRS provides a useful example of the whipsaw effect:

A cash balance plan provides for interest credits at a fixed rate of 8% per annum that are not conditioned on continued employment, and for annuity conversions using the [Internal Revenue Code § ] 417(e) applicable interest rate and mortality table. A fully vested employee with a hypothetical account balance of \$45,000 terminates employment at age 45 and elects an immediate single sum distribution. At the time of the employee’s termination, the Section 417(e) applicable interest rate is 6.5%.

The projected balance of the employee’s hypothetical account as of normal retirement age is \$209,743. If \$209,743 is discounted to age 45 at 6.5% (the Section 417(e) applicable interest rate), the present value equals \$59,524.

Accordingly, if the plan paid the hypothetical account balance of \$45,000, instead of \$59,524, the employee would receive \$14,524 less than the amount to which the employee is entitled.

*Id.* at 400–01. The court held that ERISA mandates a whipsaw calculation. The court also rejected defendant’s argument that the Plan was entitled to use a pre-retirement mortality discount, stating at 411:

Using a mortality discount to reduce the present value of the lump-sum distribution in the present case would also have the effect of reducing the value of the interest credits, as the district court pointed out. This would create the same impermissible forfeiture under ERISA as described in Part II.C. above.

*Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 38 EB 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 637:

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 638: “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. Family and Medical Leave Act**

**1. CBA Restraints on Employers’ Ability to Substitute Other Leave**

*Brotherhood of Maintenance of Way Employees v. CSX Transportation, Inc.*, 478 F.3d 814, 815, 12 WH Cases 2d 577, 181 LRRM 2481 (7th Cir. 2007), affirmed the grant of a declaratory judgment to the union providing “that if a collective bargaining agreement (CBA) grants employees the right to determine when or how they use paid vacation or personal leave, those provisions prevent the railroads from substituting contractual leave for leave under the FMLA.”

## 2. Retaliation Claims vs. Interference Claims

*Campbell v. Gambro Healthcare, Inc.*, 478 F.3d 1282, 1287–88, 12 WH Cases 2d 677 (10th Cir. 2007), affirmed the grant of summary judgment on plaintiff’s FMLA retaliation and interference claims. The court explained the difference between these two theories:

Campbell asserts two alternate claims under the FMLA: (1) that Gambro interfered with her right to take FMLA leave, in violation of 29 U.S.C. § 2615(a)(1); and (2) that, upon returning to work, Gambro retaliated against her for taking FMLA leave, in violation of 29 U.S.C. § 2615(a)(2). The two theories require different showings and differ with respect to the burden of proof.

To establish an interference claim, Campbell must show: “(1) that [s]he was entitled to FMLA leave, (2) that some adverse action by the employer interfered with h[er] right to take FMLA leave, and (3) that the employer’s action was related to the exercise or attempted exercise of h[er] FMLA rights.” . . . To make out a prima facie retaliation claim, Campbell must show that: “(1) she engaged in a protected activity; (2) [Gambro] took an action that a reasonable employee would have found materially adverse; and (3) there exists a causal connection between the protected activity and the adverse action.” . . . We have characterized the showing required to satisfy the third prong under a retaliation theory to be a showing of bad intent or “retaliatory motive” on the part of the employer. . . . Notably, we interpret retaliation claims under the burden-shifting architecture of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973), whereas the employer bears the burden of proof on the third element of an interference claim once the plaintiff has shown her FMLA leave was interfered with. . . . Due to this difference in where the burden lies with respect to the third element of each theory, it is not unusual for a plaintiff to pursue an interference theory while the defendant argues that the evidence may only be analyzed under a retaliation theory.

Beyond differences in the elements and burdens of proof, the two claims differ with respect to the timing of the adverse action. In order to satisfy the second element of an interference claim, the employee must show that she was prevented from taking the full 12 weeks’ of leave guaranteed by the FMLA, denied reinstatement following leave, or denied initial permission to take leave. . . . 29 C.F.R. § 825.216(a)(1). In contrast, a retaliation claim may be brought when the employee successfully took FMLA leave, was restored to her prior employment status, and was adversely affected by an employment action based on incidents post-dating her return to work. . . .

(Citations omitted.) The court rejected defendant’s argument that plaintiff could not bring an interference claim: “When, as is the situation before us, the employer cites only factors predating the employee’s return to work to justify the adverse action, the plaintiff is not foreclosed from bringing an interference claim. To hold otherwise would create a perverse incentive for employers to make the decision to terminate during an employee’s FMLA leave, but allow the employee to return for a brief period before terminating her so as to insulate the employer from an interference claim.”

### 3. Notice

*Burnett v. LFW Inc.*, 472 F.3d 471, 480–81, 18 AD Cases 1536, 12 WH Cases 2d 193 (7th Cir. 2006), reversed the grant of summary judgment to defendant on plaintiff’s FMLA interference claim. The court held that plaintiff’s four-month escalating series of statements to his supervisor, culminating in references to bladder cancer, with which he was diagnosed later, were far more than just saying he was “sick,” and placed his employer on notice that he had a serious health condition. The court explained:

Burnett is not seeking to reach back over vast periods of time to grasp at an isolated mention of illness that was reasonably banished from his employer’s institutional memory. He seeks only to invoke Habitat’s institutional memory as to the natural course of his illness, which spanned a period of only four months (and included the same supervisor throughout the entire relevant period). And, importantly, Habitat cannot claim a loss of memory here. Polo approved Burnett’s requests for days off for doctor’s appointments little more than a month before his termination. Just days before his termination, Burnett discussed his upcoming biopsy with Polo and others at the union grievance meeting. Finally, during his January 29 run-in with Burnett at the time clock, Polo himself made reference to the overall context of Burnett’s health, stating that Burnett’s post-biopsy treatment plan “didn’t matter.”

*Id.* at 481. The court rejected defendant’s argument that it had an un rebutted nondiscriminatory explanation for firing plaintiff: that he had been insubordinate when punching out on January 29, when he had been directed to remain at work. The court held that plaintiff was entitled to FMLA leave because he feared injury from defendant’s refusal to restrict his duties in the post-biopsy period, and that defendant’s mistaken belief that plaintiff was not entitled to FMLA leave did not allow it to treat his departure as insubordination. *Id.* at 482.

#### M. Immigration Reform and Control Act

**IRCA Does Not Preempt California “Just-Cause” Law:** *Incalza v. Fendi North America, Inc.*, 479 F.3d 1005, 1013, 25 IER Cases 1249 (9th Cir. 2007), affirmed the judgment on a jury verdict for the California “just cause” plaintiff, and held that IRCA does not preempt California’s just-cause law where the employer had means of complying with IRCA other than discharge. The court stated: “In sum, we hold that Fendi was not required by IRCA to terminate Incalza because it could have suspended him or placed him on leave without pay for a reasonable period while he was obtaining a change in work authorization to which he was entitled. Thus, in this case, California law does not conflict with federal law; it was possible to comply with and satisfy the purposes of both.”

#### N. Uniformed Services Employment and Reemployment Rights Act of 1994

*Velazquez-Garcia v. Horizon Lines Of Puerto Rico, Inc.*, 473 F.3d 11, 16, 181 LRRM 2097 (1st Cir. 2007), reversed the grant of summary judgment to the USERRA defendant. The court held that “under USERRA, the employee does not have the burden of demonstrating that the employer’s stated reason is a pretext. Instead, the employer must show, by a preponderance of the evidence, that the stated reason was *not* a pretext; that is, that ‘the action *would* have been

taken in the absence of [the employee’s military] service.’ 38 U.S.C. § 4311(c) (emphasis added).”

## **O. National Labor Relations Act**

**Work Rule Barring Complaints Outside the Chain of Command is an Unfair Labor Practice:** *Guardsmark, LLC v. N.L.R.B.*, 475 F.3d 369, 181 LRRM 2289 (D.C. Cir. 2007), enforced in part and reversed in part the NLRB’s order, finding that each of the following practices was an unfair labor practice in violation of the N.L.R.A.: “Three of the handbook’s rules are at issue here: a chain-of-command rule telling employees ‘not [to] register complaints with any representative of the client’; a solicitation rule prohibiting solicitation and distribution of literature ‘at all times while on duty or in uniform’; and a fraternization rule prohibiting employees from ‘fraterniz[ing] on duty or off duty’ with other employees.” The court held that the fraternization rule was not expressly limited to romantic relationships, and could mislead employees into thinking they could not organize into unions.

## **P. Medicaid**

*Arkansas Dept. of Health and Human Services v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752 (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.

## **VI. Theories and Proof**

### **A. The Inferential Model**

#### **1. General**

*Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 487, 490–91, 99 FEP Cases 1189 (7th Cir. 2007), affirmed the grant of summary judgment to the ADEA defendant, holding that both direct and indirect evidence are still available modes of proof under the inferential model:

The distinction between the two avenues of proof is “vague” . . . and the terms “direct” and “indirect” themselves are somewhat misleading in the present context. For, as we recently explained in *Sylvester*, “direct” proof of discrimination is not limited to near-admissions by the employer that its decisions were based on a proscribed criterion (e.g., “You’re too old to work here.”), but also includes circumstantial evidence which suggests discrimination albeit through a longer chain of inferences. . . . The “indirect method” of proof involves a subset of circumstantial evidence (including the disparate treatment of similarly situated employees) that conforms to the prescription of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

(Citations omitted.)

## 2. Causal Link in the *Prima Facie* Case

**Employer's Deceit Creates Causal Link:** *Chalfant v. Titan Distribution, Inc.*, 475 F.3d 982, 990–91, 18 AD Cases 1601 (8th Cir. 2007), affirmed the judgment on a jury verdict for the ADA plaintiff, holding that defendant's false explanation for failing to hire plaintiff provided a causal link between defendant's disability discrimination and its failure to hire plaintiff, satisfying the *prima facie* case.

## 3. Application

**Employer's Knowledge of Interest Sufficient to Satisfy Application Element, and EEOC Charge Provided Notice of Interest as to A Subsequent Opening:** *Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 937–38, 99 FEP Cases 1127 (8th Cir. 2007), affirmed the judgment for the Title VII racial-discrimination and retaliation plaintiff as to defendant's failure to promote her to Store Manager on January 15, 2002, and in November 2002. As to the former position, plaintiff had previously been an Assistant Store Manager and was still considered qualified for the position after her demotion. The court stated: "Failure to formally apply for a management position does not bar a plaintiff from establishing a *prima facie* claim, as long as the plaintiff 'made every reasonable attempt to convey [her] interest in the job to the employer.'" *Id.* at 937 (citations omitted). As to the November 2002 position, the court relied on plaintiff's intervening EEOC charge to show that defendant knew of her interest: "Without a doubt, TSI knew of Allen's interest in a management position, because in March 2002 Allen filed a complaint with the EEOC charging TSI with race discrimination for failing to promote her to assistant manager in January 2002." *Id.* at 938. Judge Smith concurred in part and dissented in part. *Id.* at 945–46.

## 4. Qualifications

**Plaintiff's Inability to Understand Complaints of Rudeness Showed She Did Not Meet Defendant's Legitimate Expectations:** *Fane v. Locke Reynolds, LLP*, 480 F.3d 534, 540, 100 FEP Cases 6 (7th Cir. 2007), affirmed the grant of summary judgment to the § 1981 defendant law firm on the plaintiff former paralegal's claim that she was fired because of her race. The court stated: "Fane's evidence is insufficient to demonstrate she was meeting the firm's legitimate expectations. The client's complaint about Fane's communication style coupled with the abrasive e-mail she sent to her co-workers demonstrate that she was not behaving in the manner Locke Reynolds expected. Fane's failure to live up to the firm's expectations was amplified by her inability to evaluate her own behavior, including the manner in which she addressed a senior partner. The fact that Fane completed her assignments has no bearing on whether she met Locke Reynolds's expectations regarding employee conduct." (Footnote omitted.)

**Defendant's Failure to Cut Pay Rate Showed It Thought Demoted Plaintiff Was Still Qualified:** *Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 937, 99 FEP Cases 1127 (8th Cir. 2007), affirmed the judgment for the Title VII racial-discrimination plaintiff as to defendant's failure to promote her to Store Manager on January 15, 2002. Defendant's asserted reason was that plaintiff, as an Assistant Store Manager, had previously been involved in a heated argument with her Store Manager behind closed doors. However, defendant continued to pay plaintiff at

the Assistant Store Manager rate after it demoted and transferred her to a Cashier position, indicating that it still felt she was qualified. Judge Smith concurred in part and dissented in part. *Id.* at 945–46.

## 5. Adverse Employment Actions

**Lateral Transfers:** *Czekalski v. Peters*, 475 F.3d 360, 99 FEP Cases 1121 (D.C. Cir. 2007), reversed the grant of summary judgment to the Title VII gender discrimination defendant, holding that lateral transfers can be an adverse employment action. The Federal Aviation Administration’s decisionmaker said that plaintiff’s performance was unsatisfactory, and transferred her. “Although he stated that this was ‘a lateral move involving no loss of pay or SES status’ . . . there were some undeniable changes in the nature of her job: she now reported to a former peer, supervised fewer than ten employees, managed a single program, and did not have a separate budget.” *Id.* at 362. The court held that lateral transfers involving a withdrawal of supervisory responsibilities, or that involve significantly different responsibilities, are adverse employment actions. *Id.* at 364. Responding to the FAA’s argument that plaintiff’s new position was more important to the agency than her old position, the court stated: “We also note that a reasonable jury could well find it difficult to reconcile the government’s insistence that the Y2K job was a position of ‘extreme importance’ to the agency, with Donohue’s assertion that he reassigned her to that position because she had failed to perform up to expected standards.” *Id.* at 365.

**Assignment of Harder Tasks Not Adverse Employment Actions Where Employee Earns Overtime, and There is No Evidence of Discrimination:** *Fane v. Locke Reynolds, LLP*, 480 F.3d 534, 539, 100 FEP Cases 6 (7th Cir. 2007), affirmed the grant of summary judgment to the § 1981 defendant law firm on the plaintiff former paralegal’s claim that she was given substantially more work than her comparator paralegals. The court stated: “Absent any evidence suggesting that discrimination motivated work distributions, the mere fact that an employee (particularly one eligible for overtime pay) had a heavier workload than her co-workers does not amount to an adverse employment action.” The court also noted that defendant’s overtime records showed that plaintiff worked far fewer overtime hours than most of her comparators, and that plaintiff’s subjecting feelings to the contrary were not probative.

## 6. Replacement by Person Outside the Class

*Lettieri v. Equant Inc.*, 478 F.3d 640, 647–49, 99 FEP Cases 1569 (4th Cir. 2007), reversed the grant of summary judgment to defendant on plaintiff’s Title VII gender discrimination and retaliation claims. The court held that plaintiff established her *prima facie* case despite the fact that it was a second decisionmaker who replaced her with a male:

We noted . . . “in order to make out a *prima facie* case of discriminatory termination, a plaintiff must ordinarily show that the position ultimately was filled by someone not a member of the protected class.” . . . There are “exceptions to this rule in limited situations.” . . . “One clear [exception] is when the defendant hires someone from within the plaintiff’s protected class in order ‘to disguise its own act of discrimination toward the plaintiff.’” . . . We recognized another exception . . . for the case “wherein the firing and replacement hiring decisions are made by different decisionmakers.” . . . In

such a case, we said, “the second individual’s hiring decision has no probative value whatsoever as to whether the first individual’s firing decision was motivated by the plaintiff’s protected status.” . . . In other words, even if the female plaintiff could have shown that the second decisionmaker hired a male to replace her, the replacement hiring decision would not have contributed to a presumption of gender discrimination on the part of the first decisionmaker, who fired the plaintiff. . . . The solution, we held, was simply to relieve the plaintiff of the burden to “show as part of her prima facie case that she was replaced by someone outside her protected class” when “the firing and hiring decisions were made by different decisionmakers.”

*Id.* at 647–48 (citations omitted). The court also held that plaintiff adequately showed she was replaced by showing that her duties were temporarily assigned to a male employee for six months, to outlast her recall rights, before being assigned to a person selected for the job. *Id.* at 648–49.

*Tuttle v. Metropolitan Government of Nashville*, 474 F.3d 307, 317–18, 99 FEP Cases 974 (6th Cir. 2007), reversed the grant of judgment as a matter of law to the ADEA defendant, holding that plaintiff’s replacement by a younger employee satisfied the fourth prong of the *prima facie* case even if the younger employee was classified as a temporary employee. The court stated: “In cases where the new hire takes on the plaintiff’s former job responsibilities, merely designating the new hire ‘temporary’ will not defeat the fourth element.” *Id.* at 318.

## 7. Adequacy of Employer’s Nondiscriminatory Reason

**Poor Performance:** *Douglas v. J.C. Penney Co., Inc.*, 474 F.3d 10, 14, 99 FEP Cases 985 (1st Cir. 2007), affirmed the grant of summary judgment to the Title VII defendant, stating: “There can be no question that, after more than four years of declining sales and mediocre or poor job performance, J.C. Penney was justified in showing Douglas the door.”

**Prior Salary, Lack of Litigation Experience, and Performance Evaluations Legitimate Grounds for Pay Disparities:** *Fane v. Locke Reynolds, LLP*, 480 F.3d 534, 539, 100 FEP Cases 6 (7th Cir. 2007), affirmed the grant of summary judgment to the § 1981 defendant law firm. The court held that the markedly higher previous salaries of plaintiff’s paralegal comparators, their possession of litigation experience, her lack of it, their markedly higher evaluations, and her lower evaluation reflecting her lack of experience and complaints of rudeness to clients, justified her lower pay.

**Insistence on Apology:** *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160, 99 FEP Cases 1377 (10th Cir. 2007) (*en banc*), affirmed the grant of summary judgment to the Title VII defendant, which had invited plaintiff back to work from a suspension after confirming that his documents were in order, but fired him when he presented a letter stating that he would not return to work without an apology. The court rejected plaintiff’s argument that no one could have believed he was serious about refusing to return without an apology. Judges Hartz and Tymkovich concurred. Judges McConnell, Kelly, O’Brien and Tymkovich concurred and concurred in the judgment, with Judge Gorsuch and Judge Holmes concurring in part in separate parts of the concurrence. Judge Gorsuch wrote a separate concurrence. Judges Lucero, Holloway, Henry, Briscoe, and Murphy dissented.



## 8. Pretext

**False Explanations Can Give Rise to Inference of Discrimination:** *Czekalski v. Peters*, 475 F.3d 360, 366, 99 FEP Cases 1121 (D.C. Cir. 2007), reversed the grant of summary judgment to the Title VII gender discrimination defendant, holding that the provision of false explanations is also evidence from which discrimination can be inferred.

**Contradictory Statements Help Show Pretext:** *Tuttle v. Metropolitan Government of Nashville*, 474 F.3d 307, 317–18, 99 FEP Cases 974 (6th Cir. 2007), reversed the grant of judgment as a matter of law to the ADEA defendant, holding that irreconcilably contradictory statements by the decisionmaker, coupled with discriminatory remarks, were adequate evidence of pretext.

**Inconsistencies Between Reasons Given to Plaintiff At Time of Termination and Those Given in Litigation Showed an Issue as to Pretext:** *Asmo v. Keane, Inc.*, 471 F.3d 588, 596, 99 FEP Cases 678 (6th Cir. 2006), reversed the grant of summary judgment to the Title VII pregnancy discrimination defendant, stating:

“An employer’s changing rationale for making an adverse employment decision can be evidence of pretext.” . . . Here, the inconsistencies in Keane’s stated reasons for terminating Asmo’s employment after she initiated this lawsuit and the reasons Santoro gave her over the phone are probative of pretext. The two reasons that Santoro initially offered Asmo that were then eliminated at the commencement of this lawsuit, that Asmo’s salary was higher than the other SG&A recruiters and that her expenses were higher than the other SG&A recruiters, are false. The other SG&A recruiter with the least seniority who started working the same day as Asmo, Jennifer Bowman, was paid about \$5000 more than Asmo. Additionally, SG&A recruiters’ expenses were not tracked, and thus the expenses of the various recruiters were unknown. It is unclear how Santoro initially came up with these reasons for termination, but the fact that they were later eliminated, and they happen to be the two reasons that Santoro gave that are false, is very suspicious. It appears that Santoro offered any and all reasons he could think of to justify his decision to Asmo, whether or not they were true. Once a lawsuit was filed and Keane knew the reasons would be subject to scrutiny, it changed the justifications offered for Asmo’s termination to include only those that were either circumstantially true or could not be as easily penetrated as false. This change in rationale is suspicious and is evidence of pretext.

(Citation omitted.) Judge Griffin dissented. *Id.* at 598–601.

**Evidence Supported Inference that Employee Was “Set Up,” and Shoddiness of Investigation Supported Inference:** *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 407, 99 FEP Cases 872 (7th Cir. 2007), reversed the grant of summary judgment to defendant on plaintiff’s § 1981 retaliation claim. The court held that plaintiff had shown genuine issues of material fact as to pretext:

Cracker Barrel also contends that it established that it had a legitimate reason for firing Humphries, and that Humphries failed to show that the reason that Cracker Barrel

provided for his discharge was pretext (i.e., a lie). . . . On these issues, we agree with the district court's determination that the record is replete with contested material facts pertaining to Humphries's work performance and the nature of Christensen's beliefs when he terminated Humphries. As an initial matter, Humphries contends that he did not leave the safe unattended, and the evidence implicating him is comprised solely of the testimony from Stinnett--the very individual Humphries targeted in his final complaint of discrimination. And there is testimony in the record that a co-worker observed Stinnett and Dowd acting differently (less deferentially) toward Humphries just prior to his firing, and that this co-worker specifically warned Humphries about Stinnett and Dowd because she believed that their behavior indicated that they were "up to something to harm Humphries." In addition, prior to firing Humphries, it appears that Christensen conducted no investigation into the veracity of Stinnett's claim. He did not interview Humphries; he simply credited Stinnett's story. Finally, the timing of Humphries's firing is suspicious: he was fired one week after he complained to Christensen about discriminatory practices and one day prior to a scheduled meeting with Dowd, which, presumably would have created a more elaborate (and less favorable to Cracker Barrel) documentary record of Humphries's complaints. Finally, there was evidence in the record tending to show that similar transgressions were not sufficient to fire other similarly situated employees who did not complain of discrimination. . . .

This is not to say that merely pointing to an employer's shoddy investigatory efforts is sufficient to establish pretext. Erroneous (but believed) reasons for terminating an employee are not tantamount to pretextual reasons. . . . But, under the circumstances here, there was sufficient other circumstantial evidence in the record to support a reasonable inference that Humphries was "set-up" by Stinnett (in tandem with Dowd and Christensen) . . . and that his purported bad act of leaving the safe unlocked was a fabrication to justify his firing. In this sense, the quality of Christensen's investigation may have some bearing on the truthfulness of Cracker Barrel's proffered reasons for terminating Humphries. In short, these are the sort of disputed factual issues that a jury should sort out.

**Pretext Per Se:** *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 570, 18 AD Cases 1697 (8th Cir. 2007), reversed the grant of summary judgment to the ADA defendant. The court articulated standards for rejecting proffered nondiscriminatory explanations as pretexts for unlawful actions:

An employer is prohibited from inventing a "post hoc rationalization for its actions at the rebuttal stage of the case." *Id.* at 404 (citing *EEOC v. Alton Packaging Corp.*, 901 F.2d 920, 925 (11th Cir. 1990) (holding that where a white applicant did not apply for position until after decision makers had determined a black employee was not qualified, relative qualifications would not establish a non-discriminatory reason); *Hill v. Seaboard C.L.R. Co.*, 767 F.2d 771, 774 (11th Cir. 1985) ("Of course, failure to promote a plaintiff because the person actually promoted was more qualified is a non-discriminatory reason, but the articulation of that reason must include the fact that the decision-maker knew that the promoted individual's qualifications were superior at the time the decision was made.")). Therefore, unless the employer articulates a legitimate,

nondiscriminatory reason for not hiring the plaintiff that “*actually* motivated the decision, the reason is legally insufficient.” *Id.* (emphasis in original).

**Lack of Documentation and Inconsistencies Show Pretext:** *Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 939, 99 FEP Cases 1127 (8th Cir. 2007), affirmed the judgment for the Title VII racial-discrimination and retaliation plaintiff, holding that the lower court did not err in rejecting defendant’s explanation—that plaintiff had been involved in an altercation with her Store Manager—as a pretext for racial discrimination:

TSI cannot persuasively contend the Lovell-Allen argument which occurred eleven months earlier could provide the sole basis for not promoting Allen in November 2002. Allen’s length of service with TSI also belies TSI’s assertion Allen was a problem employee. The record shows Allen worked for TSI for over two and one-half years, which appears to be a relatively long period of employment at TSI. Indeed, during the eleven-month period from December 2001 to November 2002, at least three management employees—Lovell, White, and Morgan—were fired. A fourth employee, Smith, quit when Bearden confronted Smith about Smith’s argument with Morgan. It certainly can be inferred from this record TSI would not hesitate to dismiss an insubordinate employee, yet the record shows no evidence, other than the December 24 incident, Allen was ever reprimanded or otherwise disciplined for insubordination. In fact, at trial Bearden admitted Allen’s personnel file contained no information about any misconduct, including the December 24 argument with Lovell, and no negative comments of any other kind. The lack of any disciplinary record in Allen’s personnel file undermines TSI’s proffered testimony suggesting Allen could be difficult.

The court also relied on statistical evidence and evidence of subjective decisionmaking to show pretext. *Id.* at 940. Judge Smith concurred in part and dissented in part. *Id.* at 945–46.

## **9. Same Decisionmaker**

*Czekalski v. Peters*, 475 F.3d 360, 368–69, 99 FEP Cases 1121 (D.C. Cir. 2007), reversed the grant of summary judgment to the Title VII gender discrimination defendant, rejecting the Federal Aviation Administration’s argument that the decisionmaker hired and promoted plaintiff, and must be presumed not to have discriminated against her in the challenged reassignment. The court explained: “To be sure, this is probative evidence against the claim that he harbored a general animus against female employees. . . . But the fact that Donohue once promoted Czekalski cannot immunize him from liability for subsequent discrimination, nor is it alone sufficient to keep this case from the jury. In light of all of Czekalski’s evidence, a reasonable trier of fact could conclude that Donahue reassigned her for a discriminatory reason.” (Citation omitted.)

## **B. Mixed Motives**

*Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1241 (9th Cir. 2007), *petition for reh’g en banc filed and response requested*, affirmed the grant of class certification and the limits the lower court imposed on back pay and punitive damages for promotion claims. The court rejected

defendant's argument that class certification would improperly deprive it of the ability to assert a "same decision" defense under the Civil Rights Act of 1991:

Plaintiffs have the choice to proceed under a "single motive" theory or a "mixed motive" theory; Wal-Mart cannot force Plaintiffs to proceed under a "mixed motive" theory simply because it wishes to present a "same decision defense." *Bogle v. McClure*, 332 F.3d 1347, 1357 (11th Cir. 2003). In this case, Plaintiffs have elected to prove the "single motive" theory. This means that Wal-Mart is not entitled to present a "same decision defense" because such a defense at the remedy stage applies only where the conduct was the result of "mixed motives." 42 U.S.C. § 2000e-5(g)(2)(B). [FN17] Accordingly, the Civil Rights Act of 1991 does not preclude use of the class action format in this case.

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FN17. Wal-Mart also contends that the 1991 Act mandates that a district court hold individualized hearings where a defendant pursues a "mixed motive" defense. However, Wal-Mart offers no support for this theory. Nor does caselaw or legislative history suggest that individualized hearings are required where plaintiffs pursue a "mixed motive" theory. Regardless, this issue is irrelevant to the case at hand because, as discussed above, Plaintiffs are proceeding under the "single motive" theory.

Judge Kleinfeld dissented. *Id.* at 1244–49. *See also* the discussion of this case in the sections below on "Statistics," and on "Class Actions."

### **C. Disparate Impact: Age Discrimination**

*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. *Id.* at 144. 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 143–44. 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” . . . but “the one selected was not unreasonable.”

*Id.* at 145–46.

## **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.

*Lemire v. State of Louisiana*, 480 F.3d 383, 389, 99 FEP Cases 1577 (5th Cir. 2007), affirmed the grant of summary judgment to defendant on plaintiff’s Title VII retaliation claim as to the order to spray herbicides, because plaintiff had not reported his supervisor’s same-sex harassment to anyone yet, and his rejection of his supervisor’s advances did not constitute protected activity.

*Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 404, 99 FEP Cases 872 (7th Cir. 2007), reversed the grant of summary judgment to defendant on plaintiff’s § 1981 retaliation claim. The court articulated the two ways in which a retaliation plaintiff can defeat a motion for summary judgment:

Under the direct method, *Humphries* must present direct evidence of (1) a statutorily protected activity; (2) a materially adverse action taken by the employer; and (3) a causal connection between the two. . . . Under the indirect method, he must show that after opposing the employer’s discriminatory practice only he, and not any similarly situated

employee who did not complain of discrimination, was subjected to a materially adverse action even though he was performing his job in a satisfactory manner.

(Citations omitted.) Judge Easterbrook dissented in part. *Id.* at 408–11.

**The “Pop Goes the Weasel” Theory of Protection from Retaliation:** *Crawford v. City of Fairburn*, 479 F.3d 774, 99 FEP Cases 1405 (11th Cir. 2007), *vacated and superseded*, 482 F.3d 1305, 100 FEP Cases 553 (11th Cir. 2007), *petition for cert. filed*, 76 USLW 3074 (U.S., Aug. 17, 2007, No. 07–233), originally affirmed the grant of summary judgment to the Title VII retaliation defendant, holding that plaintiff’s participation in an internal investigation of an officer’s second sexual harassment claim was not protected activity under the participation clause because the EEOC had issued a letter of determination on the first claim, only conciliation was underway, the City had informed the EEOC it was postponing its response to the offer of conciliation until plaintiff’s investigation of the second claim was concluded, and the second claim had not yet been filed with the EEOC. The court explained in its original opinion:

The “informal method” of conciliation, although an important part of the remedial process, *see* 29 C.F.R. § 1601.24(a), is distinct from the “investigation” that results in the letter of determination. Conciliation is also not a “proceeding”; the statute uses the word “proceedings” to refer to enforcement actions in state courts and agencies and lawsuits in federal courts. *See* 42 U.S.C. § 2000e–5(c), (d), (f). Because the participation clause protects only participation “in an investigation, proceeding, or hearing under this subchapter,” an employee’s participation in only the conciliation process is not protected activity under that clause.

On panel rehearing, the court omitted this reasoning, and affirmed the grant of summary judgment on the merits. Plaintiffs’ counsel is seeking rehearing *en banc* from that affirmance.

## **2. Determinations of Actionable Conduct**

*Burlington Northern and Santa Fe Ry. Co. v. White*, \_\_ U.S. \_\_, 126 S. Ct. 2405, 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 held that the language and purpose of § 704(a) of the Act required that it reach employer conduct not reached by § 703(a). It stated that “purpose reinforces what language already indicates, namely, that the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment.” *Id.* at 2412–13. 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.

*Id.* at 2409. The Court rejected the “ultimate employment decision” line of cases, stating:

In any event, as we have explained, differences in the purpose of the two provisions remove any perceived “anomaly,” for they justify this difference of interpretation. . . . Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. “Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.” . . . Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act’s primary objective depends.

For these reasons, we conclude that Title VII’s substantive provision and its anti-retaliation provision are not coterminous. The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. We therefore reject the standards applied in the Courts of Appeals that have treated the anti-retaliation provision as forbidding the same conduct prohibited by the anti-discrimination provision and that have limited actionable retaliation to so-called “ultimate employment decisions.”

*Id.* at 2414. The Court’s holding is:

The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm. As we have explained, the Courts of Appeals have used differing language to describe the level of seriousness to which this harm must rise before it becomes actionable retaliation. We agree with the formulation set forth by the Seventh and the District of Columbia Circuits. In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, “which in this context means it well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”

*Id.* at 2414–15. The Court made clear that materiality was an important criterion:

We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth “a general civility code for the American workplace.” . . . An employee’s decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. See 1 B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 669 (3d ed.1996) (noting that “courts have held that personality conflicts at work that generate antipathy” and “‘snubbing’ by supervisors and co-workers” are not actionable under § 704(a)). The anti-retaliation provision seeks to prevent employer interference with “unfettered access” to Title VII’s remedial mechanisms. . . . It does so by prohibiting employer actions that are likely “to deter victims of discrimination from complaining to the EEOC,” the courts, and their employers. . . . And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. See 2 EEOC 1998 MANUAL § 8, p. 8–13.

*Id.* at 2415 (emphasis in original; citations omitted). The Court expanded on the application of this standard to particular cases, making clear that there are few, if any, bright-line tests:

We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. “The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.” . . . A schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. . . . A supervisor’s refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee’s professional advancement might well deter a reasonable employee from complaining about discrimination. See 2 EEOC 1998 MANUAL § 8, p. 8-14. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an “act that would be immaterial in some situations is material in others.” . . .

*Id.* at 1215–16 (citations omitted). Here, plaintiff was assigned to a more arduous position, and was suspended without pay for 37 days, although she ultimately received back pay for this period. The Court held that each was actionable:

First, Burlington argues that a reassignment of duties cannot constitute retaliatory discrimination where, as here, both the former and present duties fall within the same job description. . . . We do not see why that is so. Almost every job category involves some responsibilities and duties that are less desirable than others. Common sense suggests that one good way to discourage an employee such as White from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable. That is presumably why the EEOC has consistently found “[r]etaliatory work assignments” to be a classic and “widely recognized” example of “forbidden retaliation.” 2 EEOC 1991 Manual § 614.7, pp. 614-31 to 614-32; see also 1972 Reference Manual § 495.2 (noting Commission decision involving an employer’s ordering an employee “to do an unpleasant work assignment in retaliation” for filing racial discrimination complaint); EEOC Dec. No. 74-77, 1974 WL 3847, \*4 (Jan. 18, 1974) (“Employers have been enjoined” under Title VII “from imposing unpleasant work assignments upon an employee for filing charges”).

To be sure, reassignment of job duties is not automatically actionable. Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and “should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’” . . . But here, the jury had before it considerable evidence that the track labor duties were “by all accounts more arduous and dirtier”; that the “forklift operator position required more qualifications, which is an indication of prestige”; and that “the forklift operator position was objectively considered a better job and the male employees resented White for occupying it.” . . . Based on this record, a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee.

*Id.* at 2416–17 (citation omitted). Turning to the suspension, the Court stated:



Second, Burlington argues that the 37-day suspension without pay lacked statutory significance because Burlington ultimately reinstated White with backpay. Burlington says that “it defies reason to believe that Congress would have considered a rescinded investigatory suspension with full back pay” to be unlawful, particularly because Title VII, throughout much of its history, provided no relief in an equitable action for victims in White’s position. . . .

We do not find Burlington’s last mentioned reference to the nature of Title VII’s remedies convincing. After all, throughout its history, Title VII has provided for injunctions to “bar like discrimination in the future” . . . an important form of relief. . . . And we have no reason to believe that a court could not have issued an injunction where an employer suspended an employee for retaliatory purposes, even if that employer later provided backpay. In any event, Congress amended Title VII in 1991 to permit victims of intentional discrimination to recover compensatory (as White received here) and punitive damages, concluding that the additional remedies were necessary to “‘help make victims whole.’” . . . We would undermine the significance of that congressional judgment were we to conclude that employers could avoid liability in these circumstances.

Neither do we find convincing any claim of insufficient evidence. White did receive backpay. But White and her family had to live for 37 days without income. They did not know during that time whether or when White could return to work. Many reasonable employees would find a month without a paycheck to be a serious hardship. And White described to the jury the physical and emotional hardship that 37 days of having “no income, no money” in fact caused. 1 Tr. 154 (“That was the worst Christmas I had out of my life. No income, no money, and that made all of us feel bad. . . . I got very depressed”). Indeed, she obtained medical treatment for her emotional distress. A reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former. That is to say, an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay. . . . Thus, the jury’s conclusion that the 37-day suspension without pay was materially adverse was a reasonable one.

*Id.* at 2417–18 (citations omitted). Justice Alito concurred in the judgment. *Id.* at 2418–22.

*Roney v. Illinois Department of Transportation*, 474 F.3d 455, 461–62, 99 FEP Cases 1044 (7th Cir. 2007), affirmed the grant of summary judgment to the Title VII defendant. The court held that plaintiff had not met the standards of *Burlington Northern* as to (a) his routine assignment to inspect painting work, (b) the failure to create a performance plan for him where he still received the four appropriate performance evaluations and no harm could be identified, (c) the failure to award him an exceptional performance merit raise at a time when such raises had been ended, (d) the threat of termination if he did not file a form the agency was not barred by law from requiring, (e) a contention that defendant fabricated the basis for an oral warning, (f) a contention that defendant fabricated the basis for a disciplinary report and then destroyed the records, (g) a truthful report to the police, and (h) an adverse unemployment compensation ruling based on a different agency’s determination that he resigned voluntarily rather than having been constructively discharged.

*McGowan v. City of Eufala*, 472 F.3d 736, 99 FEP Cases 747 (**10th Cir.** 2006), affirmed the grant of summary judgment to the Title VII retaliation defendant, applying *Burlington Northern* and holding that the denial of plaintiff's request to be transferred to the day shift was not materially adverse because her desire was only a personal preference, and that alleged police harassment of her son and his girlfriend was not materially adverse because she was not being personally harassed.

### **3. Causation**

*Lettieri v. Equant Inc.*, 478 F.3d 640, 650, 99 FEP Cases 1569 (**4th Cir.** 2007), reversed the grant of summary judgment to defendant on plaintiff's Title VII gender discrimination and retaliation claims. The court held at p. \*9 that plaintiff adequately showed causation despite the lapse of seven months between her protected activity and her termination:

In cases where “temporal proximity between protected activity and allegedly retaliatory conduct is missing, courts may look to the intervening period for other evidence of retaliatory animus.” . . . Specifically, evidence of recurring retaliatory animus during the intervening period can be sufficient to satisfy the element of causation. . . . In this case Lettieri does not rely on temporal proximity; rather, to establish causation, she points to continuing retaliatory conduct and animus directed at her by Taylor and Parkinson in the seven-month period between her complaint and her termination.

(Citations omitted.)

*Tuttle v. Metropolitan Government of Nashville*, 474 F.3d 307, 320, 99 FEP Cases 974 (**6th Cir.** 2007), reversed the grant of judgment as a matter of law to the ADEA retaliation defendant, holding that temporal proximity alone is not enough to show a causal connection between the protected activity and the challenged employment action, but the combination of temporal proximity—plaintiff was fired three months after she filed her EEOC charge—and a threat to plaintiff, which she interpreted as related to her EEOC charge, were enough to show a triable issue of causation where the threats were made nine days after the supervisor uttering the threat received notice of the charge.

*Wells v. SCI Management, L.P.*, 469 F.3d 697, 702, 99 FEP Cases 516 (**8th Cir.** 2006), affirmed the grant of summary judgment to the Title VII retaliation defendant, holding that a 34-month gap between the protected activity and the adverse employment action, and the intervening complaints about plaintiff by customers and others, did not allow a reasonable inference of causation.

### **E. Circumstantial Evidence**

*Sun v. Board of Trustees of University of Illinois*, 473 F.3d 799, 812, 99 FEP Cases 897 (**7th Cir.** 2007), affirmed the lower court's grant of summary judgment to the Title VII race and national origin discrimination defendants. The court described the types of circumstantial evidence that can be used to prove discrimination:

Circumstantial evidence of discrimination is evidence which allows the trier of fact to infer intentional discrimination by the decisionmaker. . . . This Circuit has recognized

three types of “circumstantial” evidence of intentional discrimination: (1) suspicious timing, ambiguous oral or written statements, or behavior toward or comments directed at other employees in the protected group; (2) evidence, whether or not rigorously statistical, that similarly situated employees outside the protected class received systematically better treatment; and (3) evidence that the employee was qualified for the job in question but was passed over in favor of a person outside the protected class and the employer’s reason is a pretext for discrimination. . . . Sun’s evidence falls into the first two categories.

(Citations omitted.)

## **F. Comparators**

**Lack of Comparator No Bar to Claim:** *Czekalski v. Peters*, 475 F.3d 360, 365–66, 99 FEP Cases 1121 (**D.C. Cir.** 2007), reversed the grant of summary judgment to the Title VII gender discrimination defendant, holding that plaintiff was not required to show that a comparator male employee was treated more favorably. It held that evidence as to comparators was only one way in which an inference of discrimination can arise. “In a discharge case, we explained, another way would be to show that ‘the discharge was not attributable to the two [most] common legitimate reasons for discharge: performance below the employer’s legitimate expectations or the elimination of the plaintiff’s position altogether.’ . . . The same suffices in a reassignment case like this one.” *Id.* at 366 (citation omitted). It stated that the provision of false explanations is also evidence from which discrimination can be inferred. *Id.*

*Velazquez-Garcia v. Horizon Lines Of Puerto Rico, Inc.*, 473 F.3d 11, 20, 181 LRRM 2097 (**1st Cir.** 2007), reversed the grant of summary judgment to the USERRA defendant. The court held that the lower court erred in holding that defendant’s failure to fire every employee who served in the military proved an absence of discrimination. The court stated: “As an initial matter, the failure to treat all members of a class with similar discriminatory animus does not preclude a claim by a member of that class who is so treated.” (Citations omitted.)

**Comparators Showed the Fourth Prong of the *Prima Facie* Case:** *Tuttle v. Metropolitan Government of Nashville*, 474 F.3d 307, 318–19, 99 FEP Cases 974 (**6th Cir.** 2007), reversed the grant of judgment as a matter of law to the ADEA defendant, holding that plaintiff adequately showed that younger employees were treated much more favorably, helping to establish the fourth prong of her *prima-facie* case.

**Comparability Should Be Exact as to Material Elements:** *Fane v. Locke Reynolds, LLP*, 480 F.3d 534, 540–41, 100 FEP Cases 6 (**7th Cir.** 2007), affirmed the grant of summary judgment to the § 1981 defendant law firm on the plaintiff former paralegal’s claim that she was fired because of her race. The court stated: “An employee is similarly situated to a plaintiff if the two employees deal with the same supervisor, are subject to the same standards, and have engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer’s treatment of them.” *Id.* at 540 (citation omitted). The court rejected plaintiff’s effort to compare herself to a secretary on the ground that both paralegals and secretaries were exempt and were support personnel subject to the Director of Human Resources, and relied on the defendant’s Handbook placing them in different classes of

employees, as well as on the obvious differences in duties. The court rejected plaintiff's second comparator, a paralegal who reported to the same practice group supervisor, because plaintiff failed to identify the conduct for which that comparator had been given a vague criticism, and there was thus no basis for concluding that it was the same as, or worse, than, plaintiff's conduct triggering complaints from the firm's clients, from co-workers, or from her supervisor, or that the putative comparator had blinded herself to her conduct as rigorously as plaintiff. *Id.* at 540–41.

**Comparability Need Not Be Exact:** *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 404–05, 99 FEP Cases 872 (7th Cir. 2007), reversed the grant of summary judgment to defendant on plaintiff's § 1981 retaliation claim. The court rejected defendant's attack on plaintiff's comparators:

According to Cracker Barrel, similarly situated comparators must have the same supervisors, the same job duties, the same work performance histories, and must have engaged in the same bad conduct as the plaintiff. In other words, they must be essentially identical to the plaintiff, and, under Cracker Barrel's view, Humphries's two comparators, Stinnett and Dowd, fail that test.

Cracker Barrel's view of our similarly situated requirement is too rigid and inflexible. This requirement "should not be applied mechanically or inflexibly." . . . True, we have sometimes stated the similarly situated requirement in the "must" terms that Cracker Barrel argues, but a more sensitive reading of our cases indicates that we have often stated that the similarly situated requirement "normally entails a showing that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." . . . In other words, we have emphasized that the similarly situated inquiry is a flexible one that considers "all relevant factors, the number of which depends on the context of the case." . . . "As to the relevant factors, an employee need not show complete identity in comparing himself to the better treated employee, but he must show substantial similarity." . . .

In addition, our case law does not provide any "magic formula for determining whether someone is similarly situated." . . . Instead, courts should apply a "common-sense" factual inquiry—essentially, are there enough common features between the individuals to allow a meaningful comparison? . . . Put a different way, the purpose of the similarly situated requirement is to eliminate confounding variables, such as differing roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable: complaints about discrimination. . . .

It is important not to lose sight of the common-sense aspect of this inquiry. It is not an unyielding, inflexible requirement that requires near one-to-one mapping between employees—distinctions can always be found in particular job duties or performance histories or the nature of the alleged transgressions. . . . Now, it may be that the degree of similarity necessary may vary in accordance with the size of the potential comparator pool, as well as to the extent to which the plaintiff cherry-picks would-be comparators . . . but the fundamental issue remains whether such distinctions are so significant that they

render the comparison effectively useless. In other words, the inquiry simply asks whether there are sufficient commonalities on the key variables between the plaintiff and the would-be comparator to allow the type of comparison that, taken together with the other prima facie evidence, would allow a jury to reach an inference of discrimination or retaliation--recall that the plaintiff need not prove anything at this stage.

(Citations omitted.) Judge Easterbrook dissented in part. *Id.* at 408–11.

**Comparator Showed Defendant’s Reason Pretextual:** *Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 937–38, 99 FEP Cases 1127 (8th Cir. 2007), affirmed the judgment for the Title VII racial-discrimination plaintiff as to defendant’s failure to promote her to Store Manager on January 15, 2002. Defendant’s asserted reason was that plaintiff, as an Assistant Store Manager, had previously been involved in a heated argument with her Store Manager behind closed doors after the store had closed. However, defendant promoted to Store Manager a Cashier who had been involved in a heated argument with her Store Manager in front of customers. The court held that there was no meaningful difference, adverse to plaintiff, in the two situations. Judge Smith concurred in part and dissented in part. *Id.* at 945–46.

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

*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.)

*Baylie v. Federal Reserve Bank of Chicago*, 476 F.3d 522, 526, 99 FEP Cases 1310 (7th Cir. 2007), affirmed the grant of summary judgment to the racial discrimination defendant, stating that although “a district judge should not insist that the other employees to whom a

plaintiff compares herself be identically situated, there must be a reasoned basis for thinking the comparator close enough in material ways so that a reasonable fact-finder could think that race (sex, or another covered attribute) was the difference that the employer perceived. When despite ample opportunity for discovery the plaintiff makes no serious effort to show that the favored worker was similarly situated except with respect to race (sex, and so on), the district judge properly concludes that a prima facie case of discrimination has not been established.”

*Crawford v. Indiana Harbor Belt R. Co.*, 461 F.3d 844, 98 FEP Cases 1398 (7th Cir. 2006), affirmed the grant of summary judgment to the Title VII race and sex discrimination defendant. The court referred to plaintiffs’ ability to prove discrimination by the use of comparators, but continued: “But this assumes that the better-treated workers with whom the plaintiff compares herself are a representative sample of all the workers who are comparable to her.” *Id.* at 845. It emphasized that the plaintiff should include all relevant comparators in her analysis, not just a couple who were treated dissimilarly from the others and from her. It continued:

There has been a tendency in our cases, and in those of some other circuits as well (a trend resisted, however, by the Eighth Circuit . . . to require closer and closer comparability between the plaintiff and the members of the comparison group (the group of 10 in this case). . . . The requirement is a natural response to cherry-picking by plaintiffs, the issue with which we began. If a plaintiff can make a prima facie case by finding just one or two male or nonminority workers who were treated worse than she, she should have to show that they really are comparable to her in every respect.

But if as we believe cherry-picking is improper, the plaintiff should have to show only that the members of the comparison group are sufficiently comparable to her to suggest that she was singled out for worse treatment. . . . Otherwise plaintiffs will be in a box: if they pick just members of the comparison group who are comparable in every respect, they will be accused of cherry-picking; but if they look for a representative sample, they will unavoidably include some who were not comparable in every respect, but merely broadly comparable. The cases that say that the members of the comparison group must be comparable to the plaintiff in all material respects get this right. . . .

*Id.* at 846 (citations omitted). The court stated that length of service was important if the comparison was to absolute numbers of incidents, because average numbers of incidents per year may be more relevant. The court suggested it would be more relevant to look at numbers of incidents in the same year, unless the comparators had markedly better records in prior years. *Id.* at 846–47. The court continued:

A difference in supervisors is important in evaluating a worker’s record of reprimands when the supervisors who issue the reprimands have broad discretion (the equivalent of prosecutorial discretion) in deciding whether and when to do so, as assumed in the many cases . . . that emphasize such a difference as a material circumstance in determining comparability. Here there were multiple supervisors—the plaintiff’s eight reprimands were issued by four different supervisors—and the plaintiff failed to show how much or how little discretion they had.

*Id.* at 847.

## H. Statistics

*Baylie v. Federal Reserve Bank of Chicago*, 476 F.3d 522, 525, 99 FEP Cases 1310 (7th Cir. 2007), affirmed the grant of summary judgment to the racial discrimination defendant, holding that a statistical difference showing at most that white workers received an average of one additional promotion every 20 years did not show it was more likely than not that the African-American plaintiffs were discriminated against because of their race.

*Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 487, 491–92, 99 FEP Cases 1189 (7th Cir. 2007), affirmed the grant of summary judgment to the ADEA defendant, holding that plaintiff’s statistics were too simple to be probative. The court explained:

We are also unconvinced by Hemsworth’s proposed statistical evidence because it does not provide sufficient context for a proper comparison. Hemsworth argues that 84% of the employees laid off by Quotesmith in 2001 were over the age of forty but does not explain how these other employees compare to his situation. “In order to be considered, the statistics must look at the same part of the company where the plaintiff worked; include only other employees who were similarly situated with respect to performance, qualifications, and conduct; the plaintiff and the other similarly situated employees must have shared a common supervisor; and treatment of the other employees must have occurred during the same RIF as when the plaintiff was discharged.” . . . Statistical evidence is only helpful when the plaintiff faithfully compares one apple to another without being clouded by thoughts of Apple Pie ala Mode or Apple iPods.

(Citations omitted.)

*Sun v. Board of Trustees of University of Illinois*, 473 F.3d 799, 812–13, 99 FEP Cases 897 (7th Cir. 2007), affirmed the lower court’s grant of summary judgment to the Title VII race and national origin discrimination defendants but held that plaintiff’s simple statistical evidence had some probative value. “Sun emphasized that, between the years of 1993 and 2003, the four members of the PTC voted on 19 promotion candidates, two of whom were Asian and from China and 17 of whom were Caucasian. According to Sun, the PTC voted unanimously against him and the other Chinese candidate and, in almost every case, voted unanimously in favor of the Caucasian candidates.” (Footnote omitted.) The court stated: “Although the sample size is insufficient to provide statistically reliable evidence, the PTC’s voting pattern has some probative value regarding discriminatory employment practices. . . . We do not hold, however, that a questionable pattern of promotion, standing alone, is sufficient evidence to withstand summary judgment.” *Id.* at 813.

*Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 938, 99 FEP Cases 1127 (8th Cir. 2007), affirmed the judgment for the Title VII racial-discrimination and retaliation plaintiff, relying in part on the following statistics:

When Allen filed her lawsuit, TSI had been in business for approximately ten years and operated eighty-two retail stores in states with large black populations—Arkansas, Tennessee, Mississippi, and Missouri—yet none of TSI’s stores had a black store

manager. In 2001 and 2002, TSI did not have a procedure for advancement. If an employee wanted to be considered for a management position, the employee simply asked the store manager or supervisor. Lovell, Hill, and Goggans were hired after Allen and had less managerial experience than Allen. Nonetheless, Lovell, Hill, and Goggans were hired directly into store manager positions. These hiring practices, together with TSI's word-of-mouth promotion process, support a finding of discriminatory practice.

(Citation omitted.) Judge Smith concurred in part and dissented in part. *Id.* at 945–46.

*Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007), *petition for reh'g en banc filed and response requested*, affirmed the grant of class certification and the limits the lower court imposed on back pay and punitive damages for promotion claims. The court rejected Wal-Mart's challenges to plaintiff's statistical evidence:

Wal-Mart challenges Dr. Drogin's findings and faults his decision to conduct his research on the regional level, rather than analyze the data store-by-store. However, the proper test of whether workforce statistics should be viewed at the macro (regional) or micro (store or sub-store) level depends largely on the similarity of the employment practices and the interchange of employees at the various facilities. . . .

Here, Dr. Drogin explained that a store-by-store analysis would not capture: (1) the effect of district, regional, and company-wide control over Wal-Mart's uniform compensation policies and procedures; (2) the dissemination of Wal-Mart's uniform compensation policies and procedures resulting from the frequent movement of store managers; or (3) Wal-Mart's strong corporate culture. Such evidence supports Plaintiffs' claim that the discrimination was closely related to Wal-Mart's corporate structure and policies. Because Dr. Drogin provided a reasonable explanation for conducting his research at the regional level, the district court did not abuse its discretion when it credited Dr. Drogin's analysis.

Wal-Mart also contends that the district court erred by not finding Wal-Mart's statistical evidence more probative than Plaintiffs' evidence because, according to Wal-Mart, its analysis was conducted store-by-store. However, contrary to Wal-Mart's characterization of its analysis, its research was not conducted at the individual store level. Dr. Joan Haworth, Wal-Mart's expert, did not conduct a store-by-store analysis; instead she reviewed data at the sub-store level by comparing departments to analyze the pay differential between male and female hourly employees. 547 U.S. 268, 126 S.Ct. 1752 Further, our job on this appeal is to resolve whether the "evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence ultimately will be persuasive " to the trier of fact. . . .<sup>7</sup> Thus, it was appropriate for the court to avoid resolving "the battle of the experts" at this stage of the proceedings. . . .

Finally, it is important to note that much of Dr. Haworth's evidence, which Wal-Mart argues was "unrebutted" by Wal-Mart, was in fact stricken by the district court for failing to satisfy the standards of Federal Rules of Evidence 702 and 703.<sup>8</sup> . . . The district court specifically stated that Dr. Haworth's stricken testimony could not be used



to undermine or contradict Dr. Drogin’s analysis . . . and, as noted above, Wal-Mart does not appeal this ruling. Thus, while Dr. Haworth’s testimony may be relevant to an analysis of the merits of Plaintiffs’ claims, it does not rebut Dr. Drogin’s evidence and does not support Wal-Mart’s contention that its statistical evidence is more probative than Plaintiffs’ at the certification stage.

Because the district court reasonably concluded that Dr. Drogin’s regional analysis was probative and based on well-established scientific principles, and because Wal-Mart provided little or no proper legal or factual challenge to it, the district court did not abuse its discretion when it relied on Dr. Drogin’s use and interpretation of statistical data as a valid component of its commonality analysis.

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<sup>6</sup> This means that Dr. Haworth ran separate regression analyses for: (1) each of the specialty departments in the store, (2) each grocery department in the store, and (3) the store’s remaining departments. She did not run regression analyses to examine pay differential between male and female salaried employees.

<sup>7</sup> Wal-Mart maintains that the district court erred by not requiring Dr. Drogin to perform a “Chow test” to determine whether data could be properly aggregated. The Chow test (named after the statistician who created it) can be used to analyze whether two or more sets of data may be aggregated into a single sample in a statistical model. . . . However, there is no legal support for the contention that a Chow test must—or even should—be applied at the class certification stage. Further, we have not found a single case suggesting that commonality would be undermined if Plaintiffs’ evidence failed this test.

<sup>8</sup> In addition to her sub-store analysis, Dr. Haworth conducted a survey of store managers. After reviewing the survey and its methodology, the district court concluded that the store manager survey was biased both “on its face” and in the way that it was conducted. . . . Dr. Haworth’s disaggregated analysis created pools too small to yield any meaningful results. Wal-Mart has not appealed this issue. Accordingly, this evidence is not properly before us.

*Id.* at 1228–30 (citations omitted). Judge Kleinfeld dissented. *Id.* at 1244–49. *See also* the discussion of this case in the section above on “Mixed Motives, and in the section below on “Class Actions.”

## **I. Discriminatory Statements**

### **1. Statements Probative of Unlawful Motive**

*Czekalski v. Peters*, 475 F.3d 360, 368, 99 FEP Cases 1121 (D.C. Cir. 2007), reversed the grant of summary judgment to the Title VII gender discrimination defendant, relying in part on evidence of the decisionmaker’s biased attitudes. The court described the evidence:

Burton Gifford, a male employee in AND, testified that Donohue “just doesn’t give women, that I have observed, any credibility for what they’re saying, or even acknowledge they said it, in some cases.” Gifford Dep. at 80. He also testified that

Donohue gave male employees “preference in program responsibilities, which included apparent forgiveness for slippag[es] in schedule and or costs,” while treating female employees with similar difficulties dismissively. . . . Another male employee, Dr. Charles Overby, testified that Donohue treated women in a “sexist” and “demeaning” manner. . . .

Both men pointed to specific events to substantiate their testimony. Gifford described an incident in which Donohue turned his back on a female subordinate who disagreed with him in a meeting. . . . (“[Donohue] turns away from it and refuses to deal with it when women are making these comments. He just turns to someone else and goes on with his agenda, as opposed to when a man ... makes that type of statement.”). And Overby related an episode in which Donohue was “cavalier and rude” to a high-ranking female administrator in a belittling way—essentially telling her that “[y]ou don’t have to worry your head about that.” . . .

(Citations omitted.) The court held that defendant’s reliance on the theory that Donohue was an “equal-opportunity abuser” raised a genuine issue of material fact precluding summary judgment.

**Biased Remark Decision of the Year:** *Tomassi v. Insignia Financial Group, Inc.*, 478 F.3d 111, 115–17, 99 FEP Cases 1445 (2d Cir. 2007), vacated the grant of summary judgment to the ADEA defendant, based in large part on age-biased remarks suggesting that the plaintiff was slowing down because of her age. The court attempted to clarify Circuit precedent, and did so in a way very beneficial to plaintiffs:

In ruling that Stadmeyer’s remarks lacked evidentiary significance because they were “stray,” the court failed to apply the correct standard. Instead of disregarding some of the evidence because of such a classification, the court should have considered all the evidence in the light most favorable to the plaintiff to determine whether it could support a reasonable finding in the plaintiff’s favor.

We recognize that our precedents may have been somewhat confusing. In some instances we have found the evidence legally insufficient notwithstanding the incidence of discriminatory remarks. To explain why the evidence was nonetheless insufficient, we noted that the remarks were “stray.” That locution represented an attempt—perhaps by oversimplified generalization—to explain that the more remote and oblique the remarks are in relation to the employer’s adverse action, the less they prove that the action was motivated by discrimination. For example, remarks made by someone other than the person who made the decision adversely affecting the plaintiff may have little tendency to show that the decision-maker was motivated by the discriminatory sentiment expressed in the remark. *See, e.g., Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992) (describing remarks as “stray” when made “in the workplace by persons who are not involved in the pertinent decisionmaking process”); *cf. Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 162 (2d Cir. 2001) (contrasting “the stray remarks of a colleague” with “comments made directly to” the plaintiff by someone with “enormous influence in the decision-making process”). The more a remark evinces a discriminatory state of mind, and the closer the remark’s relation to the allegedly discriminatory behavior, the more probative that remark will be. *See Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 56 (2d

**Cir.** 1998) (explaining that the label “stray” is inappropriate where “other indicia of discrimination” tie the remarks to an adverse employment action); *compare Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 162–63 (**2d Cir.** 1998) (rejecting the label “stray” where decision-makers uttered age-related remarks near the time of plaintiff’s discharge), *with Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 92 n. 2 (**2d Cir.** 2001) (characterizing remarks as “stray” where they were “unrelated to [the plaintiff’s] discharge”). Where we described remarks as “stray,” the purpose of doing so was to recognize that all comments pertaining to a protected class are not equally probative of discrimination and to explain in generalized terms why the evidence in the particular case was not sufficient. We did not mean to suggest that remarks should first be categorized either as stray or not stray and then disregarded if they fall into the stray category.

The district court was also mistaken in the view that the probative value of Stadmeyer’s remarks depended on how offensive they were. The relevance of discrimination-related remarks does not depend on their offensiveness, but rather on their tendency to show that the decision-maker was motivated by assumptions or attitudes relating to the protected class. Inoffensive remarks may strongly suggest that discrimination motivated a particular employment action.<sup>4</sup> For example, Stadmeyer’s assertion to the effect that Tomassi was well suited to work with seniors was not offensive. Nonetheless, it had a strong tendency in the circumstances to show that Stadmeyer believed that, because of Tomassi’s age, she was not well suited to deal with the younger tenants Stadmeyer was hoping to attract.

Finally, we do not understand why the district court characterized Stadmeyer’s remarks as stray. The remarks were made by the person who decided to terminate Tomassi. They could reasonably be construed, furthermore, as explaining why that decision was taken. A jury could reasonably construe Stadmeyer’s remarks, in all the circumstances, as persuasive evidence that Stadmeyer believed a younger person would be better suited to attract a young clientele to PCV/ST and that he replaced Tomassi for that reason. We recognize that the defendant attributes Stadmeyer’s dissatisfaction not to Tomassi’s age, but to her increasingly slow and deficient job performance. It is perfectly possible that the defendant’s explanation is the correct one. Nonetheless, it is our obligation at this stage to interpret ambiguities in the evidence in the light most favorable to the plaintiff.

Tomassi’s evidence included that (1) Stadmeyer made age-related remarks to Tomassi every month or so; (2) he hired younger employees while seeking to attract a younger clientele to PCV/ST; (3) he affirmed the quality of Tomassi’s job performance, evidenced by the promotion, raises, and praise she received throughout her employment, including praise at the time of her firing<sup>5</sup>; (4) Stadmeyer made age-related comments at Tomassi’s firing, especially to the effect that she was well suited to work with seniors; and (5) she was replaced by a worker 38 years younger. We see no reason why the jury could not reasonably find, on the basis of the evidence, that Stadmeyer was motivated by age discrimination in terminating Tomassi. The evidence in the aggregate raises a triable question as to whether Stadmeyer’s actions were motivated by age.

<sup>4</sup> Age discrimination is unlike other discrimination in that it is undeniable that a person's faculties deteriorate with time. Nonetheless, while age will eventually cause deterioration in everyone, some people retain their faculties longer than others. The ADEA does not prohibit the making of adverse employment decisions based on an employee's loss of faculties through the process of aging. Rather, the ADEA requires the decision-maker to treat each individual case on its merits, rather than assume that at a certain age deterioration has occurred. See *Danzer*, 151 F.3d at 54–55 (indicating that deterioration of job performance is an acceptable age-neutral justification for termination).

<sup>5</sup> We take issue with the district court's argument that because Stadmeyer "gave [Tomassi] positive evaluations, promoted her, and granted her salary raises," he was unlikely to have fired her because of her age. *Tomassi*, 398 F. Supp. 2d at 272. First, Tomassi's promotion, pay raises, and positive evaluations cut directly against the legitimate, non-discriminatory justification that Stadmeyer has offered for her termination. Stadmeyer claimed in his deposition and post-deposition affidavit that his decision to fire her was based on her poor job performance--an argument strongly undermined by evidence that she was a well-regarded employee. Second, the notion that Tomassi's work was esteemed by Stadmeyer is not necessarily inconsistent with her account of his actions. Tomassi argues that Stadmeyer fired her, not because of her work performance, but because he decided that a younger face would attract a more-desirable demographic to PCV/ST. Evidence showing he thought highly of Tomassi's work does not contradict this claim. Thus, Tomassi's promotion, pay raises, and positive evaluations are more consistent with her contentions than with the defendant's.

(Footnote omitted.)

**Silence Can Be a Biased Remark:** *Asmo v. Keane, Inc.*, 471 F.3d 588, 594–95, 99 FEP Cases 678 (6th Cir. 2006), reversed the grant of summary judgment to the Title VII pregnancy discrimination defendant, holding that defendant's selection of plaintiff for termination in a RIF two months after learning of her pregnancy with twins gave rise to an inference of a causal link, both for purposes of plaintiff's *prima facie* case and for purposes of showing pretext. The court stated that a supervisor's failure to congratulate plaintiff was evidence of pretext:

The most significant evidence showing pretext is Santoro's conduct after Asmo announced she was pregnant with twins. In October 2001, Asmo, Santoro and the entire SG & A team were participating in a conference call, during which Asmo informed the team that she was pregnant with twins. The news was met with congratulations from all her colleagues except Santoro, who did not comment and then "simply moved on to the next business topic in the conference call." . . . Santoro's initial silence is suspect. Pregnancies are usually met with congratulatory words, even in professional settings. When people work together they develop relationships beyond the realm of employment, and Asmo's pregnancy was particularly noteworthy given that she was pregnant with twins, a fairly unusual (and overwhelming) occurrence.

Additionally, though Santoro conducted weekly conference calls with the recruiters, he did not mention Asmo's pregnancy again until December 4, 2001, the day

he terminated Asmo. Asmo's job involved considerable travel (forty to sixty percent of her time), something an employer might be concerned about given the announcement that Asmo was going to have *twins*, which most people know is a tremendous responsibility. Yet Santoro did not talk with Asmo about how she planned to deal with the impending arrival of her twins and/or what the company could do to help accommodate her. Instead, he did not mention her pregnancy at all. He also did not ask any of his colleagues to discuss Asmo's pregnancy with her, or to provide her with information about how the company accommodates parents. Given the combination of Asmo's job's being particularly demanding of time due to travel and her announcement of not just a pregnancy, but a pregnancy of twins, Santoro's silence could be interpreted as discriminatory animus.

The court recognized that there might be completely satisfactory reasons for Santoro's silence, but held that such reasons were inappropriate to explore on summary judgment. It continued: "Santoro's silence is evidence of pretext because it can be read as speculation regarding the impact of Asmo's pregnancy on her work, and an employer's speculation or assumption about how an employee's pregnancy will interfere with her job can constitute evidence of discriminatory animus." *Id.* at 595 (citation omitted). Judge Griffin dissented. *Id.* at 598–601.

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

*Tuttle v. Metropolitan Government of Nashville*, 474 F.3d 307, 320, 99 FEP Cases 974 (6th Cir. 2007), reversed the grant of judgment as a matter of law to the ADEA defendant, holding that age-discriminatory statements helped show pretext:

During trial, Tuttle provided evidence of the following age-related statements directed toward her: in February 2001, Sullivan, Tuttle's former supervisor, said to her, "how old are you? ... you will be retiring quicker than you think"; in March 2001, Tucker, one of Tuttle's co-workers who supervised the office when Anderson was out, authored an email to Anderson stating, "this woman has no business on a PC"; on another occasion, when Tuttle asked Anderson whether he was trying to "get rid" of her, Anderson replied, "there have been others, and they took their retirement or pension"; in a meeting between Anderson and Tuttle in July 2001, Anderson told her, "I want to apologize for causing you stress. I wouldn't want anything to happen to my mother and dad." While these statements may not rise to direct evidence of age discrimination, they could have provided circumstantial evidence to the jury of such discrimination.

*Sun v. Board of Trustees of University of Illinois*, 473 F.3d 799, 813–14, 99 FEP Cases 897 (7th Cir. 2007), affirmed the lower court's grant of summary judgment to the Title VII race and national origin discrimination defendants. The court held that the remarks of one influential faculty member—influential because he controlled the allocation of millions of dollars in Federal funding for faculty research—that he would not accept Chinese graduate students was a "stray remark" that could still be probative of discrimination in the tenure denial process, but that there were so many levels of review that were not tainted by exposure to the remarks that the remarks were not in this instance probative of discrimination. "Therefore, Greene's possibly improper motives cannot be imputed to the final decisionmaker." *Id.* at 814.

## **J. Harassment**

### **1. Same-Sex Harassment Was Because of Sex**

*Kampmier v. Emeritus Corp.*, 472 F.3d 930, 940–41, 99 FEP Cases 755, 18 AD Cases 1607 (**7th Cir.** 2007), reversed the grant of summary judgment to the Title VII same-sex harassment defendant. The court rejected defendant’s argument that the female supervisor was an “equal-opportunity harasser” because she patted some male employees’ behinds, and made an apparent sexual proposition to one male employee, because the harassment of women was much worse:

However, the harassment that Kampmier allegedly endured was far more severe and prevalent than the alleged conduct endured by the male employees. Kampmier alleged that Badell made constant references to female employees at the Loyalton, made comments about their “boobs,” and told the women at the Loyalton that she could turn any woman gay. Yvonne Peterson, another Emeritus employee, also testified that she heard Badell claim to be able to turn any woman gay. At the least, Kampmier has raised a genuine issue of material fact as to whether Badell’s alleged harassment was because of Kampmier’s sex.

*Harsco Corp. v. Renner*, 475 F.3d 1179, 1187, 99 FEP Cases 1145 (**10th Cir.** 2007), affirmed the judgment of liability on a jury verdict for the Title VII sexual harassment plaintiff. The court held that harassment possibly motivated in part by plaintiff’s perceived girth was nonetheless because of her gender, where the harassers repeatedly referred to her, in the most vulgar of terms, as a fat woman, and repeatedly referred to her speculative sexual performances with other employees. It rejected defendant’s argument that plaintiff was only harassed because she was a Quality Control Inspector with strict standards. The court stated: “In essence, Harsco Corporation asks us to circumvent the proper ‘totality of the circumstances’ test by conveniently stripping facts of their context, which we have affirmed to be the touchstone of our analysis. The jury heard about several gender-based comments and actions that only Ms. Renner was subjected to. Harsco Corporation has not demonstrated that no reasonable inference from the facts presented could support Ms. Renner’s claim.”

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

*Gilliam v. South Carolina Department of Juvenile Justice*, 474 F.3d 134, 142–43, 99 FEP Cases 865 (**4th Cir.** 2007), affirmed the grant of summary judgment to the Title VII racial harassment defendant because plaintiff failed to show that the incidents about which she complained as harassment were based on her race:

First, she failed to present any direct evidence that Bader’s conduct was motivated by racial animosity. Indeed, she testified that Bader made no derogatory comments to her or others about her race. Second, although Gilliam was entitled to show that Bader treated her differently than similarly situated white nurses on the basis of race, she has failed to do so. . . . Although Gilliam made several general statements of dissimilar treatment, she provided very few specifics. The few specific examples Gilliam did proffer were not supported by any evidence other than her own general statements, which often lacked

detail. Such assertions, standing alone, are insufficient to sustain an actionable Title VII claim. . . . Finally, even if Bader disliked Gilliam and made her job more stressful as a result, that fact, absent some independent evidence of racial animosity, is not sufficient to establish a prima facie claim.

(Footnote and citations omitted.) The court noted at 142 n.9 that plaintiffs' supporting witnesses only gave unsupported conclusory statements without details, and held that these were insufficient to defeat summary judgment.

### 3. Severe or Pervasive

*Jackson v. County of Racine*, 474 F.3d 493, 99 FEP Cases 1025 (7th Cir. 2007), affirmed the grant of summary judgment to the Title VII sexual-harassment defendant, but held that plaintiffs had adequately shown they were subjected to a hostile environment. The court stated: "It is important to recall that harassing conduct does not need to be both severe *and* pervasive. . . . One instance of conduct that is sufficiently severe may be enough. . . . Conversely, conduct that is not particularly severe but that is an incessant part of the workplace environment may, in the end, be pervasive enough and corrosive enough that it meets the standard for liability." *Id.* at 499 (emphasis in original; citations omitted). The court continued: "What concerns us about the district court's disposition of all four cases is its characterization of Larsen's inappropriate touching and sexual comments as 'isolated incidents,' when the plaintiffs' deposition testimony asserts that he engaged in this type of behavior on a daily basis." *Id.* The court concluded by stating: "Before concluding, however, we note that all parties in this case seem to think that a working environment must be 'hellish' before a Title VII suit can succeed. The Supreme Court's decision in *Harris* establishes that something short of the Ninth Ring may violate the statute. . . . We trust that in the future counsel will avoid the use of a single, overwrought word like 'hellish' to describe the workplace and focus on the question whether a protected group is experiencing abuse in the workplace, on account of their protected characteristic, to the detriment of their job performance or advancement." *Id.* at 500.

*Harsco Corp. v. Renner*, 475 F.3d 1179, 1187–88, 99 FEP Cases 1145 (10th Cir. 2007), affirmed the judgment of liability on a jury verdict for the Title VII sexual harassment plaintiff. The court rejected defendant's seizure on a few specific facts and attempts to reason by analogy to other cases where only such facts were held insufficient, stating: "Harsco Corporation's attempt at reasoning by analogy fails because its mechanical comparison of a few strategically selected facts is precisely the type of analysis this court has rejected." *Id.* at 1187. The court continued: "Harsco Corporation exaggerates the severity and pervasiveness of the harassment in these cases and improperly discounts the evidence of harassment of Ms. Renner before the jury. Ms. Renner submitted an abundance of facts to support her claim. The substance of her proof reveals an environment polluted with gender-specific comments and behavior that exceeded the mere flirtatiousness or baseness that has been found not to support a Title VII claim." *Id.* at 1188.

*Herrera v. Lufkin Industries, Inc.*, 474 F.3d 675, 680–83, 99 FEP Cases 809 (10th Cir. 2007), reversed the grant of summary judgment to defendant on plaintiff's Title VII racially hostile environment claim. Plaintiff showed that he and his son were treated less favorably than non-Hispanic employees, that a company official made racially demeaning references to plaintiff

while speaking to others every two or three days over a four-year period and that many of these references were passed on to plaintiff, and that a company official repeatedly made such remarks directly to plaintiff. The lower court granted summary judgment on the basis that biased remarks were often communicated to plaintiff, and that the harassment was not severe or pervasive. The court of appeals held that it was a “close case,” but that indulging inferences in plaintiff’s favor required that the claim be tried. *Id.* at 683.

#### **4. Objectionable Conduct**

*Kampmier v. Emeritus Corp.*, 472 F.3d 930, 941–43, 99 FEP Cases 755, 18 AD Cases 1607 (7th Cir. 2007), reversed the grant of summary judgment to the Title VII same-sex harassment defendant. The court held that Badell’s conduct was objectively offensive:

Here, Kampmier estimated that during her employment at the Loyalton, Badell hugged her fifty to sixty times, jumped in her lap ten times, touched her buttocks thirty times, and made the comment that she could turn any woman gay ten to twelve times. Kampmier also alleged that Badell stated that she “make[s] Carol (her girlfriend) come every night within the first five minutes” and also commented that she could perform the same act on Kampmier. Based on the sustained nature of the physical contact, combined with Badell’s sexually explicit remarks, a jury reasonably could find Badell’s comments and her physical contact with Kampmier objectively offensive.

*Id.* at 941–42. The court thought that it was a closer question whether the conduct was subjectively offensive, because plaintiff “allowed Badell’s lover to babysit her daughter in Badell’s home, visited Badell in the hospital after Badell’s surgery, gave Badell a card, spent time with Badell’s son, and on at least one occasion provided medical assistance to Badell’s mother.” *Id.* at 942. However, plaintiff repeatedly told Badell to “knock it off” when Badell was engaging in the conduct described above, and complained about the conduct to three different supervisors under the company’s complaint system. The court stated: “Kampmier’s repeated complaints regarding Badell’s harassment are sufficient to raise a genuine issue of material fact as to whether she found Badell’s harassment subjectively offensive.” *Id.* at 942.

#### **5. Tangible Employment Actions**

*Kampmier v. Emeritus Corp.*, 472 F.3d 930, 943, 99 FEP Cases 755, 18 AD Cases 1607 (7th Cir. 2007), reversed the grant of summary judgment to the Title VII same-sex harassment defendant. The court held that plaintiff failed to show a tangible employment action because she failed to link her termination to the harassment or her reports of it.

**Firing Plaintiff Because She Refused to Accept Corrective Actions the Court Deemed Reasonable is Not Discrimination, or a Tangible Action:** *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1300–01, 100 FEP Cases 273 (11th Cir. 2007), affirmed the grant of summary judgment to the Title VII hostile-environment defendant. Plaintiff refused to continue to work under her manager, and demanded that he be fired instead. She rejected two remedies proffered by defendant: going through interaction training and counseling with the assistance of an industrial/organizational psychologist, or accepting a transfer from Huntsville to Birmingham, Alabama. As a result, she was fired. The court held that the offer to transfer



plaintiff could not be considered a tangible employment action. The court also held that plaintiff's discharge could not be considered a tangible employment action: "Firing an employee because she will not cooperate with the employer's reasonable efforts to resolve her complaints is not discrimination based on sex, even if the complaints are about sex discrimination. Were it otherwise, an employee would be free to refuse any reasonable remedy the employer offered to resolve her complaint." *Id.* at 1301.

## 6. Employer's Duty to Prevent Harassment

**Failure to Act on Earlier Complaints by Another Employee Exposed Plaintiff to the Same Types of Harassment:** *Kampmier v. Emeritus Corp.*, 472 F.3d 930, 943, 99 FEP Cases 755, 18 AD Cases 1607 (7th Cir. 2007), reversed the grant of summary judgment to the Title VII same-sex harassment defendant. The court held that plaintiff showed a genuine issue of material fact as to the affirmative defense in part by showing that another female employee had repeatedly complained of the same type of harassment by Badell, and that the company official receiving the complaints did not want to hear about it. The court continued: "In addition, Kampmier testified that Badell was not disciplined during Kampmier's employment, even though Kampmier complained to three different individuals about the harassment. This evidence is sufficient to create a genuine issue of material fact with regard to whether Emeritus exercised reasonable care to prevent and correct Badell's behavior."

**Employer Has Only a Limited Duty to Investigate:** *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1303–05, 100 FEP Cases 273 (11th Cir. 2007), affirmed the grant of summary judgment to the Title VII hostile-environment defendant. Plaintiff refused to continue to work under her manager, and demanded that he be fired instead. She rejected two remedies proffered by defendant: going through interaction training and counseling with the assistance of an industrial/organizational psychologist, or accepting a transfer from Huntsville to Birmingham, Alabama. As a result, she was fired. Defendant conducted an investigation, and plaintiff questioned its thoroughness in several particulars. Rejecting these challenges, the court held that defendants have only a limited duty in conducting such investigations:

A threshold step in correcting harassment is to determine if any occurred, and that requires an investigation that is reasonable given the circumstances. The requirement of a reasonable investigation does not include a requirement that the employer credit uncorroborated statements the complainant makes if they are disputed by the alleged harasser. Nothing in the *Faragher-Ellerth* defense puts a thumb on either side of the scale in a he-said, she-said situation. The employer is not required to credit the statements on the she-said side absent circumstances indicating that it would be unreasonable not to do so. Although it is not entirely clear, *Baldwin* does not seem to contest this point.

*Id.* at 1303–04. The court continued with plaintiff's specific criticisms of the investigation:

Instead, she contests the reasonableness of the investigative procedures used by the company in her case. *Baldwin* argues that there were five deficiencies in the investigation: (1) Rick King, who was in charge of the investigation, failed to speak personally with her during it; (2) King failed to take notes during his interview with

Head; (3) the interview of Baldwin's colleagues from the Huntsville office took place in the same restaurant where Head was present (although in a different part of the restaurant); (4) the discussion that took place between King and the two other members of the investigative team after the interviews was not thorough enough; and (5) not enough weight was given to the notes taken by Emma Barclay, a member of the investigative team, indicating that the responses of one of the interviewed employees seemed rehearsed (although Barclay testified in deposition that his answers had not seemed rehearsed, but it appeared he knew in advance what he would be questioned about).

*Id.* at 1304. The court then held that employers have only a limited duty to investigate harassment complaints:

For two reasons we reject Baldwin's contention that what she describes as shortcomings in the investigation render it unreasonable for *Faragher-Ellerth* purposes. The first reason is there is nothing in the *Faragher* or *Ellerth* decisions requiring a company to conduct a full-blown, due process, trial-type proceeding in response to complaints of sexual harassment. All that is required of an investigation is reasonableness in all of the circumstances, and the permissible circumstances may include conducting the inquiry informally in a manner that will not unnecessarily disrupt the company's business, and in an effort to arrive at a reasonably fair estimate of truth.

...

The investigation that Blue Cross conducted at least meets minimum standards for this type of case. It was conducted by the head of the company's Human Resources Department, who was experienced in such matters, and he was assisted by two other members of that department. They not only interviewed Baldwin and Head but also other employees of the Huntsville office whom they had reason to believe would have witnessed the harassment if it had occurred. They did interview Head and the other employees at the same location, but those interviews were conducted separately. Although King himself did not personally interview Baldwin, another member of the investigative team, Emma Barclay, had talked to Baldwin about her allegations for more than an hour, and King had the five-page written synopsis Baldwin submitted.

We will not hold that the investigation does not count, as Baldwin urges us to, because the investigators did not take more notes, because the discussion among them was not more thorough, or because they did not give more weight to a particular factor, such as Barclay's initial impression that the answers of one of the employees seemed rehearsed. To second guess investigations on grounds like those would put us in the business of supervising internal investigations conducted by company officials into sexual harassment complaints. We already have enough to do, and our role under the *Faragher* and *Ellerth* decisions does not include micromanaging internal investigations. Instead, we look only to the overall reasonableness of the investigation under the circumstances, and this investigation was reasonable.

*Id.* at 1304–05 (citation omitted). Finally, the court held in the alternative that the specific shortcomings of an investigation do not matter if the result of the investigation is reasonable. “In

other words, a reasonable result cures an unreasonable process. It does so because Title VII is concerned with preventing discrimination, not with perfecting process.” *Id.* at 1305 (citation omitted).

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

**Affirmative Defense Upheld Where Plaintiff Failed to Cooperate:** *Jackson v. County of Racine*, 474 F.3d 493, 501–02, 99 FEP Cases 1025 (7th Cir. 2007), affirmed the grant of summary judgment to the Title VII sexual-harassment defendant, because defendant met its affirmative burden, acted relatively quickly in light of the difficulties caused by plaintiff’s reluctance to make non-confidential complaints, failures to respond, and false assurances that everything was alright. The court rejected plaintiff’s argument that defendant lost its affirmative defense by demoting the harasser rather than firing him.

**Affirmative Defense Upheld, Rejecting “Bare Assertions” that Plaintiff Thought Complaints Would Be Ineffective:** *Gordon v. Shafer Contracting Co., Inc.*, 469 F.3d 1191, 1195, 99 FEP Cases 513 (8th Cir. 2006), upheld the grant of summary judgment to the Title VII racial and sexual harassment defendant, in part because defendant had provided employees with the names of three persons to whom to complain, and “Gordon never reported the alleged harassment to any of these officials. He claims he failed to do so because he believed reporting would be ineffective. Such bare assertions are insufficient to avoid summary judgment.”

**Affirmative Defense Rejected Where Employer Responded Only to Formal Complaints and Ignored Oral Complaints and Its Own Knowledge of Harassment:** *Harsco Corp. v. Renner*, 475 F.3d 1179, 1188, 99 FEP Cases 1145 (10th Cir. 2007), affirmed the judgment of liability on a jury verdict for the Title VII sexual harassment plaintiff. The court rejected defendant’s argument that it responded promptly and properly to plaintiff’s two formal complaints, because the jury could have relied on ample evidence that its response was poor to the formal complaints, and that it did not respond to repeated oral complaints by plaintiff and by a co-worker.

See the discussion of *Kampmier v. Emeritus Corp.*, 472 F.3d 930, 943, 99 FEP Cases 755, 18 AD Cases 1607 (7th Cir. 2007), in the preceding section.

## **8. 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), *cert. denied*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 1815, 1828, 167 L. Ed. 2d 317 (2007), 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 pretermitt 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.

## 9. 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.

**Excuses for Three-Month Delay in Complaining Not Good Enough:** *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1307, 100 FEP Cases 273 (11th Cir. 2007),

affirmed the grant of summary judgment to the Title VII hostile-environment defendant, in part because she waited more than three months to complain about the two propositions the alleged harasser made to her. The court stated: “An employee in extreme cases may have reasons for not reporting harassment earlier that are good enough to excuse the delay . . . but the ones that Baldwin puts forward are not.” Plaintiff explained that she was just trying to go along in order to get along, and feared being fired. The court rejected these reasons: “While we have recognized that filing a sexual harassment complaint may be ‘uncomfortable, scary or both’ . . . we have also explained that, ‘the problem of workplace discrimination ... cannot be [corrected] without the cooperation of the victims.’” . . . The *Faragher* and *Ellerth* decisions present employees who are victims of harassment with a hard choice: assist in the prevention of harassment by promptly reporting it to the employer, or lose the opportunity to successfully prosecute a Title VII claim based on the harassment.”

#### 10. Failure to Accept Proffered Remedies

*Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1305–06, 100 FEP Cases 273 (11th Cir. 2007), affirmed the grant of summary judgment to the Title VII hostile-environment defendant, in part because plaintiff failed to complain timely about the harassment and in part because plaintiff rejected two remedies proffered by defendant that the court thought were reasonable: going through interaction training and counseling with the assistance of an industrial/organizational psychologist, or accepting a transfer from Huntsville to Birmingham, Alabama. The court recognized that the transfer option may have worked a hardship on plaintiff, and placed heavy emphasis on the reasonableness of the counseling alternative. It sought to buttress the reasonableness of counseling as a first step by citing the Federal-sector regulations requiring that discrimination complainants first go through an informal counseling step before filing formal complaints. The court quoted the language, but seemed unaware that this is counseling of a *complainant*, not counseling of an *accused harasser*. The court then stated, without advertent to the underlying severity of the actions complained about:

We have held that warnings and counseling of the harasser are enough where the allegations are substantiated. See *Fleming v. Boeing Co.*, 120 F.3d 242, 246–47 (11th Cir. 1997) (talking to the harasser and telling the complainant to report any further problems was, as an initial measure, enough to constitute “immediate and appropriate corrective action”); *id.* at 247–48 (giving the harasser a verbal warning and transferring the complainant to a different work group in the same facility also constituted “immediate and appropriate corrective action”); accord *Gawley v. Ind. Univ.*, 276 F.3d 301, 306–07, 311–12 (7th Cir. 2001) (issuance of “counseling memorandum” to the harasser was sufficient); *Intlekofer v. Turnage*, 973 F.2d 773, 779–80 (9th Cir. 1992) (lead opinion) (noting that counseling may be a sufficient remedy “as a first resort”); see also *Skidmore v. Precision Printing & Packaging, Inc.*, 188 F.3d 606, 615 (5th Cir. 1999) (“What is appropriate remedial action will necessarily depend on the particular facts of the case . . . [including] the effectiveness of any initial remedial steps.” (*quoting Waltman v. Int’l Paper Co.*, 875 F.2d 468, 479 (5th Cir. 1989))).

Because warning the harasser and counseling him ordinarily is enough where the employer is able to substantiate the allegations, it certainly follows that the same remedy is enough where it is not able to do so. Here, although Blue Cross wasn’t able to

substantiate Baldwin's allegations, it could tell that there was hostility between her and Head. Where the employer sees hostility but cannot tell if there has been harassment, warning the alleged harasser, requiring both parties to participate in counseling, and monitoring their interactions is a proper and adequate remedy, at least as a first step.

#### **K. Affirmative Action**

*Alexander v. City of Milwaukee*, 474 F.3d 437, 99 FEP Cases 961 (7th Cir. 2007), affirmed the judgment holding the City liable, and the then Police Chief and each of the members of the Board of Police and Fire Commissioners personally liable, under Title VII and 42 U.S.C. §§ 1981 and 1983 for racial and sexual discrimination against 17 white male plaintiffs in making promotions to the rank of Captain. Goals had been established in hiring litigation, but never in promotions. The Chief was evaluated on diversity accomplishments as well as other factors, achieved his highest evaluation scores on such accomplishments, and nominated women and members of minority groups disproportionately for the 41 promotions at issue. The court held that the individual defendants were not entitled to qualified immunity based on an affirmative action plan, and that no defendants had a legal defense on the merits based on such a plan, because they all denied taking race and gender into account, their emphasis on diversity was amorphous and did not contain clear limits, and their actions thus did not include the precise tailoring and narrowing essential to the defense.

#### **L. Independent Investigations**

##### **1. The Effect of Independent Investigations**

**Insulation from Subordinate's Influence is the Test:** *Griffin v. Washington Convention Center*, 142 F.3d 1308, 1312, 76 FEP Cases 1526 (D.C. Cir. 1998), stated: "Thus do we join at least four other circuits in holding that evidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence." (Citations omitted.)

**Independent Investigation Immunizes Defendant from Assertedly Biased Input:** *King v. Rumsfeld*, 328 F.3d 145, 153, 91 FEP Cases 1537 (4th Cir.), cert. denied, 540 U.S. 1073 (2003), affirmed the grant of summary judgment to the Title VII race and sex discrimination defendant. Plaintiff complained that supervisor Carlson was biased against him and that this was shown by the testimony of a substitute teacher, Fontenot, who stated that Carlson ordered her to provide reviews that were critical of plaintiff's performance. The court held that this was not probative of discrimination in the absence of evidence that the reviews were inaccurate. The court stated:

And, even if Carlson's demand of Fontenot is the least bit probative that he harbored an unlawful motive for firing King and so desired that she provide a pretext under which he could fire him, the fact is that Carlson did not fire King. *Whitaker* fired King *after* conducting *his own independent investigation* of the matter, and after Carlson had left the school. No evidence links to Whitaker the motive King uses Fontenot's testimony to ascribe to Carlson. Since Carlson did not fire King, and since any motive Carlson had for pressuring Fontenot is not attributable to Whitaker, Fontenot's testimony could only be relevant if the record contained evidence that Fontenot provided reviews of King's work

that falsely attributed sub-par performance to him and that King was fired at least partially on that basis.

(Emphases in original.) Judge Gregory concurred in part and dissented in part.

**Adequate Independent Investigation Immunizes Employer from Effect of Non-Decisionmaker’s Bias; Inadequate Investigation Makes the Decisionmaker the “Cat’s Paw” of the Bigot:** *Long v. Eastfield College*, 88 F.3d 300, 71 FEP Cases 750 (5th Cir. 1996), affirmed the grant of summary judgment to the Title VII defendant on the hostile-environment claims, but reversed the grant of summary judgment on the retaliation claims.

The summary judgment evidence establishes that Aguero, as President of Eastfield College, had the final authority to hire and fire employees. Clark and Kelley, as supervisors in their respective departments, had the authority to make recommendations concerning the employment status of their subordinate employees. In this case, Clark recommended that Long be terminated, and Kelley recommended that Reavis be terminated. Aguero then made the final decisions to terminate Long and Reavis. If Aguero based his decisions on his own independent investigation, the causal link between Clark and Kelley’s allegedly retaliatory intent and Long and Reavis’s terminations would be broken. . . . If, on the other hand, Aguero did not conduct his own independent investigation, and instead merely “rubber stamped” the recommendations of Clark and Kelley, the causal link between Long and Reavis’s protected activities and their subsequent terminations would remain intact. . . . The degree to which Aguero’s decisions were based on his own independent investigation is a question of fact which has yet to be resolved at the district court level. Viewing the evidence in the light most favorable to Long and Reavis, we must assume on appeal that Aguero merely “rubber stamped” the recommendations of Clark and Kelley. . . . Accordingly, for the purposes of this appeal, we find that Long and Reavis have presented sufficient evidence to establish a causal link between their protected activities and their terminations, and we hold that Long and Reavis have presented prima facie cases for unlawful retaliation.

*Id.* at 307–08 (citations and footnotes omitted). Judge DeMoss concurred in part and dissented in part. *Id.* at 310.

**Investigations Going Beyond the Input of a Biased Source Immunize the Employer, and the Employee Has the Duty to Complain of the Bias in Order to Alert the Decisionmaker to the Need to Investigate Further:** *Brewer v. Board of Trustees of University of Illinois*, 479 F.3d 908, 100 FEP Cases 161 (7th Cir. 2007), affirmed the grant of summary judgment to the Title VI and Title VII defendant, holding that defendant was not liable for the possible racially discriminatory motives of Thompson, the employee assertedly responsible for placing plaintiff in a position to be fired because Hendricks, the decisionmaker, had conducted an independent investigation going beyond Thompson’s input. (This was another of these well-thought-out cases in which plaintiff’s theory of the case involved an improper but nondiscriminatory reason and would have required judgment for the defendant if the court had accepted it, but defendant’s theory of the case would have allowed a jury to infer that plaintiff’s termination was affected by discrimination. *Id.* at 916.) The court explained its ruling:



But it is not enough just to have some minimal amount of influence; did Thompson have the “singular influence” required by Rozskowiak? For a nominal non-decision-maker’s influence to put an employer in violation of Title VII, the employee must possess so much influence as to basically be herself the true “functional[ ] ... decision-maker.” . . . The nominal decision-maker must be nothing more than the functional decision-maker’s “cat’s paw.” . . . A good example of such a degree of influence (and one which will offer a revealing comparison to the present case) is where the party nominally responsible for a decision is, by virtue of her role in the company, totally dependent on another employee to supply the information on which to base that decision. In such a case the employee that selects, colors and supplies the information has such power over the nominal decision maker that she is in fact the true, functional decision maker. Mere “paper review” of the informer’s recommendation will not shield the employer from liability if her recommendation is racially motivated. . . .

By contrast, where a decision maker is not wholly dependent on a single source of information, but instead conducts its own investigation into the facts relevant to the decision, the employer is not liable for an employee’s submission of misinformation to the decision maker. . . . It does not matter that in a particular situation much of the information has come from a single, potentially biased source, so long as the decision maker does not artificially or by virtue of her role in the company limit her investigation to information from that source. For instance, we have frequently dealt with employees that claim they were framed for misconduct by a racist coworker or superior, which caused the employee in question to be fired. Even though the employer in such situations must often decide what to do based on nothing more than the conflicting stories of two different employees, the employer will not be liable for the racism of the alleged frame-up artist so long as it independently considers both stories.

*Id.* at 917–18 (citations omitted). The court then held that the required scope of the independent investigation depended on whether plaintiff had made a specific internal complaint alerting the decisionmaker duty to the specific act of bias:

Brewer’s case is not distinguishable from these cases in which an independent investigation absolves the employer of liability. Though Thompson, as Hendricks’s assistant, might have effective control over some of Hendricks’s decisions, the decision to fire Brewer was not one of them. Hendricks listened to the information Thompson relayed to her but did not simply rely on it. Instead, she examined the parking tag herself and confirmed that it had been altered. True, Hendricks did not investigate the possibility that Thompson was holding back relevant information, but according to Hendricks, and unlike in Willis, Brewer never claimed that Thompson was holding anything back. No one has suggested that Brewer was unable to bring such a claim to Hendricks’s attention, and until he did so Hendricks had no reason to suspect that there were additional relevant facts that she had not investigated. *Cf. Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (holding that an employer is not liable for an employee’s sexual harassment where the plaintiff failed to take advantage of corrective opportunities, such as a complaint procedure); . . . Hendricks therefore conducted an independent investigation that absolved the University of liability for any deception on Thompson’s part.

*Id.* at 919 (citations omitted). The court then disavowed earlier Seventh Circuit decisions with less defense-friendly standards, *id.* at 919–20, and summarized its new rule:

Even if we were to assume that a lesser degree of influence over an employment decision might trigger Title VII liability in other contexts, such as the context of a regularized, formal performance evaluation, we do not think that such an approach can affect the outcome in a case like this that concerns an employee’s discipline for particular misconduct. The line of cases addressing this particular situation is univocal, and indicates that even where a biased employee may have leveled false charges of misconduct against the plaintiff, the employer does not face Title VII liability so long as the decision maker independently investigates the claims before acting.

Requiring only an independent investigation of misconduct charges makes good sense in light of the practical realities that an employer often faces when addressing such charges. Title VII is informed by traditional principles of agency law, see 42 U.S.C. § 2000e–2(a)(1), *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754–55, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 791–92, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998), but those principles should be applied in light of the practical reasons for imposing liability on employers. *Faragher*, 524 U.S. at 797, 118 S. Ct. 2275; see also *Burlington Indus.*, 524 U.S. at 755, 118 S. Ct. 2257 (holding that “common-law principles may not be transferable in all their particulars to Title VII”). Title VII’s primary objective is “not to provide redress but [to] avoid harm” by giving employers an incentive to control their employees. *Erickson v. Wis. Dept. of Corr.*, 469 F.3d 600, 605–06 (7th Cir. 2006); see also *Burlington Indus.*, 524 U.S. at 764, 118 S. Ct. 2257 (“Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms.”). Consequently, employers should be liable for their employees’ racism only in “the general class of cases in which [an employer] has the practical ability to head off injury to [its] employee’s . . . victim.” *Shager*, 913 F.2d at 405. Imposing liability for employee wrongs that an employer could not practically prevent (that is, could prevent only with prohibitive expense or through unreasonable efforts) would not induce employers to impose additional controls on its employees and would therefore not be effective to avoid any harm.

In cases like the present one, there is probably no practical step an employer can take beyond independently investigating the misconduct charges that will reduce the chances of an employee’s racism influencing its behavior. When an employee is accused of wrongdoing by another, the key evidence for an employer (and the courts) to consider will often be the mere say-so of two employees, one of whom claims the other is a lying racist. Such a case is a model “swearing contest.” The best way the courts can find to deal with such puzzles is to empanel a jury and hope for the best; it might be too demanding to expect an employer to do more than have an employee conduct a fair-minded, independent investigation into the available evidence and then make a decision in good faith.

*Id.* at 920–21.

**Independent Investigation Bars Imputation to the Decisionmaker of Another's Bias:** *Richardson v. Sugg*, 448 F.3d 1046, 98 FEP Cases 401 (8th Cir. 2006), stated: "This circuit's 'cat's paw' rule provides that 'an employer cannot shield itself from liability for unlawful termination by using a purportedly independent person or committee as the decisionmaker where the decisionmaker merely serves as the conduit, vehicle, or rubber stamp by which another achieves his or her unlawful design.' . . . Where a decisionmaker makes an independent determination as to whether an employee should be terminated and does not serve as a mere conduit for another's discriminatory motives, the 'cat's-paw/ theory fails.'"

**Reliance on Independent Investigation Breaks Causal Link Between Biased Remarks and Challenged Decision:** *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640–41, 92 FEP Cases 1630 (9th Cir. 2003), *as amended* (2004), affirmed the grant of summary judgment to the Title VII defendant. In the course of rejecting plaintiff's argument that he had shown direct proof of discrimination, the court held that the decisionmaker's independent investigation barred any inference of a causal link between a non-decisionmaker's biased remarks and the challenged decision:

Vasquez has offered no direct evidence of discriminatory intent. Direct evidence is "evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption."<sup>7</sup> The only evidence Vasquez offers are the remarks of Berglund. However, Berglund was not the decisionmaker, and Vasquez has offered no evidence of discriminatory remarks made by Leeds. Therefore, Vasquez must show a nexus between Berglund's discriminatory remarks and Leeds' subsequent employment decisions.<sup>8</sup> Vasquez has not shown the necessary nexus because Leeds conducted her own thorough investigation, and as mentioned above, Vasquez presents no evidence that discriminatory animus motivated Leeds' decision.<sup>9</sup> To the extent that Berglund's remarks and Leeds' knowledge of prior conflicts between Vasquez and Berglund constitute circumstantial evidence of discriminatory intent, this evidence is insufficient to make out a prima facie case. Therefore, Vasquez must proceed under the McDonnell Douglas framework.

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<sup>7</sup> Godwin, 150 F.3d at 1221 (internal quotation marks omitted) (alteration in original).

<sup>8</sup> *DeHorney v. Bank of Am. Nat'l Trust & Sav. Assoc.*, 879 F.2d 459, 468 (9th Cir.1989).

<sup>9</sup> *See id.*; *see also Willis v. Marion County Auditor's Office*, 118 F.3d 542, 548 (7th Cir. 1997) (refusing to impute racial bias of subordinates who reported rule violation to superior because superior did her own independent investigation); *Long v. Eastfield Coll.*, 88 F.3d 300, 306–07 (5th Cir. 1996) (noting that, if final decisionmaker based decision on independent investigation, causal link between subordinate's retaliatory motive and plaintiff's termination would be broken).

Judge Ferguson dissented. *Id.* at 647–656.

## 2. Rebuttals to Independent-Investigation Defenses

**Where there is Evidence Challenging the Independence of the Determination or the Decisionmaker's Exclusive Reliance on an Independent Investigation, the Jury Must Determine the Issue:** *Laxton v. Gap Inc.*, 333 F.3d 572, 584, 92 FEP Cases 76 (5th Cir. 2003), reversed the grant of judgment as a matter of law to the Title VII pregnancy-discrimination defendant, and held that the grant of a new trial to defendant was an abuse of discretion. The court held that whether defendant actually relied on an independent investigation was doubtful, and was a question for the jury:

Rather, the discriminatory animus of a manager can be imputed to the ultimate decisionmaker if the decisionmaker “acted as a rubber stamp, or the ‘cat’s paw,’ for the subordinate employee’s prejudice.” . . . The relevant inquiry is whether Jones “had influence or leverage over” Carr and Dotto’s decisionmaking. . . . Jones issued Laxton’s Written Warning. Carr issued Laxton’s Final Written Warning, but Carr testified that Jones served as her primary source of information. Gap makes the somewhat implausible assertion that Carr and Dotto did not rely on the two warnings when they decided to terminate Laxton, but instead relied solely on the “independent investigations” of Inglis and Licona. This position is inconsistent with Gap’s proffered justification for Laxton’s discharge, namely, the cumulative effect of violations of company policy including those cited in the Written Warning and Final Written Warning. The degree to which Carr and Dotto relied on the “independent investigations” is a question of fact for the jury. . . . Given that the Written Warning and the Final Written Warning represent Strikes One and Two in Gap’s “three-strikes-you’re-out policy,” the jury could have reasonably concluded that these warnings influenced Carr and Dotto’s decisionmaking.

Gap’s reliance on Wallace for the proposition that Jones did not influence the final decisionmakers is, again, off-the-mark. Like Jones, the declarant in Wallace was the terminated employee’s direct supervisor. Also like Jones, the Wallace declarant participated in the factfinding leading to the plaintiff’s termination. In both cases, the supervisors’ discriminatory animus arguably colored their factfinding. The final decisionmakers in Wallace, however, did not rely on the Wallace declarant’s factfinding to terminate the plaintiff because the plaintiff in that case freely admitted to the final decisionmakers that she committed the violation for which they fired her. . . . Here, by contrast, Laxton never admitted to Carr and Dotto that she committed the violations charged in the Final Written Warning. Indeed, Carr herself testified that she relied on Jones for the facts underlying these violations. The jury could have therefore reasonably inferred that Jones “had influence or leverage over” Carr and Dotto, such that it would have been proper for the jury to impute Jones’s discriminatory animus to Carr and Dotto.

(Citations omitted.)

*EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 487–88, 98 FEP Cases 571 (10th Cir. 2006), cert. dismissed, \_\_\_ U.S. \_\_\_, 127 S. Ct. 1931, 167 L.Ed.2d 583 (2007), stated: “To prevail on a subordinate bias claim, a plaintiff must establish more than mere ‘influence’ or ‘input’ in the decisionmaking process. Rather, the issue is whether the biased subordinate’s discriminatory reports, recommendation, or other actions caused the adverse

employment action. . . . This standard comports with the agency law principles that animate the statutory definition of an ‘employer.’ See RESTATEMENT § 219 (describing the scope of a master’s liability ‘for the torts of his servants’ and thereby incorporating standard tort concepts like causation).” (Citation omitted.) The court held that the decisionmaker’s investigation was too inadequate to break the causal chain.

## VII. Litigation

### A. Exhaustion

**Prudential and CBA Exhaustion:** *Wilson v. MVM, Inc.*, 475 F.3d 166, 18 AD Cases 1711 (3d Cir. 2007), affirmed the dismissals of some of the Rehabilitation Act, ADA, and due process plaintiffs’ claims, and the grant of summary judgment to defendants on others. Plaintiffs were Court Security Officers working for a private security company under contract with the U.S. Marshals Service. Plaintiffs were covered by a CBA allowing discharge only for just cause. “In 2001, the USMS, which reserved by contract the right to incorporate revised medical standards, implemented a new physical examination for CSOs, adding to the list of medically disqualifying conditions use of a hearing aid, diabetes and certain heart conditions.” *Id.* at 171. They were fired after the Marshals Service determined they were medically unqualified for duty, and MVM determined that no alternative positions were available. No plaintiff pursued a grievance under the CBA past the first step, and no plaintiff filed a charge of discrimination against the Marshals Service. They did file EEOC charges against MVM. The court held that Title VII’s prudential exhaustion requirements apply to Rehabilitation Act claims, and that plaintiffs had failed to show that exhaustion of their claims against the Marshals Service would have been futile. *Id.* at 173–74. The court rejected the argument that an untimeliness involves prudential exhaustion while a complete failure to exhaust is a jurisdictional bar. *Id.* at 174–75. “Therefore, we have clearly rejected a distinction between failure to timely exhaust and complete failure to exhaust in Title VII cases.” *Id.* at 175. The court then held that plaintiffs had not shown any prudential grounds relieving them of the exhaustion requirement:

However, merely because exhaustion requirements are prudential does not mean that they are without teeth. Even prudential exhaustion requirements will be excused in only a narrow set of circumstances. At oral argument, appellants claimed that this case presented one of those narrow sets of circumstances and argued for application of the futility exception. In order to invoke the futility exception to exhaustion, a party must “provide a clear and positive showing” of futility before the District Court. . . . This is the first time the appellants have made this futility argument with regard to their claim against the federal defendants. In their complaint, the appellants alleged that they had attempted to appeal their termination and, because of a poor response to their attempts, any further efforts to exhaust administrative remedies would have been futile. While it is true that the appellants made some attempts, their failed attempts were directed at MVM, not the USMS. The appellants never brought a claim against the USMS before the EEOC and have made no argument as to why they failed to do so. They have not brought forward any evidence of futility, let alone the “clear and positive showing” we require. . . . Therefore, the District Court’s dismissal of their RA claims was appropriate.

*Id.* at 175–76 (citations omitted). The court held that plaintiffs’ failure to exhaust the CBA grievance procedure barred any due process claims against MVM. “Before bringing a claim for failure to provide due process, ‘a plaintiff must have taken advantage of the processes that are available to him or her, unless those processes are unavailable or patently inadequate.’” *Id.* at 176 (citation omitted). Here, there was no such showing.

## **B. Timeliness**

### **1. 180 Days or 300 Days Where There is a FEPA?**

**Need to Plead Worksharing Agreements?** *Mayers v. Laborers’ Health & Safety Fund of North America*, 478 F.3d 364, 368, 18 AD Cases 1798 (D.C. Cir. 2007) (*per curiam*), *petition for rehearing pending and response requested*, affirmed the grant of summary judgment to the ADA defendant, holding that the 180-day charge-filing period applied because plaintiff failed to allege the existence of a work-sharing agreement with the D.C. agency and did not dispute the applicability of the 180-day period. The court did not mention § 706(c) of Title VII, and cited an EEOC regulation, 29 C.F.R. § 1601.13(a)(4)(ii), which does not condition the 300-day period on the existence of a worksharing agreement.

**Waiver:** *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504, 99 FEP Cases 610 (2d Cir. 2006), affirmed the grant of summary judgment to the Title VII defendant, holding that plaintiff waived any argument as to the applicability of the 300-day charge-filing period by failing to make the argument below.

### **2. When Does the Cause of Action Accrue?**

**Supreme Court Says Rights Die Unless Employees File on First Suspicion:** *Ledbetter v. Goodyear Tire & Rubber Co.*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 2162, 167 L. Ed. 2d 982, 100 FEP Cases 1025 (2007), affirmed the dismissal of plaintiff’s pay discrimination claims. The Court described the case: “Ledbetter introduced evidence that during the course of her employment several supervisors had given her poor evaluations because of her sex, that as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly, and that these past pay decisions continued to affect the amount of her pay throughout her employment. Toward the end of her time with Goodyear, she was being paid significantly less than any of her male colleagues.” *Id.* at 2166. The Court held that each pay-setting decision was a “discrete act” under *Morgan*, and that plaintiff had to file a charge each time in order to challenge the resulting lower pay. The Court rejected plaintiff’s argument that pay is different, and that each new paycheck was a new violation:

But current effects alone cannot breathe life into prior, uncharged discrimination; as we held in *Evans*, such effects in themselves have “no present legal consequences.” . . . Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her. She did not do so, and the paychecks that were issued to her during the 180 days prior to the filing of her EEOC charge do not provide a basis for overcoming that prior failure.

*Id.* at 2164. Because there was no act of discrimination in setting her pay rate during the 180-day charge-filing period, the Court held the claim untimely. The Court stated that plaintiff had not

raised the issue of a discovery rule, so it would not decide that issue. *Id.* at 2177 n.10. It went on to say that one of the important Congressional goals is providing repose to respondents. The Court cited *Lorance*, and distinguished between facially discriminatory and facially neutral pay systems:

*Bazemore* stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure. But a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is “facially nondiscriminatory and neutrally applied.” . . . The fact that precharging period discrimination adversely affects the calculation of a neutral factor (like seniority) that is used in determining future pay does not mean that each new paycheck constitutes a new violation and restarts the EEOC charging period.

*Id.* at 2174 (citation omitted). Finally, the Court rejected the idea that pay discrimination was more like a hostile environment, where information needed to build up over time. Justice Ginsburg dissented, joined by Justice Stevens, Justice Souter, and Justice Breyer. *Id.* at 2178–88.

**Comment on Ledbetter:** The Court could have disposed of the case on narrower grounds because plaintiff had occasion to know that she had a problem long before she filed her EEOC charge, chose to take no action, and the employer had a good laches defense. Instead, the Court took the unwise step of reaching out to cast a wide net that will automatically bar the courthouse doors to all employees as to past discriminatory acts that occurred outside the charge-filing period, possibly even if they did not know of the discrimination at the time. The Court saw fit to speak so broadly, knowing that only a discovery rule could preserve existing rights, but chose not to address such a rule because it had not been asked to do so. The gratuitous injury the Court has thus inflicted on women and on members of every protected group suffering pay discrimination is strikingly reminiscent of the mistakes the Court made in 1989, when it engaged in similarly bookish analysis and similarly ignored the purpose of Congress in enacting the legislation. It similarly calls for a legislative correction.

The result of the ruling is that well-counseled female and minority employees will need to file EEOC charges every time they suspect they are not being paid as much as males or persons of a different race. The Court’s message is clear: File on the slightest suspicion, file early, and file often. Nor is the ruling necessarily confined to pay. Here, performance appraisals were the engine of lower pay. The Circuits have previously generally agreed that a negative performance appraisal, or one insufficiently laudatory, could not be made the basis of a case unless an adverse employment action was based on the appraisal. That may now be out the window, and employees may have to file charges whenever they get what they consider an inaccurate performance appraisal, or when someone else gets an undeservedly better one.

When business stops its victory dance in the end zone and stops to think, it will join civil rights groups in calling for a quick legislative reversal of this unwise and unreasonable decision. Nothing could be worse for employee relations than the state of constant charge-filing warfare to which the Court has so condemned both sides. Without a certain discovery rule on which employees can rely, employees will have to demand information on the pay and performance appraisals of other employees. Employers trying to forbid it will find themselves faced with the argument that this is now protected activity.

Another consequence of the decision is that the courts will have to discard the current rule that employees do not have a retaliation claim for opposing or complaining about an activity unless a reasonable employee could have concluded there was a violation of the underlying statute. Now that employees are required to file before they have a basis for concluding that there was discrimination, such an exception is untenable.

**Internal Complaint Shows Plaintiff Was Sufficiently Aware of Demotion to Start His Charge-Filing Time Running:** *Roney v. Illinois Department of Transportation*, 474 F.3d 455, 460, 99 FEP Cases 1044 (7th Cir. 2007), affirmed the grant of summary judgment to the Title VII defendant. The court rejected plaintiff's arguments that his demotion, which occurred more than 300 days before he filed his EEOC charge, was a continuing violation and that he only became aware of it within the charge-filing period. It relied on the fact that plaintiff made an immediate internal complaint of discrimination about the change in his job title, which he claimed meant it was a demotion.

### 3. Hostile Environment

*Gilliam v. South Carolina Department of Juvenile Justice*, 474 F.3d 134, 141, 99 FEP Cases 865 (4th Cir. 2007), affirmed the grant of summary judgment to the Title VII racial harassment defendant, but held that the claim was timely as a continuing violation because a related act occurred within the 300-day charge-filing period, and there was no requirement that the related act be independently actionable. The court stated: "Under the continuing violation doctrine, none of the August 31 Acts had to be discriminatory in and of itself. It was only necessary for one of these acts to contribute to the behavior relating to the incidents that occurred prior to the limitations period."

*Pruitt v. City of Chicago*, 472 F.3d 925, 99 FEP Cases 737 (7th Cir. 2006), affirmed the grant of summary judgment to the Title VII and § 1981 racial harassment defendant, because of laches. The ten plaintiffs alleged that for twenty years a certain Foreman had harassed them for being black or Hispanic, and as part of the harassment had disciplined them and denied them promotions because of their race. The court held: "That discrete acts may have been mixed with a hostile environment does not extend the time; *Morgan*, which involved just such a mixture, shows as much." *Id.* at 927 (citation omitted). The court observed that plaintiffs knew enough to bring suit by 1981, and held that plaintiffs had delayed unreasonably and that defendant had been prejudiced. It held that *Morgan* allowed the application of laches to hostile environment claims even though they were within the period of limitations. It continued:

There remains the final question posed by *Morgan*: "what consequences follow if laches is established"? . . . The district court assumed that the upshot of laches must be outright dismissal. Yet that's not the only possible consequence. A less severe consequence would be to carve off the aspects of the plaintiffs' claim that are no longer subject to meaningful adversarial testing. It might well be sensible to allow litigation about events back to 1999 (four years before the § 1981 suit began) while foreclosing litigation about older events. That would respect the fact that prejudice is not an all-or-none affair—evidence about what happened three or four years ago is more accessible, and memories of that time more reliable, than evidence about the events 10 or 20 years earlier.



The court observed that plaintiffs had not urged such an approach, but had litigated the twenty-year period as an all-or-nothing affair. It continued at 930:

Although using laches to carve years out of a claim thus may be a sensible way to answer the question reserved in *Morgan*, it is not the relief that plaintiffs sought in the district court. They did not try to identify the scope of the prejudice caused by delay and specify a temporal bound that would leave the opposing sides with roughly equal access to evidence. Their appellate brief hints at such a possibility but does not undertake any of the work necessary to determine how far back the claim could reach without undue prejudice to the employer. In the district court plaintiffs' argument was limited to the proposition (one inconsistent with *Morgan*) that the claim must stretch at least four years back because laches never may be used to abbreviate the time allowed by a statute of limitations. The City argued that plaintiffs have forfeited the benefit of any other approach. Plaintiffs then filed a reply brief that ignored the City's argument that forfeiture has occurred. Such a head-in-the-sand position is unavailing. We hold the parties to the positions they preserved in the district court, which means that we need not attempt to draw a line between recent events (unaffected by laches) and older ones where the employer's ability to defend has been undermined.

This also means that we need not discuss Chicago's fallback argument that *Morgan*'s one-employment-practice holding is limited to Title VII (which has a short period of limitations) and does not apply under § 1981. If the City is right, then an employee never may complain about episodes of hostile environment that occurred more than four years before the suit began. Whether that is so is a question for another day.

### C. Pleading

*Bell Atlantic Corp. v. Twombly*, \_\_ U.S. \_\_, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), an antitrust case, tightened the rules for pleading Complaints. The Court held that antitrust plaintiffs could not merely allege parallel conduct and their belief that an unlawful conspiracy had taken place, but must allege facts sufficient to permit the inference of conspiracy. The Court overruled any implications to the contrary in *Conley v. Gibson*, 355 U.S. 41 (1947). It stated at 1964–65:

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “give the defendant fair notice of what the ... claim is and the grounds upon which it rests,” *Conley v. Gibson*, 355 U.S. 41, 47 (1957). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.* . . . a plaintiff's obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, *see Papasan v. Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts “are not bound to accept as true a legal conclusion couched as a factual allegation”). Factual allegations must be enough to raise a right to relief above the speculative level, *see* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, pp. 235–236 (3d ed. 2004) (hereinafter WRIGHT & MILLER) (“[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of

action”),<sup>3</sup> on the assumption that all the allegations in the complaint are true (even if doubtful in fact), *see, e.g., Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1 (2002); *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (“Rule 12(b)(6) does not countenance . . . dismissals based on a judge’s disbelief of a complaint’s factual allegations”); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (a well-pleaded complaint may proceed even if it appears “that a recovery is very remote and unlikely”).

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3 The dissent greatly oversimplifies matters by suggesting that the Federal Rules somehow dispensed with the pleading of facts altogether. *See post*, at 1979 (opinion of STEVENS, J.) (pleading standard of Federal Rules “does not require, or even invite, the pleading of facts”). While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant “set out in detail the facts upon which he bases his claim,” *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (emphasis added), Rule 8(a)(2) still requires a “showing,” rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only “fair notice” of the nature of the claim, but also “grounds” on which the claim rests. *See* 5 WRIGHT & MILLER § 1202, at 94, 95 (Rule 8(a) “contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented” and does not authorize a pleader’s “bare averment that he wants relief and is entitled to it”).

(Parallel citations and lower-court citations omitted). The Court emphasized the need to avoid burdensome discovery in cases that are not well enough pleaded to state a claim directly. *Id.* at 1966–67:

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through “careful case management,” *post* at 1975, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. *See, e.g., Easterbrook, Discovery as Abuse*, 69 B.U. L. Rev. 635, 638 (1989) (“Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves”). And it is self-evident that the problem of discovery abuse cannot be solved by “careful scrutiny of evidence at the summary judgment stage,” much less “lucid instructions to juries,” *post*, at 1975; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no “ ‘reasonably founded hope that the [discovery] process will reveal relevant evidence’ ” to support a § 1 claim. *Dura*, 544 U.S., at 347 (quoting *Blue Chip Stamps, supra*, at 741; alteration in *Dura*).<sup>6</sup>

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<sup>6</sup> The dissent takes heart in the reassurances of plaintiffs’ counsel that discovery would be “ ‘phased’ ” and “limited to the existence of the alleged conspiracy and class certification.” *Post*, at ----24. But determining whether some illegal agreement may have taken place between unspecified persons at different ILECs (each a multibillion dollar corporation with legions of management level employees) at some point over seven years is a sprawling, costly, and hugely time-consuming undertaking not easily

susceptible to the kind of line drawing and case management that the dissent envisions. Perhaps the best answer to the dissent's optimism that antitrust discovery is open to effective judicial control is a more extensive quotation of the authority just cited, a judge with a background in antitrust law. Given the system that we have, the hope of effective judicial supervision is slim: "The timing is all wrong. The plaintiff files a sketchy complaint (the Rules of Civil Procedure discourage fulsome documents), and discovery is launched. A judicial officer does not know the details of the case the parties will present and in theory cannot know the details. Discovery is used to find the details. The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find. A magistrate supervising discovery does not-cannot-know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define 'abusive' discovery except in theory, because in practice we lack essential information." Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 638-639 (1989).

(Parallel citations omitted). The Court then explained and restricted the scope of *Conley v. Gibson*, at 1968-69:

Justice Black's opinion for the Court in *Conley v. Gibson* spoke not only of the need for fair notice of the grounds for entitlement to relief but of "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S., at 45-46. This "no set of facts" language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard . . . .

On such a focused and literal reading of *Conley*'s "no set of facts," a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement. . . . It seems fair to say that this approach to pleading would dispense with any showing of a "reasonably founded hope" that a plaintiff would be able to make a case, *see Dura*, 544 U.S., at 347 (quoting *Blue Chip Stamps*, 421 U.S., at 741); Mr. Micawber's optimism would be enough.

Seeing this, a good many judges and commentators have balked at taking the

literal terms of the *Conley* passage as a pleading standard. . . .

We could go on, but there is no need to pile up further citations to show that *Conley's* “no set of facts” language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. *See* . . . ; *accord*, *Swierkiewicz*, 534 U.S., at 514 . . . . *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.

(Footnotes, parallel citations, and some citations omitted). The Court denied that it was undermining *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002):

Even though *Swierkiewicz's* pleadings “detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination,” the Court of Appeals dismissed his complaint for failing to allege certain additional facts that *Swierkiewicz* would need at the trial stage to support his claim in the absence of direct evidence of discrimination. . . . We reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting that *Swierkiewicz* allege “specific facts” beyond those necessary to state his claim and the grounds showing entitlement to relief.

*Id.* at 1973–74 (citation omitted). Justice Stevens, joined in part by Justice Ginsburg, dissented. *Id.* at 1974–89.

## **D. Arbitration**

### **1. AAA “Canon X” Commercial Arbitrators**

I took three days of Commercial Arbitrator training put on by the Dispute Resolution Section of the American Bar Association. It was extremely well done, and I learned of an approach to arbitration that was new to me. With a three-member panel, it is possible for the parties to agree on all three, or for each side to pick one arbitrator and have them pick the third to act as chair. When each side picks one arbitrator, they can specify whether the wing members will be neutral arbitrators with the independence and no-contact rules applicable to judges, or predisposed arbitrators who are free to communicate with the side picking them until any part of the matter is taken under consideration, and even to help that side prepare for the hearing or to suggest lines of questioning, as long as they disclose at the earliest practicable time an intent to communicate and as long as the facts—but not the content—of all contacts are timely disclosed to all participants. Predisposed arbitrators are allowed under Canon X of the AAA Code of

Ethics for Arbitrators in Commercial Disputes. They are not allowed to disclose deliberations, and must still be just in their decisions but are allowed to be predisposed in favor of the party appointing them. They may not communicate with the neutral member unless they are in the presence of the other Canon X arbitrator. Particularly in complex cases, they have an incentive to be reasonable notwithstanding their predisposition, because otherwise the case can be decided against their party by a 2–1 vote against them on all issues. The chair handles everything not involving the merits, and obviously needs to have good “people skills.”

I had not been aware that this option was available. While it is more expensive to have three arbitrators and may make it harder to schedule hearings meeting everyone’s schedules, employers demanding enforcement of arbitration agreements may have an incentive to agree to such an approach if the claimant suggests it, because it answers their internal concerns about arbitrators not following the law and about the dangers of unappealable injunctive relief.

## **2. Intervention in EEOC Case**

*EEOC v. Woodmen of the World Life Insurance Society*, 479 F.3d 561, 99 FEP Cases 1595 (8th Cir. 2007), reversed the lower court’s order allowing the charging party to intervene in the EEOC’s enforcement action on her charge, because she was bound by an arbitration agreement. The court rejected the charging party’s claim that the EEOC’s filing preempted her own cause of action so that she had nothing on which to proceed in arbitration. It rejected her attack on the arbitral fees as making the contract unconscionable, because defendant subsequently offered to pay all the arbitral fees. The court rejected plaintiff’s argument that the arbitration agreement was unconscionable in requiring her to bear her own attorneys’ fees and expenses in arbitration, reasoning that she would have to do the same in court and never advertent to the fee-shifting provisions of Title VII.

### **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.

### **4. Vacation of Arbitration Awards**

*Electronic Data Systems Corp. v. Donelson*, 473 F.3d 684, 99 FEP Cases 1054, 18 AD Cases 1513 (6th Cir. 2007), affirmed the lower court’s order denying defendant’s motion to vacate an arbitration award in favor of two black racial and disability discrimination claimants. The parties entered into a post-dispute arbitration agreement, and tried the case before a panel of three arbitrators. The hearing apparently did not go well for the defendant:

On January 3, 2005, counsel for EDS submitted a written objection to the panel, arguing that, because the arbitration panel had not issued a decision within two weeks of the completion of briefing, as required by the arbitration agreement, the panel no longer possessed the power to do so. Notwithstanding EDS’s letter, on January 19, 2005, the panel awarded damages to Donelson in the amount of \$95,000 and to Lotts in the amount of \$35,000. Neither award set forth findings of fact or conclusions of law, but each included a request for additional briefing on the proper amount of attorney fees to be awarded. Approximately one month later, Donelson and Lotts submitted the requested briefs, to which EDS objected on the grounds that the arbitrators lacked the authority to award attorney fees and that, in any event, no evidence concerning fees had been timely submitted.

*Id.* at 687. The court distinguished Michigan law requiring findings of fact and conclusions of law on the ground that such requirements applied only to pre-dispute arbitration agreements employees had to sign as a condition of keeping their jobs. “Donelson’s and Lotts’s claims are not, however, of the type contemplated by the *Rembert* court, and it is not for us to extend that court’s holding.” *Id.* at 689. There was thus no requirement for a verbatim record, and no requirement for the issuance of the findings of fact and conclusions of law requested by the defendant. The court held that the extensions to which the parties agreed during an extended post-hearing briefing period showed that time was not of the essence, waived the time limits in the arbitration agreement, and empowered the arbitrators to issue their award six weeks after the end of briefing. The court held that the award of fees and costs more than five months after the end of briefing was similarly within the power of the arbitrators. *Id.* at 690. Finally, the court held that the arbitrators had not been shown to have manifestly disregarded the law by ignoring the requirements of a *prima facie* case, while recognizing that it was virtually impossible for defendants to make such a showing in the absence of a verbatim record and findings of fact and conclusions of law:

Because no record exists of the arbitration hearing held in this case, it is impossible to determine whether the evidence presented by Donelson and Lotts established a prima facie case under the ELCRA. Absent such a record, and in light of the undisputed facts that Hoffmaster’s cubicle contained a black-faced doll suspended by its neck and that Hoffmaster participated in the terminations of four African-American and no Caucasian employees during the period in which Donelson and Lotts were fired, we cannot determine that a “legal error . . . is evident without scrutiny of intermediate mental indicia.” . . . Accordingly, we AFFIRM the district court’s determination that the arbitrators did not manifestly disregard the law.

*Id.* at 692 (citation omitted).

## **E. Bars to Actions**

### **1. Claim Preclusion**

**Risks in Filing State-Court Tort Action While EEOC Charge is Pending:** *EEOC v. Jefferson Dental Clinics, PA*, 478 F.3d 690, 99 FEP Cases 1313 (**5th Cir.** 2007), on an interlocutory appeal reversed in part the denial of summary judgment to the Title VII employer. The court held, based on Texas law, that the Commission was not barred by *res judicata* as to liability and claims for broad injunctive relief, but was barred as to make-whole relief, by the results of the charging parties’ separate, unsuccessful state-court action for intentional infliction of emotional distress.

### **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 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.*

*Id.* at 1152 (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.

*Myricks v. Federal Reserve Bank of Atlanta*, 480 F.3d 1036, 100 FEP Cases 1 (11th Cir. 2007) (F.3d pagination not yet released), affirmed the grant of summary judgment to the Title VII defendant, holding that the cause of action was barred by plaintiff's execution of a general release as part of his severance agreement. The court explained at p. \*4 the standards in considering the knowing and voluntary character of a release:

The error of Myricks's argument is that the Bank explained in clear terms that the severance agreement required the execution of a general release, and Myricks had an opportunity to consult his attorney about those terms. A genuine issue of fact may exist when an employee has not been given enough time to review the agreement after being terminated . . . is not educated enough to understand the waiver . . . or is misled to believe that the release was necessary to prevent the employer from taking an unlawful action . . . but an educated employee with ample time to consider an agreement cannot profess ignorance about its clear terms after consulting an attorney . . . Myricks had enough time to consider the clear terms of the release, was educated, was not threatened with any unlawful action, and consulted an attorney.

The court affirmed the award of costs against plaintiff, because the defendant prevailed on an affirmative defense.

#### 4. Settlements

**Practice Tip: Do Not Agree to a Settlement and Then Assert that New Desired Terms are Material:** *Dillard v. Starcon International, Inc.*, 483 F.3d 502, 100 FEP Cases 824 (7th Cir. 2007), enforced an oral settlement agreement, holding that enforceability was governed by State law, and that plaintiff's disputes about additional written terms he wanted to see in the agreement were immaterial. One of the disputes concerned plaintiff's effort to change his at-will employment status. The court approved the Magistrate Judge's finding this was immaterial because plaintiff had always been an at-will employee, and this question had not even been mentioned in the negotiations leading to the oral agreement although "more mundane" matters had been addressed. The court rejected plaintiff's argument that terms discussing the consequences of certain possible events were material, stating: "Terms addressing purely contingent matters are not necessarily material."

#### F. Class Actions

*Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007), *petition for reh'g en banc filed and response requested*, affirmed the grant of class certification and the limits the lower court imposed on back pay and punitive damages for promotion claims. The court described the class:

The class in this case is broad and diverse. It encompasses approximately 1.5 million employees, both salaried and hourly, with a range of positions, who are or were employed at one or more of Wal-Mart's 3,400 stores across the country. Plaintiffs contend, and the district court found, that the large class is united by a complex of company-wide discriminatory practices against women.

*Id.* at 1224. The court discussed the central issue of commonality:

The commonality test is qualitative rather than quantitative—one significant issue common to the class may be sufficient to warrant certification. . . . As the district court properly noted, "plaintiffs may demonstrate commonality by showing that class members have shared legal issues by divergent facts or that they share a common core of facts but base their claims for relief on different legal theories." . . .

The district court found that Plaintiffs had provided evidence sufficient to support their contention that significant factual and legal questions are common to all class members. After analyzing Plaintiffs' evidence, the district court stated:

Plaintiffs have exceeded the permissive and minimal burden of establishing commonality by providing: (1) significant evidence of company-wide corporate practices and policies, which include (a) excessive subjectivity in personnel decisions, (b) gender stereotyping, and (c) maintenance of a strong corporate culture; (2) statistical evidence of gender disparities caused by discrimination; and (3) anecdotal evidence of gender bias. Together, this evidence raises an inference

that Wal-Mart engages in discriminatory practices in compensation and promotion that affect all plaintiffs in a common manner.

*Id.* at 1225. The court held that the district court did not err in accepting Dr. William Bielby's conclusions that "(1) that Wal-Mart's centralized coordination, reinforced by a strong organizational culture, sustains uniformity in personnel policy and practice; (2) that there are significant deficiencies in Wal-Mart's equal employment policies and practices; and (3) that Wal-Mart's personnel policies and practices make pay and promotion decisions vulnerable to gender bias." *Id.* at 1226. It rejected Wal-Mart's argument that such analysis is improper where no specific practice has been identified as the cause of the disparity. *Id.* It held that "courts need not apply the full *Daubert* 'gate-keeper' standard at the class certification stage. Rather, 'a lower *Daubert* standard should be employed at this [class certification] stage of the proceedings.'" *Id.* at 1227 (citations omitted). The court held that plaintiffs' 120 affidavits helped support the finding of commonality, rejecting defendant's argument that 120 affidavits were too few with respect to a proposed class of 1.5 million. "However, we find no authority requiring or even suggesting that a plaintiff class submit a statistically significant number of declarations for such evidence to have any value." *Id.* at 1230. The court emphasized that the affidavits were not the sole evidence of commonality. The court then turned to the evidence on subjective decision-making:

It is well-established that subjective decision-making is a "ready mechanism for discrimination" and that courts should scrutinize it carefully. . . . Wal-Mart is correct that discretionary decision-making *by itself* is insufficient to meet Plaintiffs' burden of proof. The district court recognized this, noting that managerial discretion is but one of *several* factors that supported a finding of commonality. . . .

Plaintiffs produced substantial evidence of Wal-Mart's centralized company culture and policies . . . which provides a nexus between the subjective decision-making and the considerable statistical evidence demonstrating a pattern of discriminatory pay and promotions for female employees . . . . Therefore, for the reasons stated above, we find that the district court did not abuse its discretion when it held that Wal-Mart's subjective decision-making policy raises an inference of discrimination, and provides support for Plaintiffs' contention that commonality exists among possible class members.

*Id.* at 1231 (emphasis in original; citations omitted). The court next held that the class representatives were typical of the class, rejecting Wal-Mart's argument that the plaintiffs' claims were not typical of all women with salaried management jobs because only one of the six was a salaried manager, and was only a lower-level manager.

However, the lack of a class representative for each management category does not undermine Plaintiffs' certification goal because all female employees faced the same discrimination. . . .

In addition, because the range of managers in the proposed class is limited to those working in Wal-Mart's stores, it is not a very broad class, and a named plaintiff occupying a lower-level, salaried, in-store management position is sufficient to satisfy the "permissive" typicality requirement. . . .

*Id.* at 1232–33 (citations omitted). The court held that Rule 23(b)(2) is only available where the claim for equitable relief predominates over the claim for monetary relief, whether or not such claim is incidental to the claim for injunctive relief.

Here, not only do the plaintiffs, current and former employees alike, state their common intention as ending Wal-Mart’s allegedly discriminatory practices, but logic also supports their declared intent. It is reasonable that plaintiffs who feel that their rights have been violated by an employer’s behavior would want that behavior, and the injustice it perpetuates, to end. In cases involving discrimination, it is especially likely that even those plaintiffs safe from immediate harm will be concerned about protecting those class members that are suffering as they once did. Perhaps that is why no case discusses the employment status of the plaintiffs as a factor in granting or denying class-certification under Rule 23(b)(2) even when former employees are explicitly mentioned as part of the class. . . .

*Id.* at 1234–35 (citation and footnote omitted). The court rejected defendant’s argument that the punitive-damages claim was so large that monetary relief must be considered predominant, stating: “However, such a large amount is principally a function of Wal-Mart’s size, and the predominance test turns on the *primary goal* of the litigation—not the theoretical or possible size of the damage award.” *Id.* at 1235 (emphasis in original). The court noted that claims for compensatory damages were not included in the class certification. It held that the claim for punitive damages did not automatically make the case ineligible for Rule 23(b)(2) certification, particularly in light of the lower court’s order granting class members the right to opt out of the class for purposes of punitive-damages. *Id.* at 1235–36. The court suggested that the lower court should have allowed an opt-out right on back pay claims as well and stated that in the absence of such a provision the back-pay claims undercut the motion for class certification, but held that the lower court did not err in finding that the class’s claims for injunctive relief nevertheless predominated over the claims for back pay. *Id.* at 1237. The court then held that class certification did not deprive defendant of substantive defenses. It summarized its holding on this issue:

This case involves the largest certified class in history. The district court was cognizant of this fact when it concluded that the class size, although large, was not unmanageable. In analyzing the manageability of the class at all stages of the case, the district court reasoned that if, at the merits stage, Wal-Mart was found liable of discrimination, the court could employ a formula to determine the amount of backpay and punitive damages owed to the class members. Wal-Mart contends that, by reaching this conclusion, the district court “decided to strip Wal-Mart of its right to defend itself.”

Raising objections more appropriate for the merits stage, Wal-Mart maintains that it has the right to an individualized hearing for each class member’s claim so that it may present a defense relevant to the facts raised but that such a right cannot be exercised in a class action because of the enormous class size. Wal-Mart further contends that, by eliminating Wal-Mart’s ability to present a defense to each individual’s claims, the district court altered substantive law. For the reasons stated below, we find that the district court neither deprived Wal-Mart of substantive defenses nor altered substantive law when it certified the class.

*Id.* at 1237–38. The court held that neither Title VII nor *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), nor the Civil Rights Act of 1991, nor the presence of a punitive-damages claim, nor due process, require individualized hearings on relief. 474 F.3d at 1238–42. The court stated that a Special Master could be employed to develop a formula for the distribution of a punitive-damages award, and stated:

Thus, in the event that Wal-Mart faces a punitive damages award, the district court took—and presumably will continue to take—sufficient steps to ensure that any award will comply with due process. [FN19]

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FN19. The district court speculated that a Special Master might assist the court by developing and employing a formula to compute damages at the remedy stage. . . . Wal-Mart contends that its Seventh Amendment rights to a jury trial will be violated if the district court assigns this task to a Special Master. However, neither Plaintiffs nor the district court has suggested that a Special Master would be substituted for the jury as the fact-finder. Further, as Plaintiffs note, any formula, whether prepared by a Special Master or the parties’ experts, can be subjected to a jury’s review. . . .

*Id.* at 1242 (citations omitted). Finally, the court limited the monetary relief awardable by affirming the lower court’s requirement that class members demonstrate objective evidence of their interest in promotions in order to be entitled to back pay or punitive damages. The court recognized that this might deny all monetary relief to the class members most exposed to discrimination, but held that this was a consequence of the lack of individualized hearings:

Wal-Mart’s corporate records may provide substantial objective information about class members’ qualifications for promotions, but there is no suggestion that such records demonstrate or quantify Plaintiffs’ interest. . . . Thus, the district court reasoned, individual hearings would be necessary to determine which class members had an interest in promotions. . . .

Conceding that individualized hearings would be unmanageable, Plaintiffs suggest that this court overlook the district court’s interest requirement. However, there is no support for this proposition. Rather, courts have recognized that a class member may be qualified for a promotion but not interested in taking advantage of that opportunity. . . . Although Plaintiffs are correct that neither *Teamsters* nor *McKenzie* definitively requires individualized proof of interest at the remedy stage, Plaintiffs fail to present any case where a court states that individualized proof of interest is irrelevant.

We recognize that awarding backpay relief only to those plaintiffs who can demonstrate an interest in a promotion may deny relief to those class members exposed to the greatest opportunities for discrimination in promotions . . . and in turn fail to provide the class with “the most complete relief possible” . . . . However, in light of relevant case law, the district court acted reasonably when it concluded that class members must be able to prove with objective data an interest in a promotion in order to be eligible to collect certain damages. . . . Therefore, we find that the district court did not abuse its discretion when it concluded that backpay for promotions may be limited to those plaintiffs for whom actual proof of qualification and interest exists.

*Id.* at 1243–44 (citations omitted). Judge Kleinfeld dissented. *Id.* at 1244–49. *See also* the discussion of this case in the sections above on “Statistics” and on “Mixed Motives.”

- **Practice Suggestion:** The limitation on recovery points to the importance of ensuring the preservation of, and discovering, all e-mails and other documents that might contain information about promotability and interest in promotions. Messages between managers, exit interviews, performance evaluations, personnel folders, and the like could all contain such objective evidence. If a defendant fails to preserve such records, perhaps an appropriate sanction might be to waive the requirement of objective evidence of interest in promotions. In some cases, the proof-of-claim form includes a statement that the class member would have been interested in promotions at the time, and it falls to the defendant to rebut it.

## 1. Class Action Fairness Act

*Hart v. FedEx Ground Package System Inc.*, 457 F.3d 675, 679–82 (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.

## G. Defense Mental Examinations

*Herrera v. Lufkin Industries, Inc.*, 474 F.3d 675, 689–90, 99 FEP Cases 809 (10th Cir. 2007), reversed the grant of summary judgment to defendant on plaintiff’s Title VII racially hostile environment claim, but held that the lower court did not abuse its discretion in ordering plaintiff to submit to a DME (called an IME in the decision). where plaintiff alleged severe emotional distress and had stipulated that his mental condition was in controversy. District Judge Cassell dissented in part. *Id.* at 690–92.

## H. Summary Judgment

### 1. Decisions

*Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 2499, 2511–12, 168 L. Ed. 2d 179 (2007), a securities case in which Justice Ginsburg wrote for the majority, stated:

Accounting for its construction of § 21D(b)(2), the Seventh Circuit explained that the court “th[ought] it wis[e] to adopt an approach that [could not] be misunderstood as a usurpation of the jury’s role.” . . . In our view, the Seventh Circuit’s concern was undue.<sup>7</sup> A court’s comparative assessment of plausible inferences, while constantly assuming the plaintiff’s allegations to be true, we think it plain, does not impinge upon the Seventh Amendment right to jury trial.<sup>8</sup>

<sup>7</sup> The Seventh Circuit raised the possibility of a Seventh Amendment problem on its own initiative. The Shareholders did not contend below that dismissal of their complaint under § 21D(b)(2) would violate their right to trial by jury. *Cf. Monroe Employees Retirement System v. Bridgestone Corp.*, 399 F.3d 651, 683, n. 25 (C.A.6

2005) (noting possible Seventh Amendment argument but declining to address it when not raised by plaintiffs).

<sup>8</sup> In numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury's judgment without violating the Seventh Amendment. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (expert testimony can be excluded based on judicial determination of reliability); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1967) (judgment as a matter of law); *Pease v. Rathbun-Jones Engineering Co.*, 243 U.S. 273, 278, 37 S. Ct. 283, 61 L. Ed. 715 (1917) (summary judgment).

**Defense Response to Plaintiff's Opposition Creates Issue That Cannot Be Resolved on Summary Judgment:** *Czekalski v. Peters*, 475 F.3d 360, 368, 99 FEP Cases 1121 (D.C. Cir. 2007), reversed the grant of summary judgment to the Title VII gender discrimination defendant, relying in part on evidence of the decisionmaker's biased attitudes. The court held that defendant's reliance on the theory that Donohue was an "equal-opportunity abuser" raised a genuine issue of material fact precluding summary judgment.

**Lower Court Cannot Dismiss Plaintiff's Specific Assertions as "Self-Serving":** *Velazquez-Garcia v. Horizon Lines Of Puerto Rico, Inc.*, 473 F.3d 11, 17–18, 181 LRRM 2097 (1st Cir. 2007), reversed the grant of summary judgment to the USERRA defendant. The court held that the lower court erred in dismissing plaintiff's descriptions of anti-military comments as self-serving.

First, the court discounted Velázquez's testimony of anti-military remarks because it was his own self-serving testimony and because he had not previously reported it or made a formal complaint. Here, the distinction in Rule 56 between "specific facts" and "mere allegations" is important. Fed.R.Civ.P. 56(e). Had Velázquez merely rested on allegations of military discrimination, this would be a different case. Instead, he provided deposition testimony presenting specific instances of anti-military remarks, as well as complaints and pressure from his superiors, and it is for the jury, not the judge, to determine his credibility.

Moreover, whether a nonmovant's deposition testimony or affidavits might be self-serving is not dispositive. It is true that testimony and affidavits that "merely reiterate allegations made in the complaint, without providing specific factual information made on the basis of personal knowledge" are insufficient. . . . However, a "party's own affidavit, containing relevant information of which he has first-hand knowledge, may be self-serving, but it is nonetheless competent to support or defeat summary judgment." Therefore, provided that the nonmovant's deposition testimony sets forth specific facts, within his personal knowledge, that, if proven, would affect the outcome of the trial, the testimony must be accepted as true for purposes of summary judgment.

(Citations omitted.)

**Defendant's Motion Inadequate:** *Lemire v. State of Louisiana*, 480 F.3d 383, 388, 99 FEP Cases 1577 (5th Cir. 2007), reversed the grant of summary judgment to defendant on

plaintiff’s Title VII sexual harassment claim, where plaintiff presented evidence of repeated gay sexually harassing comments by plaintiff’s supervisor to plaintiff and his female friend. The court rejected the dissent’s suggestion that plaintiff had failed to show that the same-sex harassment was “because of sex,” or that it was severe or pervasive, where defendant never raised that issue. The court stated:

Here, LaDOTD did not mention “same-sex harassment” or “hostile work environment” in its motion for summary judgment. Instead, it filed a bare-bones motion that failed to cite to any legal precedent or standards regarding sexual harassment. This is insufficient to put LeMaire on notice that he needed to produce evidence on those issues. While the dissent assumes that LeMaire has no further evidence to support those elements of his claim, we cannot do so because LeMaire was never under an obligation to produce such evidence.

The court also reversed at 389–90 the grant of summary judgment on vaguely-described incidents of alleged retaliation, where defendant did not mention them in its motion and the lower court never issued an opinion showing that they had been considered. Judge DeMoss dissented in part and concurred in part.

**2. Chart Showing Some Recent Reversals of SJ or JMOL**

<u>Citation</u>	<u>Laws Involved</u>	<u>Type of Claim</u>
<i>Czekalski v. Peters</i> , 475 F.3d 360, 99 FEP Cases 1121 ( <b>D.C. Cir.</b> 2007) (SJ)	Title VII	Lateral Reassignment
<i>De Jesus v. LTT Card Services, Inc.</i> , 474 F.3d 16, 99 FEP Cases 1048, 18 AD Cases 1505 ( <b>1st Cir.</b> 2007) (SJ)	Title VII, ADA, etc. (vacated as to holding of insufficient employees for coverage)	Retaliation
<i>Velazquez-Garcia v. Horizon Lines Of Puerto Rico, Inc.</i> , 473 F.3d 11, 181 LRRM 2097 ( <b>1st Cir.</b> 2007)	USERRA	Termination
<i>Tomassi v. Insignia Financial Group, Inc.</i> , 478 F.3d 111, 99 FEP Cases 1445 ( <b>2d Cir.</b> 2007)	ADEA	Termination
<i>Wishkin v. Potter</i> , 476 F.3d 180, 18 AD Cases 1719 ( <b>3d Cir.</b> 2007)	ADA	Suspended because of fitness for duty disagreement
<i>Lettieri v. Equant Inc.</i> , 478	Title VII (discrimination and	Termination



<u>Citation</u>	<u>Laws Involved</u>	<u>Type of Claim</u>
F.3d 640, 99 FEP Cases 1569 (4th Cir. 2007),	retaliation)	
<i>Lemaire v. State of Louisiana</i> , 480 F.3d 383, 388, 99 FEP Cases 1577 (reversed in part)	Title VII	Sexual harassment, and part of retaliation claim
<i>Muhammad v. Dallas County Community Supervision And Corrections Dept.</i> , 479 F.3d 377, 99 FEP Cases 1281 (5th Cir. 2007) (Rule 12(b)(6) dismissal)	Title VII	Coverage
<i>Tuttle v. Metropolitan Government of Nashville</i> , 474 F.3d 307, 99 FEP Cases 974 (6th Cir. 2007) (JMOL)	ADEA	Termination
<i>Asmo v. Keane, Inc.</i> , 471 F.3d 588, 99 FEP Cases 678 (6th Cir. 2006)	Title VII (Pregnancy)	Termination in RIF
<i>Doe v. Oberweis Dairy</i> , 456 F.3d 704, 98 FEP Cases 958, 98 FEP Cases 1022 (7th Cir. 2006) (SJ), cert. denied, ___ U.S. ___, 127 S. Ct. 1815, 1828, 167 L. Ed. 2d 317 (2007)	Title VII	Sexual harassment
<i>Kampmier v. Emeritus Corp.</i> , 472 F.3d 930, 99 FEP Cases 755, 18 AD Cases 1607 (7th Cir. 2007)	Title VII	Same-Sex Harassment
<i>Burnett v. LFW Inc.</i> , 472 F.3d 471, 18 AD Cases 1536, 12 WH Cases 2d 193 (7th Cir. 2006) (in part)	FMLA	Termination
<i>EEOC v. Wal-Mart Stores, Inc.</i> , 477 F.3d 561, 18 AD Cases 1697 (8th Cir. 2007)	ADA	Hiring

<u>Citation</u>	<u>Laws Involved</u>	<u>Type of Claim</u>
<i>EEOC v. City of Independence</i> , 471 F.3d 891, 99 FEP Cases 770 ( <b>8th Cir.</b> 2006) (in part)	ADEA	Disqualification from leave bank program
<i>Syverson v. International Business Machines Corp.</i> , 461 F.3d 1147, 98 FEP Cases 1345 ( <b>9th Cir.</b> 2006) (SJ)	ADEA	OWBPA release
<i>Herrera v. Lufkin Industries, Inc.</i> , 474 F.3d 675, 99 FEP Cases 809 ( <b>10th Cir.</b> 2007) (reversed in part)	Title VII	Hostile Environment
<i>Casey v. West Las Vegas Independent School District</i> , 473 F.3d 1323, 1332–33 ( <b>10th Cir.</b> 2007) (SJ)	First Amendment	Retaliation (one of several counts)

## I. Evidence

**Earlier Failure to Complain Raises Jury Question:** *Velazquez-Garcia v. Horizon Lines Of Puerto Rico, Inc.*, 473 F.3d 11, 19, 181 LRRM 2097 (**1st Cir.** 2007), reversed the grant of summary judgment to the USERRA defendant. The court held that the lower court erred in dismissing plaintiff’s descriptions of anti-military comments as self-serving, in part because he had not reported such comments earlier.

Finally, the fact that Velázquez failed to report the remarks earlier is not dispositive. Cf. *Faragher v. City of Boca Raton*, 524 U.S. 775, 808, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (holding that plaintiff’s failure to report sexual harassment is not an affirmative defense to a Title VII claim where plaintiff was discharged). In an atmosphere such as a working seaport, it is reasonable for a person to avoid making a scene over such behavior, or even to believe that the behavior is only in jest, only to discover too late that it was a harbinger of worse discrimination to come. Velázquez’s failure to report the behavior may be considered by a jury in judging his credibility, but it is evident to us that a jury could reasonably decide to place no weight on his prior silence. Thus, it is a jury that should ultimately decide.

## J. Claim of Pro-Plaintiff Bias

*Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 940, 99 FEP Cases 1127 (**8th Cir.** 2007), affirmed the judgment for the Title VII racial-discrimination and retaliation plaintiff, holding that defendant waived any argument that the trial judge was biased on behalf of plaintiff

by failing to move for recusal, or to question the lower court’s impartiality, below. The court held that questions asked by the court during trial were for purposes of ensuring a fair trial, not an exercise in partiality. Judge Smith concurred in part and dissented in part. *Id.* at 945–46.

## **K. Preliminary Injunctions**

*Burlington Northern and Santa Fe Ry. Co. v. White*, \_\_ U.S. \_\_, 126 S. Ct. 2405, 2417, 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 held that the eventual recovery of back pay for a 37-day unpaid suspension did not mean it was not a material injury to plaintiff. In the course of its discussion, the Court stated in *dictum*: “And we have no reason to believe that a court could not have issued an injunction where an employer suspended an employee for retaliatory purposes, even if that employer later provided backpay.”

- Plaintiffs will use this statement in seeking preliminary injunctions in some EEO and retaliation cases, to rebut the common perception among lower-court judges that the availability of back pay years later makes such relief unnecessary.

## **L. Back Pay**

### **1. Causation**

*Alexander v. City of Milwaukee*, 474 F.3d 437, 451, 99 FEP Cases 961 (7th Cir. 2007), affirmed the judgment holding the City liable, and the then Police Chief and each of the members of the Board of Police and Fire Commissioners personally liable, under Title VII and 42 U.S.C. §§ 1981 and 1983 for racial and sexual discrimination against 17 white male plaintiffs in making promotions to the rank of Captain. The court held that the lower court erred in instructing the jury that, under the lost-chance method, plaintiffs were to be evaluated only against other plaintiffs with respect to each of the promotional opportunities in question:

The plaintiffs bear the burden of establishing their losses, and, in the case of promotional opportunities, it is the plaintiffs’ burden to establish the probability that they would be promoted over *all* other potential candidates. Only in the face of evidence that they would have been promoted *over any other non-plaintiff candidates* absent discrimination would the district court have been justified in instructing the jury to limit its consideration of the plaintiffs’ lost chances to the consideration only of other plaintiffs. Although the evidence in the record strongly supports the conclusion that the lieutenant-plaintiffs were *qualified*—indeed, that is uncontested—it necessarily does not follow from our case law that the plaintiffs were entitled to an instruction that treated them as though they were the only qualified individuals.

(Footnote omitted; emphases in original.) The court held that the same analysis had to be applied to the damages for emotional distress.

### **2. Mitigation**

*Chalfant v. Titan Distribution, Inc.*, 475 F.3d 982, 992–93, 18 AD Cases 1601 (8th Cir. 2007), affirmed the judgment on a jury verdict for the ADA plaintiff, holding that plaintiff was

entitled to the \$60,000 awarded in back pay, and rejecting defendant's argument that plaintiff failed to mitigate his damages. The court relied on the fact that plaintiff found other employment, at half his former pay, within two months, and continued looking for better jobs in the newspaper classified advertisements. "Titan relies on testimony from Chalfant's and Titan's vocational experts that Chalfant would have been able to find a better paying job. There was also testimony from Chalfant's vocational expert, though, that at Chalfant's age it would be difficult to find a similar paying job. With this evidence, we cannot say the district court clearly abused its discretion in concluding that the jury could reasonably find that Chalfant mitigated his damages." *Id.* at 992 (citation omitted).

### **3. Calculation**

*EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 18 AD Cases 1793 (5th Cir. 2007) (F.3d pagination not yet available), affirmed the award of \$91,000 in back pay to the ADA charging party, holding at p. \*5 that the record allowed the jury to disregard the charging party's physician's certification that he was unable to work and determine that he would have worked longer in the absence of discrimination:

Although Dr. Montegut, Barrios's physician, testified that Barrios was medically unable to work after June 2001, the jury could have relied upon testimony that Barrios had a high pain threshold and could have worked after that date. The jury was in a better position than this court to weigh the evidence concerning the proper date to cut off backpay. . . . Further, assessing the backpay at the modest amount of approximately \$20,000 per year over a five-year period was not improper.

(Footnote and citation omitted.) Note 4 stated: "The backpay award was adjusted for the amount of disability compensation Barrios received from DuPont during this period."

*Alexander v. City of Milwaukee*, 474 F.3d 437, 452, 99 FEP Cases 961 (7th Cir. 2007), affirmed the judgment holding the City liable, and the then Police Chief and each of the members of the Board of Police and Fire Commissioners personally liable, under Title VII and 42 U.S.C. §§ 1981 and 1983 for racial and sexual discrimination against 17 white male plaintiffs in making promotions to the rank of Captain. The court held that the lower court erred in ignoring the economic value of the overtime the plaintiffs did earn as Lieutenants but could not have earned as Captains, and in ignoring the economic value of the flextime Captains earned.

*Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 941–42, 99 FEP Cases 1127 (8th Cir. 2007), affirmed the judgment for the Title VII racial-discrimination and retaliation plaintiff, holding that the lower court did not err in finding that plaintiff would likely have received the top range of managerial pay rather than the bottom range, because plaintiff was still receiving Assistant Manager pay after her demotion to the job of Cashier. Judge Smith concurred in part and dissented in part. *Id.* at 945–46.

### **M. Front Pay**

*EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 18 AD Cases 1793 (5th Cir. 2007) (F.3d pagination not yet available), reversed the award of \$200,000 in front pay to the

ADA charging party, where his physical condition had deteriorated so sharply in the years since his termination that at the time of judgment he was no longer able to work.

*Alexander v. City of Milwaukee*, 474 F.3d 437, 452–53, 99 FEP Cases 961 (7th Cir. 2007), affirmed the judgment holding the City liable, and the then Police Chief and each of the members of the Board of Police and Fire Commissioners personally liable, under Title VII and 42 U.S.C. §§ 1981 and 1983 for racial and sexual discrimination against 17 white male plaintiffs in making promotions to the rank of Captain. The court held that the lower court erred in ending front pay at retirement or after two years' service as Captain, because the proper stopping point under the lost-chance method is when a plaintiff obtains the right to compete on an equal footing, regardless of selection. The court stated: "We note that, because the City promotes officers to captains only when a vacancy in the rank of captain arises, the frequency of this availability should be among the relevant considerations in determining when each of the seventeen plaintiffs, and in particular, those who have not yet been promoted or have not yet retired, would have an unimpeded promotional opportunity."

*Chalfant v. Titan Distribution, Inc.*, 475 F.3d 982, 993, 18 AD Cases 1601 (8th Cir. 2007), affirmed the judgment on a jury verdict for the ADA plaintiff, holding that plaintiff was entitled to the \$18,750 awarded as front pay, representing one year's difference in earnings and benefits, because plaintiff continued looking for better jobs in the newspaper classified advertisements. Plaintiff had sought six years of front pay.

**N. Liquidated Damages**

*Tuttle v. Metropolitan Government of Nashville*, 474 F.3d 307, 322, 99 FEP Cases 974 (6th Cir. 2007), reversed the grant of judgment as a matter of law to the ADEA retaliation defendant but upheld the lower court's denial of a requested instruction on liquidated damages, because there was no evidence of a knowing violation of law.

**O. Compensatory Damages**

*Alexander v. City of Milwaukee*, 474 F.3d 437, 451, 99 FEP Cases 961 (7th Cir. 2007), affirmed the judgment holding the City liable, and the then Police Chief and each of the members of the Board of Police and Fire Commissioners personally liable, under Title VII and 42 U.S.C. §§ 1981 and 1983 for racial and sexual discrimination against 17 white male plaintiffs in making promotions to the rank of Captain. The lower court used the lost-chance method of awarding back pay, and the court held that the plaintiffs had to be compared to all other eligible candidates, not just to other plaintiffs. "Although the evidence in the record strongly supports the conclusion that the lieutenant-plaintiffs were *qualified*—indeed, that is uncontested—it necessarily does not follow from our case law that the plaintiffs were entitled to an instruction that treated them as though they were the only qualified individuals." (Footnote omitted; emphases in original.) The court held that the same analysis had to be applied to the damages for emotional distress.

**P. Punitive Damages**

**1. Upholding Entitlement**

**Case of the Year for Plaintiffs:** *EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 18 AD Cases 1793 (5th Cir. 2007) (F.3d pagination not yet available), affirmed the award of \$300,000 on a jury verdict for the ADA charging party, holding at p. \*7 that punitive damages were permissible where back pay has been awarded, even if no other legal compensatory damages are awarded. It held that awards of back pay and front pay serve a compensatory function. The court also gave short shrift, at p. \*6, to defendant's argument that the EEOC had failed to show malice or reckless disregard of the law:

There was sufficient, albeit disputed, evidence to support the jury finding that DuPont intentionally discriminated against Barrios with malice or with reckless disregard for her rights. DuPont was aware of its responsibilities under the ADA. Yet, viewed in the light most favorable to the verdict, DuPont made Barrios's job more difficult. The company placed Barrios's printer over one hundred feet from her desk in spite of her walking difficulties, whereas other lab clerks' printers were adjacent to their desks. DuPont refused to allow Barrios to demonstrate her ability to evacuate before she was terminated—for inability to evacuate. The company spent years trying to convince Barrios to retire on disability. But the crowning evidentiary blow against DuPont is that after Barrios attempted to get her job back, a DuPont supervisor stated that he no longer wanted to see her "crippled crooked self, going down the hall hugging the walls." The supervisor's denial of this remark under oath, like DuPont's rejoinder to other negative evidence, was subject to the jury's credibility assessment. The jury likewise could have

rejected DuPont's good-faith defense based on the conclusory assertions by two DuPont employees that they comply with the law. . . .

(Citation omitted.)

*Alexander v. City of Milwaukee*, 474 F.3d 437, 453–54, 99 FEP Cases 961 (7th Cir. 2007), affirmed the judgment holding the City liable, and the then Police Chief and each of the members of the Board of Police and Fire Commissioners personally liable, under Title VII and 42 U.S.C. §§ 1981 and 1983 for racial and sexual discrimination against 17 white male plaintiffs in making promotions to the rank of Captain. The court held that plaintiffs were entitled to punitive damages:

As the plaintiffs correctly note, there is some evidence in the record that the defendants at times failed to require the Chief to comply with their policies mandating that he submit various paper records to the Board along with a candidate for promotion. . . . During the liability phase, the jury found the personal participation of the Commissioners in discrimination, and this finding would suggest that the jury concluded that the Commissioners had done more than simply evaluate single candidates that had come before them, as the statute requires. The plaintiffs' also produced evidence of the apparent racial animus of Chief Jones of which the Commissioners were aware, and introduced the 2001 Dimow report. This evidence could be interpreted as having put the Commissioners on notice that the promotional policies in effect in the Police Department, over which they had authority, were resulting in a quickly changing racial make-up exhibiting an under-representation of white males on the command staff. Taking that evidence in the light most favorable to the plaintiffs and in light of the jury's verdict, the Commissioners knew about a problem, failed to act to control it, as the responsibility of their office required them to do, and knowingly participated in its continuance. This evidence permitted a jury to find reckless or callous indifference to the federally protected rights of the plaintiffs, and we must therefore conclude that the district court did not abuse its discretion in submitting the issue of punitive damages to the jury.

*Chalfant v. Titan Distribution, Inc.*, 475 F.3d 982, 991–92, 18 AD Cases 1601 (8th Cir. 2007), affirmed the judgment on a jury verdict for the ADA plaintiff, holding that plaintiff was entitled to the \$100,000 awarded for punitive damages. The court noted that defendant's President testified that he and corporate counsel were aware of the law on disability discrimination. The court continued: "Titan also had knowledge of the federal disability discrimination laws because it had been a defendant in two federal disability discrimination cases that were ultimately appealed to our circuit." *Id.* at 991 (citations omitted). The court continued:

Along with this strong evidence of Titan's familiarity with disability discrimination laws at the time it made the decision, Titan's inconsistent behavior at the time of the decision and its inability to explain its behavior could lead a reasonable jury to infer that Titan knew it might be acting in violation of federal law. In short order, Titan accepted that Chalfant passed his physical, notified him that he would be hired, changed the results of his physical to "failed" and notified him that he would not be hired. Until Luthin's sudden memory improvement at trial, no one at Titan could say who made the decision to alter the outcome of the physical examination from "pass" to "fail,"

and no one from Titan ever explained the impetus for that change. Instead, each person simply denied that he or she had any involvement at all in the decision not to hire Chalfant. A reasonable jury could infer that this unusual decision-making process occurred because Titan was aware at the time it decided not to hire Chalfant that it “may [have been] acting in violation of federal law.”

*Id.* at 991–92 (citation omitted).

## 2. Denying Entitlement

*Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 942–43, 99 FEP Cases 1127 (8th Cir. 2007), affirmed the judgment for the Title VII racial-discrimination and retaliation plaintiff, but held that plaintiff was not entitled to punitive damages because plaintiff’s insubordination was not enough to justify defendant’s failure to promote her, but was enough to disprove malice. The court relied on the fact that other employees were fired for insubordination, but “TSI gave some deference to Allen and transferred her, rather than terminating her as TSI terminated Lovell.” *Id.* at 943. The court also relied on an “I was overwhelmed” defense, stating:

In addition, the record depicts TSI as a rapidly growing company with inadequate, rather than malicious, personnel procedures. Cobb testified when he started with TSI in 1993, TSI had only one store, and by 2003, TSI had eighty-two stores. Cobb further testified TSI opened eleven stores during the eight-week period beginning December 15, 2001, which suggests most of TSI’s growth occurred after 2002. Cobb explained the focus of the business was on profits rather than on the make-up of store personnel. Cobb also explained in 2001 and 2002, to advance at TSI, an employee would ask to be considered for a management position. Although TSI’s rapid growth and promotion practices fail to justify the racial disparity within TSI’s management personnel, those practices demonstrate justifiable business reasons or ineptness and not racial malice or reckless indifference directed toward Allen. Neither Allen nor the record before us demonstrates TSI acted with the requisite state of mind to support an award of punitive damages.

*Id.* Judge Smith dissented in part as to this holding. *Id.* at 945–46.

*Harsco Corp. v. Renner*, 475 F.3d 1179, 1189–90, 99 FEP Cases 1145 (10th Cir. 2007), affirmed the judgment of liability on a jury verdict for the Title VII sexual harassment plaintiff, but reversed the award of punitive damages where defendant had adequate policies and plaintiff failed to link local managers’ inactions to defendant. “Harsco Corporation submitted substantial evidence showing that the company established comprehensive policies and training procedures in an effort to comply with Title VII. In response, Ms. Renner alleges that her supervisors were not properly trained, but the only evidence she provides of that faulty training is the fact that her supervisors did not comply with the company’s policies and procedures in various respects. If failure of supervisors to comply with company policy were sufficient evidence to prove the lack of a good-faith effort to train, the *Kolstad* defense would be effectively eliminated.” *Id.* at 1189. The court rejected plaintiff’s argument that defendant’s HR manager was aware of the harassment, because it was based on one remark at trial, and more than a “scintilla of evidence” was needed. *Id.* at 1189–90. The court rejected plaintiff’s argument that *Kolstad* did not apply



on the ground that this was assertedly a direct-liability case rather than a vicarious-liability case, finding that she waived the theory by failure to mention it before her reply brief on appeal, and failing to object to a *Kolstad* instruction at trial. *Id.* at 1190.

### **3. Instructions**

*Alexander v. City of Milwaukee*, 474 F.3d 437, 454–55, 99 FEP Cases 961 (7th Cir. 2007), affirmed the judgment holding the City liable, and the then Police Chief and each of the members of the Board of Police and Fire Commissioners personally liable, under Title VII and 42 U.S.C. §§ 1981 and 1983 for racial and sexual discrimination against 17 white male plaintiffs in making promotions to the rank of Captain. The court held that plaintiffs were entitled to punitive damages, but that the jury should have been instructed to award punitive damages in accordance with each defendant’s actual fault:

We note that the punitive damages award was equal with respect to each Commissioner and with respect to Chief Jones, apparently irrespective of the fact that some Commissioners sat on the Board over a significantly smaller number of promotions than others and the concededly discriminatory acts of Chief Jones. “[P]unitive damages should be proportional to the wrongfulness” of each defendant’s actions. . . . Although the jury was instructed to consider the “reprehensibility of the Defendants’ conduct” and the likelihood that a defendant would repeat the conduct absent an award of punitive damages . . . it should have been more clearly instructed that each individual defendant’s actions and fault must serve as the basis for fashioning an appropriate punitive damages award.

### **4. Amounts**

*Alexander v. City of Milwaukee*, 474 F.3d 437, 454, 99 FEP Cases 961 (7th Cir. 2007), affirmed the judgment holding the City liable, and the then Police Chief and each of the members of the Board of Police and Fire Commissioners personally liable, under Title VII and 42 U.S.C. §§ 1981 and 1983 for racial and sexual discrimination against 17 white male plaintiffs in making promotions to the rank of Captain. The court held that plaintiffs were entitled to punitive damages, and that *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), did not require any reduction in the punitive damages because the compensatory damages were relatively low, and the *State Farm* ratios do not apply in such instances.

### **Q. Attorneys’ Fees**

*Sole v. Wyner*, \_\_ U.S. \_\_, 127 S. Ct. 2188, 167 L. Ed. 2d 1069 (2007), a § 1983 case involving nudist “performance art,” unanimously held that plaintiffs who prevail in obtaining a preliminary injunction but lose on the merits are not entitled to attorney’s fees under 42 U.S.C. § 1988. The Court held: “A plaintiff who achieves a transient victory at the threshold of an action can gain no award under that fee-shifting provision if, at the end of the litigation, her initial success is undone and she leaves the courthouse emptyhanded.” *Id.* at 2192. The Court expressed no view as to cases in which the grant of a preliminary injunction is not followed by a loss on the merits. The Court stated in note 3 that the opinion was consistent with the views of

both the majority and the dissenters in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 600 (2001).

*Harsco Corp. v. Renner*, 475 F.3d 1179, 1191, 99 FEP Cases 1145 (10th Cir. 2007), affirmed the judgment of liability on a jury verdict for the Title VII sexual harassment plaintiff, and affirmed the vacation of the award of punitive damages where defendant had adequate policies and plaintiff failed to link local managers' inactions to defendant. Plaintiff had requested appellate attorneys' fees in her opening brief. The court stated: "We have discretion to award attorney fees when we deem it appropriate, but a prevailing party is not automatically entitled to an award of attorney fees." The court granted the fees because plaintiff had successfully defended her verdict.

## **R. Sanctions**

**Sanctions for Improper Deposition Conduct:** *Redwood v. Dobson*, 476 F.3d 462, 467–70 (7th Cir. 2007), censured three attorneys, and admonished one attorney, for improper deposition conduct. Defense counsel asked thoroughly improper questions, and were sanctioned. Plaintiff's counsel should have stopped the deposition and sought relief from the court, but instead repeatedly directed the witness not to answer even though the question did not call for privileged information. The Federal claims in the case were frivolous, but their merit is immaterial. What is material is that, as the Seventh Circuit observed in beginning its opinion, "This case is a grudge match." Charles Danner and Jude Redwood represented plaintiffs Jude and Erik Redwood. Defendant Harvey Welch was former counsel for Erik Redwood in a criminal matter ending in Redwood's conviction. Erik Redwood is white, Welch is African-American, and the two scuffled after Erik Redwood was convicted and called his criminal counsel a "shoe-shine boy." Redwood filed a State-court battery claim against Welch, who was represented by Marvin Gerstein. That case settled. With an unsuccessful hate-crime prosecution and Redwood's demand that Welch admit ineffective assistance of counsel so that Redwood could get his conviction overturned, things went rapidly downhill. The Redwoods brought § 1983 and § 1985 claims against Welch and Gerstein. The Redwoods also sued Elizabeth Dobson, an Assistant State's Attorney, and Officer Troy Phillips of the Urbana Police Department. Roger Webber represented Gerstein. Just to make things clear, Jude Redwood is Erik's wife, and is both a plaintiff—claiming loss of consortium—and counsel for Erik. And making things even more clear, they are jointly suing Erik Redwood's former counsel in the criminal matter (Welch), and counsel's counsel in the State-court battery case (Gerstein). To aficionados of crazy cases, it doesn't get much better than this. The court's opinion is well worth setting out:

A profusion of motions and cross-motions for sanctions—and the conduct underlying some of these motions—demonstrates the extent to which counsel have allowed personal distaste to displace dispassionate legal analysis. Most depositions are taken without judicial supervision. Witnesses often want to avoid giving answers, and questioning may probe sensitive or emotionally fraught subjects, so unless counsel maintain professional detachment decorum can break down. That happened here; the results were ugly.

Gerstein's deposition was taken by Charles L. Danner on behalf of both

Redwoods, though Jude Redwood attended and sometimes acted as counsel in addition to her role as a plaintiff. Gerstein’s counsel was Roger Webber, though Gerstein himself peppered the transcript with legal arguments. The deposition began badly when Danner spent the first 30 pages or so of the transcript exploring Gerstein’s criminal record—mostly vehicular violations. Danner made no effort to explain how these questions could lead to admissible evidence, and they got under Gerstein’s skin. After Gerstein spontaneously refused to answer some of the questions (remarking “That’s none of your business”), Webber began instructing Gerstein not to answer.

Webber gave no reason beyond his declaration that the questions were designed to harass rather than obtain information—which may well have been their point, but Fed.R.Civ.P. 30(d) specifies how harassment is to be handled. Counsel for the witness may halt the deposition and apply for a protective order, see Rule 30(d)(4), but must not instruct the witness to remain silent. “Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4).” Fed.R.Civ.P. 30(d)(1). Webber violated this rule repeatedly by telling Gerstein not to answer yet never presenting a motion for a protective order. The provocation was clear, but so was Webber’s violation.

\* \* \*

Danner’s conduct of this deposition was shameful—not as bad as the insult-riddled performance by Joe Jamail that incensed the Supreme Court of Delaware, see *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 52–57 (Del. 1994), but far below the standards to which lawyers must adhere. Gerstein, Webber, and Klaus were goaded, but their responses—feigned inability to remember, purported ignorance of ordinary words (the “consult” episode was not the only one), and instructions not to respond that neither shielded a privilege nor supplied time to apply for a protective order—were unprofessional and violated the Federal Rules of Civil Procedure as well as the ethical rules that govern legal practice.

\* \* \*

Mutual enmity does not excuse the breakdown of decorum that occurred at Gerstein’s deposition. Instead of declaring a pox on both houses, the district court should have used its authority to maintain standards of civility and professionalism. It is precisely when animosity runs high that playing by the rules is vital. Rules of legal procedure are designed to defuse, or at least channel into set forms, the heated feelings that accompany much litigation. Because depositions take place in law offices rather than courtrooms, adherence to professional standards is vital, for the judge has no direct means of control.

Sanctions are in order, but they need not be monetary. See Fed.R.Civ.P. 30(d)(3), 37(a)(4), (b)(2). Because the arguments pro and con have been fully ventilated in this court, and none of the attorneys has asked for a hearing under Fed. R.App. P. 46(c), we

see no need to drag out this controversy with a remand. Attorneys Danner, Gerstein, and Webber are censured for conduct unbecoming a member of the bar; attorney Klaus is admonished. (We differentiate in this way because a censure is the more opprobrious label, see *In re Charge of Judicial Misconduct*, 404 F.3d 688, 695-96 (2d Cir.2005), and Klaus's misconduct is substantially less serious than that of the other lawyers.) Any repetition of this performance, in any court within this circuit, will lead to sterner sanctions, including suspension or disbarment.

*Id.* at

**Vacation of Default Sanction Affirmed:** *Sun v. Board of Trustees of University of Illinois*, 473 F.3d 799, 811–12, 99 FEP Cases 897 (7th Cir. 2007), affirmed the lower court's vacation of its own entry of default judgment as a sanction for defense counsel's discovery violations, because the penalty was unduly harsh. The court explained:

While defendants' attorneys were by no means paragons of responsible lawyering, their involvement in the discovery process was consistent and ongoing. Although counsel should have promptly complied with the court's orders to answer outstanding interrogatories, their delay was not so extreme as to warrant an entry of default. Likewise, although the district court tried to use less drastic sanctions by twice imposing monetary penalties, it brought out the heavy artillery too soon. Instead of entering a default, punishing the defendants and giving the plaintiff a windfall, the district court should have imposed increased monetary sanctions against the attorneys who had caused the discovery delays.

**Denial of Sanction Affirmed:** *Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 936, 99 FEP Cases 1127 (8th Cir. 2007), affirmed the trial court's refusal to grant judgment for the losing Title VII defendant as a sanction for plaintiff's testimony about two incidents where her testimony was successfully impeached by surveillance videotapes. Defendant won as to those two incidents, but lost as to others. The court explained: "Although impeachment may be clear and beneficial, the degree of benefit is properly for the trier of fact. Furthermore, like the district court, we do not find the discrepancies between Allen's testimony and the events as depicted on the surveillance videotapes to be so egregious as justify dismissing Allen's claims." The court also held that any claim of falsified application was not material because defendant did not rely on applications. Judge Smith concurred in part and dissented in part. *Id.* at 945–46.

**Sanction Reversed for Procedural Error:** *Amlong & Amlong, P.A. v. Denny's, Inc.*, 457 F.3d 1180, 98 FEP Cases 1617 (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 1184: "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.”

## **VIII. Taxes**

### **1. 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.

### **2. The Murphy Decision**

*Murphy v. Internal Revenue Service*, 493 F.3d 170 (D.C. Cir. 2007), overturned its own earlier decision and held that the Constitution allows imposition of the income tax on emotional-distress damages unrelated to earnings.

## **IX. Special Problems with the Federal Government as Employer**

*Toyama v. Merit Systems Protection Board*, 481 F.3d 1361, 100 FEP Cases 12 (Fed. Cir. 2007), reversed the MSPB’s dismissal of petitioner’s FMLA claim, filed twenty months after the thirty-day deadline, because the agency never gave her the notice required by EEOC regulations that her only way to pursue an FMLA claim was by filing an appeal with the MSPB or an action in district court. The court rejected the agency’s argument that a statement by an administrative judge provided equivalent notice: “While the administrative judge dismissing Toyama’s initial MSPB appeal on August 29, 2003 did advise that she could refile within thirty days of a final agency decision, such notice does not satisfy the requirements of § 1614.302(d).”

*Kirkendall v. Department of Army*, 479 F.3d 830, 843–44 (Fed. Cir. 2007), reversed the MSPB’s dismissal of petitioner’s claims under the Veterans Employment Opportunities Act of 1998 (“VEOA”), 5 U.S.C. § 3330a (2000), and the Uniformed Services Employment and Reemployment Rights Act (“USERRA”), 38 U.S.C. § 4311 (2000). The court held that the deadline for asserting a VEOA claim is subject to equitable tolling. The court stated:

Even if this were a close case, which it is not, the canon that veterans' benefits statutes should be construed in the veteran's favor would compel us to find that section 3330a is subject to equitable tolling. . . . Both subsection 3330a(a)(1)(A) and subsection 3330a(d)(1)(B) are subject to equitable tolling.

*Id.* at 843–44 (citations omitted). The court also held that Federal employees have a right to a hearing on their USERRA claims, and rejected the MSPB's practice of granting or denying hearings as a matter of grace, depending on its administrative convenience. It stated: "But it must administer the law as Congress wrote it. The board's consistent misapplication of the law can neither be used to defend its practice; nor to justify what Congress did not intend." *Id.* at 844 (citations omitted).

*Price v. Bernanke*, 470 F.3d 384, 389, 99 FEP Cases 687 (**D.C. Cir.** 2006), affirmed the dismissal as untimely of plaintiff's ADEA retaliation case against the Federal Reserve Board. The court stated: "Accordingly, we hold that when federal employees bring a civil action after pursuing administrative remedies under the ADEA, the action must be brought within 90 days of final agency action, the time period allowed for similar suits under Title VII." The court noted that the EEOC had endorsed such a result, and that four other Circuits had previously adopted that standard.

#### **X. Appellate Tips for Effective Advocacy**

*Pruitt v. City of Chicago*, 472 F.3d 925, 930, 99 FEP Cases 737 (**7th Cir.** 2006), affirmed the grant of summary judgment to the Title VII and § 1981 racial harassment defendant, because of laches. The court criticized plaintiffs' "head in the sand" approach to a serious problem raised in defendants' brief, and said such approaches were "unavailing." The court continued:

Plaintiffs pepper their brief with other contentions, none developed fully. For example, plaintiffs complain about seven items in the bill of costs but devote only a sentence or two to each; insufficient development forfeits all of these arguments. Appellate counsel must recognize that scattergun contentions are doomed to failure. These and all remaining arguments do not require further analysis.