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Trends in Employment Discrimination Law

by

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This paper will be updated at various times during the year, and updates can be downloaded from www.rickseymourlaw.com. Many of my other CLE papers are also downloadable from this site.

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I. The Statistics

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

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

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

II. EEOC Charge Statistics

The first two columns of the following figures were downloaded from the EEOC web site, www.eeoc.gov:

Type	FY 1997	FY 2007	Difference	Change
Race	29,199	30,510	1,311	4.5%
Sex	24,728	24,826	98	0.4%
National Origin	6,712	9,396	2,684	40.0%
Religion	1,709	2,880	1,171	68.5%
Retaliation—All Statutes	18,198	26,663	8,465	46.5%
Retaliation—Title VII	16,394	23,371	6,977	42.6%
Age	15,785	19,103	3,318	21.0%

Type	FY 1997	FY 2007	Difference	Change
Disability	18,108	17,734	-374	-2.1%
Equal Pay Act	1,134	818	-316	-27.9%

III. Legislation and Rules Changes

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

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

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

SECTION 1. SHORT TITLE.

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

SEC. 2. FINDINGS AND PURPOSES.

(a) Findings- Congress finds that--

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S.

184 (2002) for `substantially limits', and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and

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

SEC. 3. CODIFIED FINDINGS.

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

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

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

(2) by striking paragraph (7); and

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

SEC. 4. DISABILITY DEFINED AND RULES OF CONSTRUCTION.

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

`SEC. 3. DEFINITION OF DISABILITY.

`As used in this Act:

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

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

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

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

`(2) MAJOR LIFE ACTIVITIES-

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

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

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

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

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

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

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

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

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

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

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

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

`(II) use of assistive technology;

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

`(IV) learned behavioral or adaptive neurological modifications.

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

`(iii) As used in this subparagraph--

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

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

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

`SEC. 4. ADDITIONAL DEFINITIONS.

`As used in this Act:

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

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

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

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

`(D) other similar services and actions.

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

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

`Sec. 3. Definition of disability.

`Sec. 4. Additional definitions.'.

SEC. 5. DISCRIMINATION ON THE BASIS OF DISABILITY.

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

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

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

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

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

(c) Conforming Amendments-

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

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

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

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

SEC. 6. RULES OF CONSTRUCTION.

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

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

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

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

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

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

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

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

`The authority to issue regulations granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation under this Act includes the authority to issue regulations implementing the definitions of disability in section 3 (including rules of construction) and the definitions in section 4, consistent with the ADA Amendments Act of 2008.'; and

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

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

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

SEC. 7. CONFORMING AMENDMENTS.

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

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

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

SEC. 8. EFFECTIVE DATE.

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

B. Whistleblower Protections in the Consumer Product Safety Commission Reform Act, H.R. 4040 and S.2663

Passed the House and Senate, and is now Public Law No: 110-314. Sec. 219 contains the whistleblower protections. Enforcement is through the Department of Labor, but individuals can file suit and obtain trial *de novo* in the district courts if the Department of Labor has not issued a final decision in 210 days. The remedies are reinstatement with back seniority, back pay with interest, and litigation expenses, including attorneys' fees. Sec. 219 provides:

SEC. 219. WHISTLEBLOWER PROTECTIONS.

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

`WHISTLEBLOWER PROTECTION

`Sec. 40. (a) No manufacturer, private labeler, distributor, or retailer, may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee, whether at the employee's initiative or in the ordinary course of the employee's duties (or any person acting pursuant to a request of the employee)--

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

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

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

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

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

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

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

`(ii) Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and

convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

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

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

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

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

> `(i) to take affirmative action to abate the violation;
>
> `(ii) to reinstate the complainant to his or her former position together with compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and
>
> `(iii) to provide compensatory damages to the complainant.

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

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

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

jurisdiction to grant all relief necessary to make the employee whole, including injunctive relief and compensatory damages, including--

> `(A) reinstatement with the same seniority status that the employee would have had, but for the discharge or discrimination;
>
> `(B) the amount of back pay, with interest; and
>
> `(C) compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.

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

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

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

`(7)(A) A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

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

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

`(d) Subsection (a) shall not apply with respect to an employee of a manufacturer, private labeler, distributor, or retailer who, acting without direction from such manufacturer,

private labeler, distributor, or retailer (or such person's agent), deliberately causes a violation of any requirement relating to any violation or alleged violation of any order, regulation, or consumer product safety standard under this Act or any other law enforced by the Commission.'.

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

`Sec. 40. Whistleblower protection.'.

C. Genetic Information Nondiscrimination Act of 2008, H.R. 493 and S. 358

Signed by the President on May 21, 2008, and is now Public Law 110-233, 122 Stat. 881 (2008). The Act draws heavily on Title VII, and in the context of employment gives the same enforcement powers and remedies to the EEOC and persons affected by violations. Title II of the bill covers employment, and states:

TITLE II--PROHIBITING EMPLOYMENT DISCRIMINATION ON THE BASIS OF GENETIC INFORMATION

SEC. 201. DEFINITIONS.

In this title:

(1) COMMISSION- The term `Commission' means the Equal Employment Opportunity Commission as created by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(2) EMPLOYEE; EMPLOYER; EMPLOYMENT AGENCY; LABOR ORGANIZATION; MEMBER-

(A) IN GENERAL- The term `employee' means--

(i) an employee (including an applicant), as defined in section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f));

(ii) a State employee (including an applicant) described in section 304(a) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e-16c(a));

(iii) a covered employee (including an applicant), as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301);

(iv) a covered employee (including an applicant), as defined in section 411(c) of title 3, United States Code; or

(v) an employee or applicant to which section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(a)) applies.

(B) EMPLOYER- The term `employer' means--

(i) an employer (as defined in section 701(b) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(b)));

(ii) an entity employing a State employee described in section 304(a) of the Government Employee Rights Act of 1991;

(iii) an employing office, as defined in section 101 of the Congressional Accountability Act of 1995;

(iv) an employing office, as defined in section 411(c) of title 3, United States Code; or

(v) an entity to which section 717(a) of the Civil Rights Act of 1964 applies.

(C) EMPLOYMENT AGENCY; LABOR ORGANIZATION- The terms `employment agency' and `labor organization' have the meanings given the terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(D) MEMBER- The term `member', with respect to a labor organization, includes an applicant for membership in a labor organization.

(3) FAMILY MEMBER- The term `family member' means, with respect to an individual--

(A) a dependent (as such term is used for purposes of section 701(f)(2) of the Employee Retirement Income Security Act of 1974) of such individual, and

(B) any other individual who is a first-degree, second-degree, third-degree, or fourth-degree relative of such individual or of an individual described in subparagraph (A).

(4) GENETIC INFORMATION-

(A) IN GENERAL- The term `genetic information' means, with respect to any individual, information about--

(i) such individual's genetic tests,

(ii) the genetic tests of family members of such individual, and

(iii) the manifestation of a disease or disorder in family members of such individual.

(B) INCLUSION OF GENETIC SERVICES AND PARTICIPATION IN GENETIC RESEARCH- Such term includes, with respect to any

individual, any request for, or receipt of, genetic services, or participation in clinical research which includes genetic services, by such individual or any family member of such individual.

(C) EXCLUSIONS- The term `genetic information' shall not include information about the sex or age of any individual.

(5) GENETIC MONITORING- The term `genetic monitoring' means the periodic examination of employees to evaluate acquired modifications to their genetic material, such as chromosomal damage or evidence of increased occurrence of mutations, that may have developed in the course of employment due to exposure to toxic substances in the workplace, in order to identify, evaluate, and respond to the effects of or control adverse environmental exposures in the workplace.

(6) GENETIC SERVICES- The term `genetic services' means--

(A) a genetic test;

(B) genetic counseling (including obtaining, interpreting, or assessing genetic information); or

(C) genetic education.

(7) GENETIC TEST-

(A) IN GENERAL- The term `genetic test' means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes.

(B) EXCEPTIONS- The term `genetic test' does not mean an analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes.

SEC. 202. EMPLOYER PRACTICES.

(a) Discrimination Based on Genetic Information- It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee; or

(2) to limit, segregate, or classify the employees of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee.

(b) Acquisition of Genetic Information- It shall be an unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee or a family member of the employee except--

(1) where an employer inadvertently requests or requires family medical history of the employee or family member of the employee;

(2) where--

(A) health or genetic services are offered by the employer, including such services offered as part of a wellness program;

(B) the employee provides prior, knowing, voluntary, and written authorization;

(C) only the employee (or family member if the family member is receiving genetic services) and the licensed health care professional or board certified genetic counselor involved in providing such services receive individually identifiable information concerning the results of such services; and

(D) any individually identifiable genetic information provided under subparagraph (C) in connection with the services provided under subparagraph (A) is only available for purposes of such services and shall not be disclosed to the employer except in aggregate terms that do not disclose the identity of specific employees;

(3) where an employer requests or requires family medical history from the employee to comply with the certification provisions of section 103 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2613) or such requirements under State family and medical leave laws;

(4) where an employer purchases documents that are commercially and publicly available (including newspapers, magazines, periodicals, and books, but not including medical databases or court records) that include family medical history;

(5) where the information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace, but only if--

(A) the employer provides written notice of the genetic monitoring to the employee;

(B)(i) the employee provides prior, knowing, voluntary, and written authorization; or

(ii) the genetic monitoring is required by Federal or State law;

(C) the employee is informed of individual monitoring results;

(D) the monitoring is in compliance with--

(i) any Federal genetic monitoring regulations, including any such regulations that may be promulgated by the Secretary of Labor pursuant to the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.), the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq.), or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.); or

(ii) State genetic monitoring regulations, in the case of a State that is implementing genetic monitoring regulations under the authority of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.); and

(E) the employer, excluding any licensed health care professional or board certified genetic counselor that is involved in the genetic monitoring program, receives the results of the monitoring only in aggregate terms that do not disclose the identity of specific employees; or

(6) where the employer conducts DNA analysis for law enforcement purposes as a forensic laboratory or for purposes of human remains identification, and requests or requires genetic information of such employer's employees, but only to the extent that such genetic information is used for analysis of DNA identification markers for quality control to detect sample contamination.

(c) Preservation of Protections- In the case of information to which any of paragraphs (1) through (6) of subsection (b) applies, such information may not be used in violation of paragraph (1) or (2) of subsection (a) or treated or disclosed in a manner that violates section 206.

SEC. 203. EMPLOYMENT AGENCY PRACTICES.

(a) Discrimination Based on Genetic Information- It shall be an unlawful employment practice for an employment agency--

(1) to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of genetic information with respect to the individual;

(2) to limit, segregate, or classify individuals or fail or refuse to refer for employment any individual in any way that would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect the status of the individual as an employee, because of genetic information with respect to the individual; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this title.

(b) Acquisition of Genetic Information- It shall be an unlawful employment practice for an employment agency to request, require, or purchase genetic information with respect to an individual or a family member of the individual except--

(1) where an employment agency inadvertently requests or requires family medical history of the individual or family member of the individual;

(2) where--

(A) health or genetic services are offered by the employment agency, including such services offered as part of a wellness program;

(B) the individual provides prior, knowing, voluntary, and written authorization;

(C) only the individual (or family member if the family member is receiving genetic services) and the licensed health care professional or board certified genetic counselor involved in providing such services receive individually identifiable information concerning the results of such services; and

(D) any individually identifiable genetic information provided under subparagraph (C) in connection with the services provided under subparagraph (A) is only available for purposes of such services and shall not be disclosed to the employment agency except in aggregate terms that do not disclose the identity of specific individuals;

(3) where an employment agency requests or requires family medical history from the individual to comply with the certification provisions of section 103 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2613) or such requirements under State family and medical leave laws;

(4) where an employment agency purchases documents that are commercially and publicly available (including newspapers, magazines, periodicals, and books, but not including medical databases or court records) that include family medical history; or

(5) where the information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace, but only if--

(A) the employment agency provides written notice of the genetic monitoring to the individual;

(B)(i) the individual provides prior, knowing, voluntary, and written authorization; or

(ii) the genetic monitoring is required by Federal or State law;

(C) the individual is informed of individual monitoring results;

(D) the monitoring is in compliance with--

(i) any Federal genetic monitoring regulations, including any such regulations that may be promulgated by the Secretary of Labor pursuant to the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.), the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq.), or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.); or

(ii) State genetic monitoring regulations, in the case of a State that is implementing genetic monitoring regulations under the authority of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.); and

(E) the employment agency, excluding any licensed health care professional or board certified genetic counselor that is involved in the genetic monitoring program, receives the results of the monitoring only in aggregate terms that do not disclose the identity of specific individuals.

(c) Preservation of Protections- In the case of information to which any of paragraphs (1) through (5) of subsection (b) applies, such information may not be used in violation of paragraph (1), (2), or (3) of subsection (a) or treated or disclosed in a manner that violates section 206.

SEC. 204. LABOR ORGANIZATION PRACTICES.

(a) Discrimination Based on Genetic Information- It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from the membership of the organization, or otherwise to discriminate against, any member because of genetic information with respect to the member;

(2) to limit, segregate, or classify the members of the organization, or fail or refuse to refer for employment any member, in any way that would deprive or tend to deprive any member of employment opportunities, or otherwise adversely affect the status of the member as an employee, because of genetic information with respect to the member; or

(3) to cause or attempt to cause an employer to discriminate against a member in violation of this title.

(b) Acquisition of Genetic Information- It shall be an unlawful employment practice for a labor organization to request, require, or purchase genetic information with respect to a member or a family member of the member except--

(1) where a labor organization inadvertently requests or requires family medical history of the member or family member of the member;

(2) where--

(A) health or genetic services are offered by the labor organization, including such services offered as part of a wellness program;

(B) the member provides prior, knowing, voluntary, and written authorization;

(C) only the member (or family member if the family member is receiving genetic services) and the licensed health care professional or board certified genetic counselor involved in providing such services receive individually identifiable information concerning the results of such services; and

(D) any individually identifiable genetic information provided under subparagraph (C) in connection with the services provided under subparagraph (A) is only available for purposes of such services and shall not be disclosed to the labor organization except in aggregate terms that do not disclose the identity of specific members;

(3) where a labor organization requests or requires family medical history from the members to comply with the certification provisions of section 103 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2613) or such requirements under State family and medical leave laws;

(4) where a labor organization purchases documents that are commercially and publicly available (including newspapers, magazines, periodicals, and books, but not including medical databases or court records) that include family medical history; or

(5) where the information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace, but only if--

(A) the labor organization provides written notice of the genetic monitoring to the member;

(B)(i) the member provides prior, knowing, voluntary, and written authorization; or

(ii) the genetic monitoring is required by Federal or State law;

(C) the member is informed of individual monitoring results;

(D) the monitoring is in compliance with--

(i) any Federal genetic monitoring regulations, including any such regulations that may be promulgated by the Secretary of Labor pursuant to the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.), the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq.), or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.); or

(ii) State genetic monitoring regulations, in the case of a State that is implementing genetic monitoring regulations under the authority of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.); and

(E) the labor organization, excluding any licensed health care professional or board certified genetic counselor that is involved in the genetic monitoring program, receives the results of the monitoring only in aggregate terms that do not disclose the identity of specific members.

(c) Preservation of Protections- In the case of information to which any of paragraphs (1) through (5) of subsection (b) applies, such information may not be used in violation of paragraph (1), (2), or (3) of subsection (a) or treated or disclosed in a manner that violates section 206.

SEC. 205. TRAINING PROGRAMS.

(a) Discrimination Based on Genetic Information- It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs--

(1) to discriminate against any individual because of genetic information with respect to the individual in admission to, or employment in, any program established to provide apprenticeship or other training or retraining;

(2) to limit, segregate, or classify the applicants for or participants in such apprenticeship or other training or retraining, or fail or refuse to refer for employment any individual, in any way that would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect the status of the individual as an employee, because of genetic information with respect to the individual; or

(3) to cause or attempt to cause an employer to discriminate against an applicant for or a participant in such apprenticeship or other training or retraining in violation of this title.

(b) Acquisition of Genetic Information- It shall be an unlawful employment practice for an employer, labor organization, or joint labor-management committee described in subsection (a) to request, require, or purchase genetic information with respect to an individual or a family member of the individual except--

(1) where the employer, labor organization, or joint labor-management committee inadvertently requests or requires family medical history of the individual or family member of the individual;

(2) where--

(A) health or genetic services are offered by the employer, labor organization, or joint labor-management committee, including such services offered as part of a wellness program;

(B) the individual provides prior, knowing, voluntary, and written authorization;

(C) only the individual (or family member if the family member is receiving genetic services) and the licensed health care professional or board certified genetic counselor involved in providing such services receive individually identifiable information concerning the results of such services; and

(D) any individually identifiable genetic information provided under subparagraph (C) in connection with the services provided under subparagraph (A) is only available for purposes of such services and shall not be disclosed to the employer, labor organization, or joint labor-management committee except in aggregate terms that do not disclose the identity of specific individuals;

(3) where the employer, labor organization, or joint labor-management committee requests or requires family medical history from the individual to comply with the certification provisions of section 103 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2613) or such requirements under State family and medical leave laws;

(4) where the employer, labor organization, or joint labor-management committee purchases documents that are commercially and publicly available (including newspapers, magazines, periodicals, and books, but not including medical databases or court records) that include family medical history;

(5) where the information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace, but only if--

(A) the employer, labor organization, or joint labor-management committee provides written notice of the genetic monitoring to the individual;

(B)(i) the individual provides prior, knowing, voluntary, and written authorization; or

(ii) the genetic monitoring is required by Federal or State law;

(C) the individual is informed of individual monitoring results;

(D) the monitoring is in compliance with--

(i) any Federal genetic monitoring regulations, including any such regulations that may be promulgated by the Secretary of Labor pursuant to the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.), the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq.), or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.); or

(ii) State genetic monitoring regulations, in the case of a State that is implementing genetic monitoring regulations under the authority of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.); and

(E) the employer, labor organization, or joint labor-management committee, excluding any licensed health care professional or board certified genetic counselor that is involved in the genetic monitoring program, receives the results of the monitoring only in aggregate terms that do not disclose the identity of specific individuals; or

(6) where the employer conducts DNA analysis for law enforcement purposes as a forensic laboratory or for purposes of human remains identification, and requests or requires genetic information of such employer's apprentices or trainees, but only to the extent that such genetic information is used for analysis of DNA identification markers for quality control to detect sample contamination.

(c) Preservation of Protections- In the case of information to which any of paragraphs (1) through (6) of subsection (b) applies, such information may not be used in violation of paragraph (1), (2), or (3) of subsection (a) or treated or disclosed in a manner that violates section 206.

SEC. 206. CONFIDENTIALITY OF GENETIC INFORMATION.

(a) Treatment of Information as Part of Confidential Medical Record- If an employer, employment agency, labor organization, or joint labor-management committee possesses genetic information about an employee or member, such information shall be maintained on separate forms and in separate medical files and be treated as a confidential medical record of the employee or member. An employer, employment agency, labor organization, or joint labor-management committee shall be considered to be in compliance with the maintenance of information requirements of this subsection with respect to genetic information subject to this subsection that is maintained with and treated as a confidential medical record under section 102(d)(3)(B) of the Americans With Disabilities Act (42 U.S.C. 12112(d)(3)(B)).

(b) Limitation on Disclosure- An employer, employment agency, labor organization, or joint labor-management committee shall not disclose genetic information concerning an employee or member except--

(1) to the employee or member of a labor organization (or family member if the family member is receiving the genetic services) at the written request of the employee or member of such organization;

(2) to an occupational or other health researcher if the research is conducted in compliance with the regulations and protections provided for under part 46 of title 45, Code of Federal Regulations;

(3) in response to an order of a court, except that--

(A) the employer, employment agency, labor organization, or joint labor-management committee may disclose only the genetic information expressly authorized by such order; and

(B) if the court order was secured without the knowledge of the employee or member to whom the information refers, the employer, employment agency, labor organization, or joint labor-management committee shall inform the employee or member of the court order and any genetic information that was disclosed pursuant to such order;

(4) to government officials who are investigating compliance with this title if the information is relevant to the investigation;

(5) to the extent that such disclosure is made in connection with the employee's compliance with the certification provisions of section 103 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2613) or such requirements under State family and medical leave laws; or

(6) to a Federal, State, or local public health agency only with regard to information that is described in section 201(4)(A)(iii) and that concerns a contagious disease that presents an imminent hazard of death or life-threatening illness, and that the employee whose family member or family members is or are the subject of a disclosure under this paragraph is notified of such disclosure.

(c) Relationship to HIPAA Regulations- With respect to the regulations promulgated by the Secretary of Health and Human Services under part C of title XI of the Social Security Act (42 U.S.C. 1320d et seq.) and section 264 of the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. 1320d-2 note), this title does not prohibit a covered entity under such regulations from any use or disclosure of health information that is authorized for the covered entity under such regulations. The previous sentence does not affect the authority of such Secretary to modify such regulations.

SEC. 207. REMEDIES AND ENFORCEMENT.

(a) Employees Covered by Title VII of the Civil Rights Act of 1964-

(1) IN GENERAL- The powers, procedures, and remedies provided in sections 705, 706, 707, 709, 710, and 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4 et seq.) to the Commission, the Attorney General, or any person, alleging a violation of title VII of that Act (42 U.S.C. 2000e et seq.) shall be the powers, procedures, and remedies this title provides to the Commission, the Attorney General, or any person, respectively, alleging an unlawful employment practice in violation of this title against an employee described in section 201(2)(A)(i), except as provided in paragraphs (2) and (3).

(2) COSTS AND FEES- The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes of the United States (42 U.S.C. 1988), shall be powers, remedies, and procedures this title provides to the Commission, the Attorney General, or any person, alleging such a practice.

(3) DAMAGES- The powers, remedies, and procedures provided in section 1977A of the Revised Statutes of the United States (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be powers, remedies, and procedures this title provides to the Commission, the Attorney General, or any person, alleging such a practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes of the United States).

(b) Employees Covered by Government Employee Rights Act of 1991-

(1) IN GENERAL- The powers, remedies, and procedures provided in sections 302 and 304 of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e-16b, 2000e-16c) to the Commission, or any person, alleging a violation of section 302(a)(1) of that Act (42 U.S.C. 2000e-16b(a)(1)) shall be the powers, remedies, and procedures this title provides to the Commission, or any person, respectively, alleging an unlawful employment practice in violation of this title against an employee described in section 201(2)(A)(ii), except as provided in paragraphs (2) and (3).

(2) COSTS AND FEES- The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes of the United States (42 U.S.C. 1988), shall be powers, remedies, and procedures this title provides to the Commission, or any person, alleging such a practice.

(3) DAMAGES- The powers, remedies, and procedures provided in section 1977A of the Revised Statutes of the United States (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be powers, remedies, and procedures this title provides to the Commission, or any person, alleging such a practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes of the United States).

(c) Employees Covered by Congressional Accountability Act of 1995-

(1) IN GENERAL- The powers, remedies, and procedures provided in the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) to the Board (as defined in section 101 of that Act (2 U.S.C. 1301)), or any person, alleging a violation of section 201(a)(1) of that Act (42 U.S.C. 1311(a)(1)) shall be the powers, remedies, and procedures this title provides to that Board, or any person, alleging an unlawful employment practice in violation of this title against an employee described in section 201(2)(A)(iii), except as provided in paragraphs (2) and (3).

(2) COSTS AND FEES- The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes of the United States (42 U.S.C. 1988), shall be powers, remedies, and procedures this title provides to that Board, or any person, alleging such a practice.

(3) DAMAGES- The powers, remedies, and procedures provided in section 1977A of the Revised Statutes of the United States (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be powers, remedies, and procedures this title provides to that Board, or any person, alleging such a practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes of the United States).

(4) OTHER APPLICABLE PROVISIONS- With respect to a claim alleging a practice described in paragraph (1), title III of the Congressional Accountability Act of 1995 (2 U.S.C. 1381 et seq.) shall apply in the same manner as such title applies with respect to a claim alleging a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)).

(d) Employees Covered by Chapter 5 of Title 3, United States Code-

(1) IN GENERAL- The powers, remedies, and procedures provided in chapter 5 of title 3, United States Code, to the President, the Commission, the Merit Systems Protection Board, or any person, alleging a violation of section 411(a)(1) of that title, shall be the powers, remedies, and procedures this title provides to the President, the Commission, such Board, or any person, respectively, alleging an unlawful employment practice in violation of this title against an employee described in section 201(2)(A)(iv), except as provided in paragraphs (2) and (3).

(2) COSTS AND FEES- The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes of the United States (42 U.S.C. 1988), shall be powers, remedies, and procedures this title provides to the President, the Commission, such Board, or any person, alleging such a practice.

(3) DAMAGES- The powers, remedies, and procedures provided in section 1977A of the Revised Statutes of the United States (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be

powers, remedies, and procedures this title provides to the President, the Commission, such Board, or any person, alleging such a practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes of the United States).

(e) Employees Covered by Section 717 of the Civil Rights Act of 1964-

(1) IN GENERAL- The powers, remedies, and procedures provided in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) to the Commission, the Attorney General, the Librarian of Congress, or any person, alleging a violation of that section shall be the powers, remedies, and procedures this title provides to the Commission, the Attorney General, the Librarian of Congress, or any person, respectively, alleging an unlawful employment practice in violation of this title against an employee or applicant described in section 201(2)(A)(v), except as provided in paragraphs (2) and (3).

(2) COSTS AND FEES- The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes of the United States (42 U.S.C. 1988), shall be powers, remedies, and procedures this title provides to the Commission, the Attorney General, the Librarian of Congress, or any person, alleging such a practice.

(3) DAMAGES- The powers, remedies, and procedures provided in section 1977A of the Revised Statutes of the United States (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be powers, remedies, and procedures this title provides to the Commission, the Attorney General, the Librarian of Congress, or any person, alleging such a practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes of the United States).

(f) Prohibition Against Retaliation- No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this title or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title. The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this subsection.

(g) Definition- In this section, the term `Commission' means the Equal Employment Opportunity Commission.

SEC. 208. DISPARATE IMPACT.

(a) General Rule- Notwithstanding any other provision of this Act, `disparate impact', as that term is used in section 703(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(k)), on the basis of genetic information does not establish a cause of action under this Act.

(b) Commission- On the date that is 6 years after the date of enactment of this Act, there shall be established a commission, to be known as the Genetic Nondiscrimination Study Commission (referred to in this section as the `Commission') to review the developing science of genetics and to make recommendations to Congress regarding whether to provide a disparate impact cause of action under this Act.

(c) Membership-

(1) IN GENERAL- The Commission shall be composed of 8 members, of which--

(A) 1 member shall be appointed by the Majority Leader of the Senate;

(B) 1 member shall be appointed by the Minority Leader of the Senate;

(C) 1 member shall be appointed by the Chairman of the Committee on Health, Education, Labor, and Pensions of the Senate;

(D) 1 member shall be appointed by the ranking minority member of the Committee on Health, Education, Labor, and Pensions of the Senate;

(E) 1 member shall be appointed by the Speaker of the House of Representatives;

(F) 1 member shall be appointed by the Minority Leader of the House of Representatives;

(G) 1 member shall be appointed by the Chairman of the Committee on Education and Labor of the House of Representatives; and

(H) 1 member shall be appointed by the ranking minority member of the Committee on Education and Labor of the House of Representatives.

(2) COMPENSATION AND EXPENSES- The members of the Commission shall not receive compensation for the performance of services for the Commission, but shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance of services for the Commission.

(d) Administrative Provisions-

(1) LOCATION- The Commission shall be located in a facility maintained by the Equal Employment Opportunity Commission.

(2) DETAIL OF GOVERNMENT EMPLOYEES- Any Federal Government employee may be detailed to the Commission without reimbursement, and such detail shall be without interruption or loss of civil service status or privilege.

(3) INFORMATION FROM FEDERAL AGENCIES- The Commission may secure directly from any Federal department or agency such information as the Commission considers necessary to carry out the provisions of this section. Upon request of the Commission, the head of such department or agency shall furnish such information to the Commission.

(4) HEARINGS- The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers advisable to carry out the objectives of this section, except that, to the extent possible, the Commission shall use existing data and research.

(5) POSTAL SERVICES- The Commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the Federal Government.

(e) Report- Not later than 1 year after all of the members are appointed to the Commission under subsection (c)(1), the Commission shall submit to Congress a report that summarizes the findings of the Commission and makes such recommendations for legislation as are consistent with this Act.

(f) Authorization of Appropriations- There are authorized to be appropriated to the Equal Employment Opportunity Commission such sums as may be necessary to carry out this section.

SEC. 209. CONSTRUCTION.

(a) In General- Nothing in this title shall be construed to--

(1) limit the rights or protections of an individual under any other Federal or State statute that provides equal or greater protection to an individual than the rights or protections provided for under this title, including the protections of an individual under the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) (including coverage afforded to individuals under section 102 of such Act (42 U.S.C. 12112)), or under the Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.);

(2)(A) limit the rights or protections of an individual to bring an action under this title against an employer, employment agency, labor organization, or joint labor-management committee for a violation of this title; or

(B) provide for enforcement of, or penalties for violation of, any requirement or prohibition applicable to any employer, employment agency, labor organization, or joint labor-management committee subject to enforcement for a violation under--

(i) the amendments made by title I of this Act;

(ii)(I) subsection (a) of section 701 of the Employee Retirement Income Security Act of 1974 as such section applies with respect to genetic information pursuant to subsection (b)(1)(B) of such section;

(II) section 702(a)(1)(F) of such Act; or

(III) section 702(b)(1) of such Act as such section applies with respect to genetic information as a health status-related factor;

(iii)(I) subsection (a) of section 2701 of the Public Health Service Act as such section applies with respect to genetic information pursuant to subsection (b)(1)(B) of such section;

(II) section 2702(a)(1)(F) of such Act; or

(III) section 2702(b)(1) of such Act as such section applies with respect to genetic information as a health status-related factor; or

(iv)(I) subsection (a) of section 9801 of the Internal Revenue Code of 1986 as such section applies with respect to genetic information pursuant to subsection (b)(1)(B) of such section;

(II) section 9802(a)(1)(F) of such Act; or

(III) section 9802(b)(1) of such Act as such section applies with respect to genetic information as a health status-related factor;

(3) apply to the Armed Forces Repository of Specimen Samples for the Identification of Remains;

(4) limit or expand the protections, rights, or obligations of employees or employers under applicable workers' compensation laws;

(5) limit the authority of a Federal department or agency to conduct or sponsor occupational or other health research that is conducted in compliance with the regulations contained in part 46 of title 45, Code of Federal Regulations (or any corresponding or similar regulation or rule);

(6) limit the statutory or regulatory authority of the Occupational Safety and Health Administration or the Mine Safety and Health Administration to promulgate or enforce workplace safety and health laws and regulations; or

(7) require any specific benefit for an employee or member or a family member of an employee or member under any group health plan or health insurance issuer offering group health insurance coverage in connection with a group health plan.

(b) Genetic Information of a Fetus or Embryo- Any reference in this title to genetic information concerning an individual or family member of an individual shall--

(1) with respect to such an individual or family member of an individual who is a pregnant woman, include genetic information of any fetus carried by such pregnant woman; and

(2) with respect to an individual or family member utilizing an assisted reproductive technology, include genetic information of any embryo legally held by the individual or family member.

(c) Relation to Authorities Under Title I- With respect to a group health plan, or a health insurance issuer offering group health insurance coverage in connection with a group health plan, this title does not prohibit any activity of such plan or issuer that is authorized for the plan or issuer under any provision of law referred to in clauses (i) through (iv) of subsection (a)(2)(B).

SEC. 210. MEDICAL INFORMATION THAT IS NOT GENETIC INFORMATION.

An employer, employment agency, labor organization, or joint labor-management committee shall not be considered to be in violation of this title based on the use, acquisition, or disclosure of medical information that is not genetic information about a manifested disease, disorder, or pathological condition of an employee or member, including a manifested disease, disorder, or pathological condition that has or may have a genetic basis.

SEC. 211. REGULATIONS.

Not later than 1 year after the date of enactment of this title, the Commission shall issue final regulations to carry out this title.

SEC. 212. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as may be necessary to carry out this title (except for section 208).

SEC. 213. EFFECTIVE DATE.

This title takes effect on the date that is 18 months after the date of enactment of this Act.

D. <u>Civil Rights Tax Relief Act, H.R. 1540 and S. 1689</u>

Pending in both chambers. It has 52 co-sponsors in the House, and 8 in the Senate.

E. <u>Civil Rights Act of 2008, H.R. 5129 and S. 2554</u>

Introduced in the House on January 23, 2008, and introduced in the Senate on January 24, 2008. It has 33 co-sponsors in the House and 19 in the Senate.

F. Lilly Ledbetter Fair Pay Act of 2007, H.R. 2831 (see also S. 1843)

Passed the House, and is now in the Senate. Senate motion for cloture lost, 56-42, on April 23, 2008.

G. Employee Free Choice Act of 2007, H.R. 800

Passed the House, and is now in the Senate. Senate motion for cloture lost, 51-48, on June 26, 2007.

H. Arbitration Fairness Act of 2007, H.R. 3010

Introduced in the House on July 12, 2007. Subcommittee hearings held on October 25, 2007. It now has 102 co-sponsors. On July 15, 2008, the House subcommittee forwarded the bill to the full House Committee on the Judiciary.

I. Whistleblower Protection Enhancement Act of 2007, H.R. 985

Passed the House, and is now in the Senate.

IV. The Constitution and Statutes

A. The First Amendment

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

> Grief insists that *Garcetti* and its progeny control, emphasizing that (1) Charles's speech concerned "special knowledge" that he had obtained through his employment at the Commission, and (2) Charles identified himself in his e-mails as a Commission employee. Even when accepted as true, neither of these assertions is dispositive. To hold that any employee's speech is not protected merely because it concerns facts that he happened to learn while at work would severely undercut First Amendment rights. Also, it is apparent that Charles identified himself as a Commission employee solely to demonstrate the veracity of the factual allegations he was making in his e-mails to the legislators. After introducing himself as a Commission employee, Charles further emphasized the foundation for his allegations by stating that he was available to speak to the legislative officials about activities that he had "witnessed" while employed. Moreover, Charles submitted the e-mails from his private e-mail address and listed his home address and phone number for his contact information, all of which further undermines the emphasis Grief tries to place on Charles's identification of himself as a Commission employee.
>
> Most significantly, though, Charles's speech—unlike that of the plaintiffs in Garcetti and Williams—was not made in the course of performing or fulfilling his job

> responsibilities, was not even indirectly related to his job, and was not made to higher-ups in his organization (as were Ceballos's and Williams's) but was communicated directly to elected representatives of the people. As a systems analyst, Charles worked in the area of Information Resources as a senior technical lead coordinating and supporting the Commission's computer network operations. He was not in a professional position of trust and confidence like those of an assistant district attorney or a sheriff's deputy. Even though his job description is not contained in the record on appeal and is therefore unavailable to us, we are convinced that his e-mails concerned topics far removed from the realm of—and unrelated to—any conceivable job duties. As the district court indicated, there can be no Garcetti-like nexus between Charles's systems analyst's work and the malfeasance that he sought to expose to the cognizant public authorities.
>
> Moreover, the persons to whom Charles directed his e-mails further distinguishes his speech from that of the plaintiffs in Garcetti and Williams: Charles voiced his complaints *externally*, to Texas legislators who had oversight authority over the Commission, not *internally*, to supervisors. His decision to ignore the normal chain of command in identifying problems with Commission operations is a significant distinction. We conclude that Charles's speech is not left unprotected by *Garcetti*'s genre of "non-protected" speech and turn next to examine whether his speech involved matters of public concern.

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

B. The Fourteenth Amendment

1. "Class of One" Equal-Protection Claims

Engquist v. Oregon Dept. of Agriculture, __ **U.S.** __, 128 S. Ct. 2146, 2148-49, 170 L. Ed. 2d 975 (2008) (Roberts, J.), stated the holding of the Court succinctly: The question in this case is whether a public employee can state a claim under the Equal Protection Clause by alleging that she was arbitrarily treated differently from other similarly situated employees, with no assertion that the different treatment was based on the employee's membership in any particular class. We hold that such a "class-of-one" theory of equal protection has no place in the public employment context." The Court distinguished public actions affecting the general public, in which everyone is expected to be treated the same, from actions affecting single employees, in which there is an expectation of individual treatment. *Id.* at 2151-54. It explained at 2155: "State employers cannot, of course, take personnel actions that would independently violate the Constitution. . . . But recognition of a class-of-one theory of equal protection in the public employment context—that is, a claim that the State treated an employee differently from others for a bad reason, or for no reason at all—is simply contrary to the concept of at-will employment. The Constitution does not require repudiating that familiar doctrine." (Citation omitted.) The Court continued:

> In concluding that the class-of-one theory of equal protection has no application in the public employment context-and that is all we decide-we are guided, as in the past,

> by the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." . . . If, as Engquist suggests, plaintiffs need not claim discrimination on the basis of membership in some class or group, but rather may argue only that they were treated by their employers worse than other employees similarly situated, any personnel action in which a wronged employee can conjure up a claim of differential treatment will suddenly become the basis for a federal constitutional claim. Indeed, an allegation of arbitrary differential treatment could be made in nearly every instance of an assertedly wrongful employment action-not only hiring and firing decisions, but any personnel action, such as promotion, salary, or work assignments—on the theory that other employees were not treated wrongfully. . . . On Engquist's view, every one of these employment decisions by a government employer would become the basis for an equal protection complaint.

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

2. Ministerial Exception

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

C. 42 U.S.C. § 1981

1. Application to Municipalities

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

Comment of Richard Seymour on *Arendale v. City of Memphis*: There is a Circuit split on this question, with the majority of Circuits addressing the issue holding that § 1983

provides the only cause of action for violation of the rights created by § 1981. Plaintiffs' attorneys should plead § 1983 to protect the claims at issue.

2. What is "Race"?

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

3. Retaliation

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

> Second, CBOCS argues that Congress, in 1991 when it reenacted § 1981 with amendments, intended the reenacted statute not to cover retaliation. CBOCS rests this conclusion primarily upon the fact that Congress did not include an explicit antiretaliation provision or the word "retaliation" in the new statutory language-although Congress has included explicit antiretaliation language in other civil rights statutes. See, e.g., National Labor Relations Act, 29 U.S.C. § 158(a)(4); Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12203(a)-(b); Family and Medical Leave Act of 1993, 29 U.S.C. § 2615.
>
> We believe, however, that the circumstances to which CBOCS points find a far more plausible explanation in the fact that, given *Sullivan* and the new statutory language nullifying *Patterson,* there was no need for Congress to include explicit language about retaliation. After all, the 1991 amendments themselves make clear that Congress intended to supersede the result in *Patterson* and embrace pre- *Patterson* law. And pre- *Patterson* law included *Sullivan*. See Part II, *supra*. Nothing in the statute's text or in the surrounding circumstances suggests any congressional effort to supersede *Sullivan* or the interpretation that courts have subsequently given that case. To the contrary, the amendments' history indicates that Congress intended to restore that interpretation. See, *e.g.*, H.R.Rep. No. 102-40, at 92 (noting that § 1981(b) in the "context of employment discrimination . . . would include . . . claims of . . . retaliation").

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

> We agree with CBOCS that the statute's language does not expressly refer to the claim of an individual (black or white) who suffers retaliation because he has tried to help

> a different individual, suffering direct racial discrimination, secure his § 1981 rights. But that fact alone is not sufficient to carry the day. After all, this Court has long held that the statutory text of § 1981's sister statute, § 1982, provides protection from retaliation for reasons related to the *enforcement* of the express statutory right.

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

4. Application of *National R.R. Passenger Corp. v. Morgan*

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

D. 42 U.S.C. § 1983

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

E. Title VII of the Civil Rights Act of 1964

1. Interracial Association

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

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

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

2. Abortions

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

F. The Age Discrimination in Employment Act

1. "Because of . . . Age"

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

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

The Kentucky plan classified some positions as hazardous, and imputed a limited number of additional years of service to hazardous-duty employees who become disabled in the line of duty but are not yet eligible for retirement. "Thus, if an employee with 17 years of service becomes disabled at age 48, the Plan adds 3 years and calculates the benefits as if the employee had completed 20 years of service. If an employee with 17 years of service becomes disabled at age 54, the Plan adds 1 year and calculates the benefits as if the employee had retired at age 55 with 18 years of service." *Id.* at 2365. The number of imputed years cannot be greater than the number of years of actual service. *Id.* The charging party became disabled after he reached the age of 55 and was eligible for normal retirement, and did not receive the benefit of any imputed years in determining the amount of his benefits. The Court rejected the EEOC's argument that the distinction was motivated by age:

> Kentucky's Plan turns normal pension eligibility *either* upon the employee's having attained 20 years of service alone *or* upon the employees having attained 5 years of service and reached the age of 55. The ADEA permits an employer to condition pension eligibility upon age. See 29 U.S.C.A. § 623(*l*)(1)(A)(i) (Supp.2007). Thus we must decide whether a plan that (1) lawfully makes age in part a condition of pension eligibility, and (2) treats workers differently in light of their pension status, (3) *automatically* discriminates *because of* age. The Government argues "yes." But, following *Hazen Paper*'s approach, we come to a different conclusion. In particular, the

following circumstances, taken together, convince us that, in this particular instance, differences in treatment were not "actually motivated" by age.

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

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

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

2. Retaliation in the Federal Sector

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

G. The Americans with Disabilities Act and Rehabilitation Act

1. Disability

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

2. "Qualified" Individuals

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

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

3. Regarded As Disabled

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

Wilson v. Phoenix Specialty Mfg. Co., Inc., 513 F.3d 378, 20 AD Cases 193 (4th Cir. 2008), affirmed the judgment for the ADA plaintiff on his claim that defendant discriminated against him because it regarded him as disabled. Plaintiff had Parkinson's Disease but his symptoms were controlled by medication. The court held that defendant thought his symptoms were considerably worse than they were, and that they interfered with the major life activity of performing manual tasks such as using a computer, writing, interfered with the major life activity of counting, and interfered with the major life activity of seeing. Judge Niemeyer dissented. *Id.* at 388–95.

H. Family and Medical Leave Act

1. Joint Employers and Integrated Enterprises

Grace v. USCAR, 521 F.3d 655, 13 WH Cases 2d 815 (**6th Cir.** 2008), reversed the grant of summary judgment to defendants on plaintiff's FMLA claim. Plaintiff was employed by a staffing agency that provided her services to USCAR, a joint venture of U.S. automakers, and worked in that capacity for eight years. However, plaintiff's original staffing agency went into bankruptcy and defendant Bartech took over its contracts. Plaintiff needed to go on FMLA leave eleven months after Bartech took over her contract and became her employer. Construing the Department of Labor's regulations under the FMLA, the court held at 665 that USCAR and Bartech were not an "integrated enterprise." There was no common management of the core responsibilities and operations of each business, their operations were not interrelated but performed entirely different functions at different locations, their employment relations as a whole were not interrelated even though both communicated with some of the same employees, and there was no common ownership or control. However, the court held, USCAR and Bartech were joint employers under 29 C.F.R. § 825.106. *Id.* at 665-67. The court held that Bartech was a successor in interest to the prior staffing agency, and was thus covered by the FMLA. *Id.* at 671-76. The court rejected USCAR's argument that it was not an employer because it did not have any employees on its payroll, holding that the relevant criterion is whether USCAR had employment relationships, not just whether such relationships were reflected on the payroll. *Id.* at p. 676.

2. Notice

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

I. ERISA

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

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

> The Employee Retirement Income Security Act of 1974 (ERISA) permits a person denied benefits under an employee benefit plan to challenge that denial in federal

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

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

J. Privacy: Employer's Access to Employee Communications Over the Employer's Electronic Systems

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

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

> C. Access to all sites on the Internet is recorded and will be periodically reviewed by the City. The City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources.
>
> D. Access to the Internet and the e-mail system is not confidential; and information produced either in hard copy or in electronic form is considered City property. As such, these systems should not be used for personal or confidential communications. Deletion of e-mail or other electronic information may not fully delete the information from the system.
>
> E. The use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language in the e-mail system will not be tolerated.

In 2000, before the City acquired the pagers, both Quon and Trujillo had signed an "Employee Acknowledgment," which borrowed language from the general Policy, indicating that they had "read and fully understand the City of Ontario's Computer Usage, Internet and E-mail policy." The Employee Acknowledgment, among other things, states that "[t]he City

of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice," and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." Two years later, on April 18, 2002, Quon attended a meeting during which Lieutenant Steve Duke, a Commander with the Ontario Police Department's Administration Bureau, informed all present that the pager messages "were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing." Quon "vaguely recalled attending" this meeting, but did not recall Lieutenant Duke stating at the meeting that use of the pagers was governed by the City's Policy.

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

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

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

V. Theories and Proof

A. The Inferential Model

1. Drawing the Inference Because a Pretextual Explanation Was Advanced

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

> As previously noted, the question presented at the third stage of the *Batson* inquiry is "'whether the defendant has shown purposeful discrimination.'" . . . The

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

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

2. Application

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

3. Qualifications

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

4. Adverse Employment Actions

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

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

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

5. Replacement by Person Outside the Class

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

> As to the issue of restructuring, the plaintiff points to the notes and deposition of Martin (the USCAR Director of Operations) from the meeting in which the decision to terminate Grace was made. After being apprised of the need to have a "legitimate business reason"

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

(Emphasis in original; citation omitted.)

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

6. Circumstances Giving Rise to Inference of Discrimination

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

> The college decided to fire Holcomb, a white man married to a black woman, and Chiles, a black man, while retaining O'Driscoll, a white man who was not in an interracial relationship. Moreover, it is plain that Brennan and Petriccione both knew that Holcomb was married to a black woman, and the record suggests that both Brennan and Petriccione played a role in the termination decision. For each of these men, finally, Holcomb has adduced evidence of racially improper motives. As further detailed below, the record permits an inference that Brennan sought to reduce African-American presence at basketball program events for the sake of alumni relations and fundraising. From this perspective, it would make sense for Brennan to want to keep O'Driscoll, as the only white member of the staff without a black girlfriend or spouse, rather than Holcomb. And in the case of Petriccione, there is clearly evidence in the record indicating his disapproval of Holcomb's marriage to a black woman, and, indeed, of Petriccione's willingness to act on his disapproval by insulting Holcomb in public.
>
> The fact that the college decided to keep Ruland, who was also in an interracial relationship, does not allay the suspicion that the firings were grounded in an illegitimate motive. It was agreed all around that Ruland was simply too expensive to fire, with over five years left on his contract, whether or not he was in a relationship with a black woman. At the prima facie stage, then, these circumstances are more than sufficient to support an inference that Holcomb was terminated on the basis of his interracial marriage.

7. Reductions in Force

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

8. Adequacy of Employer's Nondiscriminatory Reason

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

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

Davis v. Team Electric Co., 520 F.3d 1080, 1094-95, 102 FEP Cases 1641 (**9th Cir.** 2008), reversed the grant of summary judgment to the Title VII retaliation defendant. The court held that defendant failed to proffer an adequate nondiscriminatory reason for terminating plaintiff in a layoff because it failed to offer any explanation why she was one of the persons selected for layoff.

9. Defendant's Attempted Outsourcing of Responsibility for Bias

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

> Fleetwood also tries to suggest that WorkSTEPS bears responsibility for the decision to remove Duncan from his job. According to Fleetwood, the essential job functions for the position of material handler "were set forth in a job description created

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

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

DeCaire v. Mukasey, __ F.3d __, 2008 WL 642533, 102 FEP Cases 1758 (**1st Cir.** March 11, 2008) (No. 07-1539), reversed the grant of summary judgment to the Title VII defendant. The court stated at p. *17:

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

The court rejected the defendant's attempt to embrace the new rationale on appeal, finding that it was grounded not in the record, but on speculation.

11. Pretext

a. Special Problems with Multiple Claims

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

> An examination of whether the plaintiff has fulfilled her burden and established that the defendant's justification was pretextual requires us to distinguish the FMLA and

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

(Emphases in original.)

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

b. Temporal Proximity Between Misconduct and Discharge Supports Employer

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

c. Multiple Consistent Explanations Do Not Raise Inference of Pretext

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

d. Employer's Good-Faith Error Does Not Constitute Pretext

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

e. Failure to Follow Handbook Policies Allows Inference of Pretext

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

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

f. Circumstantial Evidence

DeCaire v. Mukasey, __ F.3d __, 2008 WL 642533, 102 FEP Cases 1758 (**1st Cir.** March 11, 2008) (No. 07-1539), reversed the grant of summary judgment to the Title VII defendant. The court held at p. *17 that the lower court erred when it held that either direct evidence, or circumstantial evidence with a close temporal connection, was necessary in order to show pretext.

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

Davis v. Team Electric Co., 520 F.3d 1080, 1088 n.4, 1091, 102 FEP Cases 1641 (**9th Cir.** 2008), reversed the grant of summary judgment to the Title VII defendant. The court stated

that there was no need to resolve the question whether plaintiff was required to show "specific" and "substantial" evidence of pretext, because she had made such a showing.

12. Same Decisionmaker

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

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

13. Discretionary-Action Defense

DeCaire v. Mukasey, __ F.3d __, 2008 WL 642533, 102 FEP Cases 1758 (**1st Cir.** March 11, 2008) (No. 07-1539), reversed the grant of summary judgment to the Title VII defendant. The court held at p. 17 that the lower court erred in adopting a discretionary-action defense: "The district court also erroneously suggested that because an employer's action falls within an area of discretion, that is an adequate justification. . . . Discretion may be exercised in ways which are discriminatory or retaliatory." (Citation omitted.)

B. Mixed Motives

Holcomb v. Iona College, 521 F.3d 130, 141-42, 102 FEP Cases 1844 (**2d Cir.** 2008), vacated the grant of summary judgment to the Title VII defendant, and stated: "It is important to stress, moreover, that a plaintiff who, like Holcomb, claims that the employer acted with mixed motives is not *required* to prove that the employer's stated reason was a pretext. A plaintiff alleging that an employment decision was motivated both by legitimate and illegitimate reasons may establish that the 'impermissible factor was a motivating factor, without proving that the employer's proffered explanation was not some part of the employer's motivation.'" (Citations omitted).

C. Disparate Impact

1. Burden of Production and Persuasion on Justification

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

concurred in the judgment. *Id.* at 2407. Justice Thomas concurred in part and dissented in part. *Id.* at 2407-08.

2. Adverse Impact

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

3. Defendant's Manipulation Showed Intent

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

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

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

D. Retaliation

1. Associational Discrimination

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

court relied on the EEOC COMPLIANCE MANUAL, and on the purposes of the statute. Judge Griffin dissented.

2. Protected Conduct

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

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

3. How Specific Must Defendant's Knowledge of Protected Conduct Be?

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

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

statements (and any other relevant evidence) permit the inference that the company had a policy against hiring (or retaining) individuals with litigation against the company?

4. Determinations of Actionable Conduct

Billings v. Town of Grafton, 515 F.3d 39, 53–57, 102 FEP Cases 1091 (1st Cir. 2008), reversed the grant of summary judgment to the Title VII and Massachusetts-law sexual harassment and retaliation defendant, and held that defendant's transfer of plaintiff from a non-union clerical position in the office of the Town Administrator to a union clerical position elsewhere, and barring her from coming into the Selectmen's Office to attend meetings there, opening an investigation of her for opening her boss's private mail from his attorney, and requiring her to take personal time off for her deposition, met the *Burlington Northern* standard and was actionable.

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

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

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

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

5. Causation

a. Temporal Proximity

DeCaire v. Mukasey, __ F.3d __, 2008 WL 642533, 102 FEP Cases 1758 (**1st Cir.** March 11, 2008) (No. 07-1539), reversed the grant of summary judgment to the Title VII defendant. The court stated at p. *16: "Instead, our law is that temporal proximity alone can suffice to "meet the relatively light burden of establishing a prima facie case of retaliation." . . . All of the events described here took place within a period of about one year. In our view, the court may have overlooked the temporal closeness of events by focusing on the fact that Dichio had mistreated DeCaire prior to her complaint." (Citation omitted.)

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

> Where an employer tolerates an undesirable condition for an extended period of time, and then, shortly after the employee takes part in protected conduct, takes an adverse action in purported reliance on the long-standing undesirable condition, a reasonable jury can infer the adverse action is based on the protected conduct. . . . In this case, a fact finder could reasonably infer Action would have terminated Fitzgerald sooner if accumulated misconduct had been the true motivation for his discharge.
>
> Viewed in concert with other evidence of pretext, the close temporal proximity between Fitzgerald's notification and Action's termination decision provides support for an inference of retaliatory intent. Because material questions of fact exist on the issue of pretext, we conclude it was error for the district court to grant Action summary judgment on Fitzgerald's ERISA claim.

Id. at 875-76 (citation omitted).

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

Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1278, 102 FEP Cases 716 (11th Cir. 2008), affirmed the judgment on a jury verdict for the Title VII and § 1981 retaliation

plaintiff. The court rejected defendant's argument that the eight-month gap between the filing of plaintiff's EEOC charge and his termination precluded any inference of causation. The court held that the argument was a "straw man" because plaintiff was fired immediately after he refused to sign an agreement to arbitrate his pending charge. Because plaintiff was willing to arbitrate future claims, the dispute was only about arbitration of his pending employment discrimination claim. The court held that plaintiff adequately showed a connection between his EEOC charge and his termiantion.

b. Disloyalty Defense

DeCaire v. Mukasey, __ F.3d __, 2008 WL 642533, 102 FEP Cases 1758 (**1st Cir.** March 11, 2008) (No. 07-1539), reversed the grant of summary judgment to the Title VII defendant. The court rejected the lower court's disloyalty defense, which had not been urged by the parties. The court stated at p. *16: "As a matter of law, the filing of an EEO complaint cannot be an act of disloyalty to either the U.S. Marshals Service or the Marshal which would justify taking adverse actions."

c. Prior Discriminatory Actions Defense

DeCaire v. Mukasey, __ F.3d __, 2008 WL 642533, 102 FEP Cases 1758 (**1st Cir.** March 11, 2008) (No. 07-1539), reversed the grant of summary judgment to the Title VII defendant. The court rejected at p. *16 the lower court's view that discrimination against plaintiff because of her gender before she filed her EEOC charge negated her claims of retaliation after she filed the charge.

E. Circumstantial Evidence

1. Changing Stories

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

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

2. Failure to Follow Employer's Own Policies

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

3. Discriminatory Statements

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

4. Absence of Female Supervisors

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

5. "Counterweight" Evidence

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

> To be sure, Team Electric did a number of helpful things for Davis, including accommodating her childcare needs by assigning her to her preferred site and allowing her to work a later shift. Team Electric responded to many of Davis's grievances, including providing her with improved safety equipment, giving her a radio, allowing her to come to meetings, transferring two female electricians to the site after she filed her BOLI questionnaire, assigning her a new supervisor when she reported that Loughary had a negative attitude toward her, and re-assigning her to a different wing of the building on one occasion, when she complained about working with Monokote.
>
> Even if, however, we were to take Team Electric's responses to some of Davis's grievances as counterweights to Davis's proffer of specific and substantial evidence of discriminatory motive, a counterweight is not enough to eliminate the need for a fact-finder to weigh the facts on both sides. A jury could weigh Team Electric's response as mitigating facts, but the litany of complaints answered may also be taken by a reasonable jury as evidence that Davis was treated differently because she was a woman. The fact that Davis's supervisors had never before had complaints about work assignments would support this conclusion. Although "this is a close case ... [s]uch uncertainty at the summary judgment stage must be resolved in favor of the plaintiff."

(Citation omitted.)

F. Comparators

1. Supreme Court's Use of Comparators

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

2. Defendant's Lack of Comparators

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

3. Rejection of Defendant's Comparators

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

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

4. Acceptance of Plaintiff's Comparators

Jackson v. FedEx Corporate Services, Inc., 518 F.3d 388, 102 FEP Cases 1543 (**6th Cir.** 2008), reversed the grant of judgment as a matter of law to the Title VII and § 1981 racial discrimination defendant. The trial court granted judgment as a matter of law to defendant on the conclusion of plaintiff's evidence, after finding that plaintiff had presented no evidence of comparators who were similarly situated, for purposes of his *prima facie* case. The lower court had stated: "to be similarly situated . . . with whom the Plaintiff seeks to compare treatment must have the same supervisor, be subject to the same standards, having engaged in similar conduct

without differentials or mitigation . . . It means these individuals have to have similar background, education, experience, job responsibilities, and performance. It means that the job responsibilities must require the same skills and abilities. And the job responsibilities are equal and interchangeable." *Id.* at 391. The court of appeals disagreed, stating at 396-97:

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

(Citation omitted.) Judge Rogers dissented.

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

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

5. Rejection of Plaintiff's Comparators

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

proffered comparator was not similarly situated because he had a different supervisor. Finally, it rejected plaintiff's final comparator because plaintiff was paid more than the comparator.

G. Comparative Qualifications and Evidence Bearing on Employee Performance

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

H. Statistics

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

> A different picture emerges, however, when we consider the data with Brandt in mind. He first began to make personnel decisions for Crew 94 when he was hired as a supervisor in May 2001. The average age of the workers hired before that date was 44.29. For the period of May 2001 to January 2002, during which Daffern and Brandt both made personnel decisions, the average age of Crew 94 hirees dropped to 40.8. Once Brandt took over as the sole hiring authority, the average age dropped still further to 35.28. By contrast, the average age of workers laid off from Crew 94 increased slightly from 46.2 during the period of Daffern's and Brandt's joint supervision to 51.1 after Brandt became the sole supervisor. In short, the disparity between the average age of those hired and those laid off increased from slightly less than two years to nearly 16 years once Brandt started to make personnel decisions. This evidence suggests that although Eagle Produce was not responsible for discriminatory hiring practices prior to Brandt's advent, Brandt used his authority to replace older workers with younger counterparts.
>
> Reasonable jurors could find that this interpretation of the data supports an inference of discrimination. Viewing the statistical evidence with Brandt in mind helps to explain how Eagle Produce could both hire Plaintiffs without regard to age and also terminate their employment because of age shortly thereafter. Because Brandt did not work at Eagle Produce until May 2001, he could not preclude the hiring of Mancilla in approximately 1996, Diaz in 1997, and Moreno in 2000. However, he could lay off these workers because of their ages in the winter of 2002.

I. Discriminatory Statements

1. Courts Refusing to Rely on Biased Statements

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

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

Id. at 876-77. The court held that no inference of age discrimination could be drawn because plaintiff's ERISA comparator, an employee three years younger with far worse conduct who had no pending surgery and was retained, was in the protected age group, and because of a "same company" extension of the "same decisionmaker" rule. "Further, Action hired Fitzgerald when he was fifty and terminated him when he was fifty-two. We have noted it is unlikely a supervisor would hire an older employee and then discriminate on the basis of age, and such evidence creates a presumption against discrimination." (Citation omitted) The court concluded: "Under different circumstances, the remarks attributed to Easley might create an inference of discrimination. In this instance, however, they are insufficient to overcome the presumption created by the fact Action hired Fitzgerald at age fifty." *Id.* at 877.

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

2. Courts Relying on Biased Statements

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

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

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

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

> Davis alleged a series of discriminatory comments made by her supervisors. In one conversation, foreman Walsh pulled her aside to tell her that he "felt uncomfortable" around her. In the same conversation, he and Davis discussed her need to drop off her child at daycare, and Walsh allegedly said "this is a man's working world out here, you know."In another incident, Davis told foreman Loughary that her work was causing her neck pain. Loughary allegedly responded that he would assign Burkitt to be her foreman because he "needs a girlfriend." At another point, Loughary allegedly said that food for a meeting was only "for the guys." Finally, when Davis told a supervisor, Dave Davis, that she was doing most of the work entailing exposure to Monokote, he allegedly said something to the effect of "the guys don't mind having a girl working with them if they don't complain."
>
> The magistrate judge disregarded Walsh's comments because they were not tied to any job assignment on the Clackamas County High School site, and Walsh did not transfer Davis. Even so, a reasonable jury could conclude that Walsh's response that she was in a "man's working world" is relevant evidence of pretext. A jury could also infer

pretext from Loughary's suggestion that she could do another work assignment so that she could be a foreman's "girlfriend." The magistrate judge inexplicably dismissed Loughary's statement that food was only "for the guys" as "not overtly gender-based."[7]

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

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

(Citations omitted.)

3. Speakers Who Were Not Formal Decisionmakers

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

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

the jury to decide. A rational trier of fact could, in other words, conclude that, once the decision was reached to retain the Head Coach and one of the three assistant coaches, Brennan and/or Petriccione urged the selection of O'Driscoll instead of Holcomb, and that at least one of them did so in part for racially discriminatory reasons.

J. Harassment

1. Conduct Neutral in Form

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

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

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

(Citations omitted.)

2. Severe or Pervasive

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

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

> While this standard surely prohibits an employment atmosphere that is "permeated with discriminatory intimidation, ridicule, and insult" . . . it is equally clear that Title VII does not establish a "general civility code for the American workplace" . . . . This is because, in order to be actionable, the harassing "conduct must be [so] extreme [as] to amount to a change in the terms and conditions of employment." . . . Indeed, as the Court observed, "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." . . . .
>
> Our circuit has likewise recognized that plaintiffs must clear a high bar in order to satisfy the severe or pervasive test. Workplaces are not always harmonious locales, and even incidents that would objectively give rise to bruised or wounded feelings will not on that account satisfy the severe or pervasive standard. Some rolling with the punches is a fact of workplace life. Thus, complaints premised on nothing more than "rude treatment by [coworkers]" . . . "callous behavior by [one's] superiors" . . . or "a routine difference of opinion and personality conflict with [one's] supervisor" . . . are not actionable under Title VII.
>
> The task then on summary judgment is to identify situations that a reasonable jury might find to be so out of the ordinary as to meet the severe or pervasive criterion. That is, instances where the environment was pervaded with discriminatory conduct "aimed to humiliate, ridicule, or intimidate," thereby creating an abusive atmosphere. . . . With these principles in mind, we examine whether a reasonable person in Ingram's position would have found the environment to be sufficiently severe or hostile.

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

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

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

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

Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 102 FEP Cases 1165 (6th Cir. 2008), affirmed in part and reversed in part the grant of summary judgment to Ohio law defendant, using Title VII principles. The court held that, in determining whether the harassing conduct was severe or pervasive, conduct that is personally invasive or threatening must be weighted more heavily, and conduct that is continuous in nature must be weighted more heavily than

conduct that is sporadic. *Id.* at 333-34. The court added: "This court's caselaw therefore makes clear that the factfinder may consider similar acts of harassment of which a plaintiff becomes aware during the course of his or her employment, even if the harassing acts were directed at others or occurred outside of the plaintiff's presence." *Id.* at 336. The court held that the comparative weighting of such actions depends on the circumstances. "When determining the relative weight to assign similar past acts of harassment, the factfinder may consider factors such as the severity and prevalence of the similar acts of harassment, whether the similar acts have been clearly established or are mere conjecture, and the proximity in time of the similar acts to the harassment alleged by the plaintiff." *Id.* Serial harassers raise different concerns, however: "On the other hand, more weight should be given to acts committed by a serial harrasser if the plaintiff knows that the same individual committed offending acts in the past. This is because a serial harrasser left free to harass again leaves the impression that acts of harassment are tolerated at the workplace and supports a plaintiff's claim that the workplace is both objectively and subjectively hostile." *Id.* at 337. The court held that plaintiffs Hill and Cunningham met the "severe or pervasive" test.

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

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

> However, drawing all reasonable inferences in favor of Mr. Tademy, we further conclude that there is genuine issue of fact as to whether the racist graffiti, Mr. Cagle's use of the term "boy," the slaves e-mail, and Mr. Bleckert's reference to "F* * *ing Kunta Kinte" were part of the same hostile work environment as the hanging of the noose. In our view, a reasonable jury could find that each was calculated to demean or intimidate African-American employees.
>
> The Cagle "boy" incident, for example, underscores why summary judgment was inappropriate. As typically used in everyday English, there is nothing inherently offensive about the word "boy." Nevertheless, it is a term that has been used to demean African-American men, among others, throughout American history. In conversation, a slight difference in emphasis on a particular word or syllable in a sentence can alter its meaning. Here, we are confronted with conflicting testimony about whether the term was used in an offensive way in this particular instance. Union Pacific's decision to send Mr. Cagle to sensitivity training indicates that the company recognized the racial implications

> of his comment. Given all of the facts of this case, whether Mr. Cagle's comment was racially motivated and what effect it had on Mr. Tademy are judgments of the sort we are not equipped to make as an appellate court reviewing a cold record. Nor were they appropriate for the district court in ruling on a summary judgment motion. . . . And we believe this assessment applies equally to the "slaves" e-mail and the racist graffiti.
>
> We also believe that the number of incidents in the given timespan is sufficient to constitute a hostile environment. Our precedent reveals no talismanic number of incidents needed to give rise to a hostile discrimination claim. As we will discuss in greater detail below, whether a hostile environment claim is actionable depends not only on the number of incidents, but also on the severity of the incidents. Here, the incidents include highly offensive graffiti and a noose hanging in the south shanty. As we outline below, we think that a jury could find that although Mr. Tademy may not have been subjected to racism on a daily basis, he has presented evidence sufficient to support his hostile environment claim. Considering all of the circumstances, we are persuaded that a reasonable jury could conclude that these incidents constituted the same employment practice.

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

3. Unwelcomeness

EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 314, 102 FEP Cases 1735 (**4th Cir.** 2008), reversed the grant of summary judgment to the Title VII religious harassment defendant. The court held at p. *5 that the charging party's frequent complaints to managers and co-workers about the harassing behavior, and his effort to obtain a transfer, adequately showed a triable issue as to the unwelcomeness of the behavior.

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

4. The "Boorish Workplace" Defense

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

> While the district court suggested that the harassment might be discounted because the environment was inherently coarse, Title VII contains no such "crude environment" exception, and to read one into it might vitiate statutory safeguards for those who need them most. Of course, if Sunbelt's environment was somehow so

universally crude that the treatment of Ingram was nothing out of the ordinary, the jury would be entitled to take that into account. However, the evidence here suggests that the jury could also take the opposite view-that the harassment of Ingram was unique.

5. The "Paramour" Defense

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

> In cases involving a prior failed relationship between an accused harasser and alleged victim, reasoning that the harassment could not have been motivated by the victim's sex because it was instead motivated by a romantic relationship gone sour establishes a false dichotomy. Presumably the prior relationship would never have occurred if the victim were not a member of the sex preferred by the harasser, and thus the victim's sex is inextricably linked to the harasser's decision to harass. To interpret sexual harassment perpetrated by a jilted lover in all cases not as gender discrimination, but rather as discrimination " 'on the basis of the failed interpersonal relationship' . . . is as flawed a proposition under Title VII as the corollary that 'ordinary' sexual harassment does not violate Title VII when the [ ] asserted purpose is the establishment of a 'new interpersonal relationship.'" . . . Whether a harasser picks his or her targets because of a prior intimate relationship, desire for a future intimate relationship, or any other factor that draws the harasser's attention should not be the focus of the Title VII analysis. Instead, improper gender bias can be inferred from conduct; if the harassing conduct is gender-based, Title VII's requirement that the harassment be "based upon sex" is satisfied.

(Footnote and citations omitted.)

6. Employer's Vicarious Liability

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

Davis v. Team Electric Co., 520 F.3d 1080, 1096, 102 FEP Cases 1641 (**9th Cir.** 2008), reversed the grant of summary judgment to the Title VII defendant on plaintiff's hostile-environment claims. The court held that the participation of defendant's managers in the harassment of plaintiff made the defendant liable: "A reasonable jury could find Team Electric liable for the hostile environment described by Davis because its supervisors played a significant role in creating the environment, making it clear to Davis on more than one occasion that women were not welcome on the work site."

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

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

> After Ingram complained to Dempster about the religious harassment starting up again, he was met with accusations of paranoia and litigation. Rather than investigating the matter further or taking any form of corrective action, Dempster dismissed Ingram's complaint and accused him of "being paranoid," "seeing things," and "trying to build a case against" Sunbelt.
>
> The mere existence of an anti-harassment policy does not allow Sunbelt to escape liability. While the "adoption of an effective anti-harassment policy is an important factor in determining whether it exercised reasonable care," the policy must be effective in order to have meaningful value. . . . Here the existence of the policy might still leave a jury unconvinced that Sunbelt worked in a serious fashion to combat the rampant harassment in its midst-harassment of which it was repeatedly made aware and which nonetheless continued unabated.

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

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

Id. at 341. The court held that "a jury could find that, in light of the brewery's knowledge that Robinson was a serial harasser, management acted inappropriately by repeatedly removing the victims of harassment from line 75 while failing to undertake more fundamental action, such as training, warning, or monitoring Robinson." *Id.* at 342. It stated that lesser actions may be appropriate for persons who were not serial harassers or had engaged in less threatening behavior. The court discussed at length the steps that could have been taken but were not shown in the record as having been taken. It rejected defendant's argument that it could not have taken any further action because Robinson had denied engaging in harassment:

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

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

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

> Team Electric has failed to show that it took steps to prevent sexual harassment in its workplace. There is no evidence, for example, that it had an anti-harassment policy, or that it had any other preventive measures in place, such as sexual harassment training. . . . One of Team Electric's project managers stated in a deposition that "pretty much whoever has a problem goes to the project manager, and it's dealt with in that manner."Nothing in the record shows whether this is a written policy, or even whether employees are informed of the policy. Davis alleged that she was prohibited from reporting her problems to anyone but her immediate supervisors-the very supervisors who allegedly created the hostile environment.
>
> Team Electric's only apparent attempt to correct the harassment came after Davis contacted the BOLI, following several months of alleged mistreatment by her supervisors. There is no evidence that any of these supervisors were disciplined for their conduct or even told to behave differently, and Team Electric has not shown that Davis failed to take advantage of any preventive or corrective opportunities that it offered. In sum, Team Electric has not successfully asserted an affirmative defense to Davis's claim.

(Citation omitted.)

Tademy v. Union Pacific Corp., 520 F.3d 1149, 102 FEP Cases 1798 (**10th Cir.** 2008), reversed the grant of summary judgment to the Title VII and § 1981 racial harassment defendant. The court held at 1165 that plaintiff had shown a triable issue of fact as to defendant's knowledge of the harassment. It stated: "we assume that Union Pacific was, or at least should have been, on notice that the Salt Lake service unit had a serious problem with bigoted messages appearing in public spaces around the time Mr. Tademy raised his complaints. we assume that Union Pacific was, or at least should have been, on notice that the Salt Lake service unit had a serious problem with bigoted messages appearing in public spaces around the time Mr. Tademy raised his complaints." The court considered racist graffiti observed by others, but declined to consider noose incidents at other locations because they would not have put management on

notice of a problem at plaintiff's location. The court also held that plaintiff had shown a triable issue as to the adequacy of defendant's response, because defendant routinely failed to investigate or follow up on the many complaints made. The court stated that the fact that racist messages "appeared, and in some instances remained, in areas accessible to all employees may well reveal more about what is acceptable in the work environment than any EEO manuals, which may or may not be distributed to or read by employees." *Id.* at 1166. The court pointed out the many remedies available to employers for widespread anonymous graffiti. *Id.* at 1166-67.

8. Failure to Complain, and Adequacy of Complaints

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

> Sunbelt, like the district court, makes much of the fact that the incidents highlighted in the written complaint lacked a direct religious nexus. But this fact is not dispositive for several reasons.
>
> First, when filing the complaint, Ingram made very clear to HR Specialist Wilson that he believed the harassment was because of his religion-a fact Wilson passed on in her report to Riddlemoser and Dempster. Second, Ingram explained that the examples provided in the written complaint were never intended to be an exhaustive list. Rather, given his limited time and his understanding of the directions, he simply wrote about incidents that had happened near the time of the complaint. Third, the written submission cannot be viewed in isolation, but rather in conjunction with the repeated oral complaints.
>
> Based on the evidence presented, and in light of Gray's corroborating testimony, we believe that any doubts espoused by the district court about whether Sunbelt had sufficient notice were misplaced. Evidence of repeated complaints to supervisors and managers creates a triable issue as to whether the employer had notice of the harassment.

(Citation omitted.)

K. Independent Investigations

Metzger v. Illinois State Police, 519 F.3d 677, 681-84, 102 FEP Cases 1744 (**7th Cir.** 2008), affirmed the grant of summary judgment to the Title VII defendant retaliation claim. The court held that the independent investigation of the Illinois Department of Central Management Services ("CMS") into plaintiff's job classification and pay grade barred any finding of retaliation despite the alleged retaliatory animus of a non-decisionmaker.

VI. Litigation

A. Exhaustion

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

> As a cautionary preface, we note that the EEOC enforcement mechanisms and statutory waiting periods for ADEA claims differ in some respects from those pertaining to other statutes the EEOC enforces, such as Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq., and the Americans with Disabilities Act of 1990, 104 Stat. 327, as amended, 42 U.S.C. § 12101 et seq. While there may be areas of common definition, employees and their counsel must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination. *Cf. General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 586–587, 124 S. Ct. 1236, 157 L. Ed. 2d 1094 (2004). This is so even if the EEOC forms and the same definition of charge apply in more than one type of discrimination case.

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

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

Id. at 1155. The Court accepted the EEOC's policy, even though unevenly applied, that a charge must contain a request for action. "Here, the relevant interpretive statement, embodied in the compliance manual and memoranda, has been binding on EEOC staff for at least five years. . . . True, as the Government concedes, the agency's implementation of this policy has been uneven. . . . In the very case before us the EEOC's Tampa field office did not treat respondent's filing as a charge, as the Government now maintains it should have done. And, as a result, respondent filed suit before the agency could initiate a conciliation process with the employer." *Id.* at 1156. It found no reason to conclude that the most recent policy utterance had been framed to benefit the plaintiff in this litigation. *Id.* at 1156–57. The Court found the EEOC's position reasonable,

because under the ADEA the EEOC has both an educational and an enforcement function: "Of about 175,000 inquiries the agency receives each year, it dockets around 76,000 of these as charges. . . . Even allowing for errors in the classification of charges and noncharges, it is evident that many filings come from individuals who have questions about their rights and simply want information." *Id.* at 1157. The Court was concerned that a policy of treating every filing as a charge would deter individuals from enquiring about their rights. The Court summarized its holding succinctly: "We conclude as follows: In addition to the information required by the regulations, *i.e.*, an allegation and the name of the charged party, if a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee." *Id.* at 1157-58. The Court then rejected the employer's argument that a filing can only be considered a charge if it is served on the respondent:

> Asserting its interest as an employer, petitioner urges us to condition the definition of charge, and hence an employee's ability to sue, upon the EEOC's fulfilling its mandatory duty to notify the charged party and initiate a conciliation process. In petitioner's view, because the Commission must act "[u]pon receiving such a charge," 29 U.S.C. § 626(d), its failure to do so means the filing is not a charge.
>
> The agency rejects this view, as do we. As a textual matter, the proposal is too artificial a reading of the statute to accept. The statute requires the aggrieved individual to file a charge before filing a lawsuit; it does not condition the individual's right to sue upon the agency taking any action. *Ibid.* ("No civil action may be commenced by an individual under [the ADEA] until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission"); Cf. *Edelman v. Lynchburg College*, 535 U.S. 106, 112–113, 122 S. Ct. 1145, 152 L. Ed. 2d 188 (2002) (rejecting the argument that a charge is not a charge until the filer satisfies Title VII's oath or affirmation requirement). The filing of a charge, moreover, determines when the Act's time limits and procedural mechanisms commence. It would be illogical and impractical to make the definition of charge dependent upon a condition subsequent over which the parties have no control. . . .

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

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

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

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

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

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

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

abrogation of the litigation, a return to the agency, and a new lawsuit even where the case had been tried to a verdict.

Holender v. Mutual Industries North Inc., 527 F.3d 352, 357, 103 FEP Cases 712 (**3d Cir.** 2008), reversed the grant of summary judgment to the ADEA defendant and found plaintiff's EEOC Form 5 and affidavit to be sufficient to be a charge. The court rejected defendant's argument that a plaintiff must meet a higher standard when the plaintiff has counsel, stating: "There is no need to require that counseled submissions to the EEOC contain some magic combination of words explicitly seeking agency action. A charge, submitted by counsel or not, may imply such a request."

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

B. Timeliness

1. Pay as a Discrete Action

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.

Randle v. Local 28 Int'l Longshoremens Ass'n / AFL-CIO, 255 Fed. Appx. 842, 2007 WL 4170714, 183 LRRM 2099 (**5th Cir.** 2007), applied *Ledbetter* and held that the union's decision in 2000 to retain membership dues from container royalties could not be challenged under the LMRDA simply because that dues-setting was still in effect.

Mynatt v. Lockheed Martin Energy Systems, Inc., 2008 WL 744725, 102 FEP Cases (**6th Cir.** 2008) (unpublished), applied *Ledbetter* and held in the alternative that racial discrimination claims for unequal pay under Title VII were limited to discriminatory decisions within the charge-filing period, and that there were no such specific claims.

Hulteen v. AT & T Corp., 498 F.3d 1001, 1006-07, 101 FEP Cases 449 (**9th Cir.** 2007), applied *Ledbetter* and *Bazemore* and held that an employer violates Title VII every time it applies a facially discriminatory policy. The court stated: "Pacific Bell adopted a policy that calculates pregnancy leave differently than other temporary disability leave, and it engages in intentional discrimination *each time it applies the policy* in a benefits calculation for an employee affected by pregnancy, even if the pregnancy occurred before the enactment of the PDA." *Id.* at 2007 (emphasis in original).

Smithers v. Wynne, 2008 WL 53245 (**11th Cir.** Jan. 4, 2008) (unpublished), applied *Ledbetter* and held that past denials of promotion, outside the charge-filing period, could not be resurrected by challenging their present effect in the form of lower pay.

2. Hostile Environment

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

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

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

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"),[3] 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*).[6]

[6] 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 *Swierkewicz 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.

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

D. Arbitration

Hall Street Associates, L.L.C. v. Mattel, Inc., __ **U.S.** __, 128 S. Ct. 1396 (2008), involved an arbitration agreement crafted while the dispute was in litigation in the U.S. District Court for the District of Oregon, and entered as an order by the court. Hall Street claimed a right to indemnification for environmental clean-up costs resulting from Mattel's tenancy in the property leased to it by Hall Street. The agreement approved by the court contained a paragraph providing for judicial review of the arbitrator's award, including authority to "vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." *Id.* at 1400–01. In the event, the district court rejected the arbitrator's interpretation of the lease as implausible. The Court held that the provisions for judicial review in §§ 10 and 11 of the FAA, 9. U.S.C. §§ 10, 11, are exclusive and may not be expanded by contract. The Court explained:

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

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

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

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

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

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

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

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

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

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

(Citations omitted.)

E. Summary Judgment

1. Procedure

Brannon v. Luco Mop Co., 521 F.3d 843, 847, 20 AD Cases 709 (**8th Cir.** 2008), affirmed the grant of summary judgment to the ADA defendant and held that the lower court did

not abuse its discretion in denying plaintiff's Motion to Strike defendant's Statement of Uncontroverted Material Facts for failure to include the line number in its citations to pages of transcripts. The court noted that the local rule merely required appropriate citations to the record, and did not specify that line numbers were required. It also noted that the lower court had not found the citations to be burdensome.

2. "Sham Affidavits"

Brannon v. Luco Mop Co., 521 F.3d 843, 847-48, 20 AD Cases 709 (**8th Cir.** 2008), affirmed the grant of summary judgment to the ADA defendant and held that the lower court did not abuse its discretion in denying plaintiff's Motion to Strike the affidavit of the decisionmaker. The decisionmaker had testified on deposition that as to his beliefs of the reasons why plaintiff was fired, and his affidavit stated why she was fired. The court held that this was a mere clarification, not a conflict, and noted that the decisionmaker certainly knew his own motives.

3. Undue Concern for Usurping the Role of the Jury

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.[7] 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.[8]

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[7] 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).

[8] 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).

4. Due Concern for Usurping the Role of the Jury

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

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

(Citations omitted) The court continued at 141:

> Direct evidence of discrimination, "a smoking gun," is typically unavailable . . . and this case is no exception to that pattern. It is well settled, however, that employment discrimination plaintiffs are entitled to rely on circumstantial evidence. In this respect, we have noted the need to be "alert to the fact that employers are rarely so cooperative as to include a notation in the personnel file that the firing is for a reason expressly forbidden by law."

(Citations and footnote omitted)

F. Evidence

1. Other Instances of Discrimination

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

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

Id. at 1147.

Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1285–87, 102 FEP Cases 716 (11th Cir. 2008), affirmed the judgment on a jury verdict for the Title VII and § 1981 retaliation plaintiff. The court held that the lower court did not abuse its discretion in admitting evidence of other instances of discrimination, although for the wrong reason. The court rejected the lower court's reliance on Fed. R. Evid. 406, because four instances of termination after filing an EEOC charge are not enough to show a habit. The court held that the evidence was properly admissible

under Rule 303(b) to show defendant's motive, intent, and plan to discriminate and retaliate. The court stated: "Goldsmith and coworkers Jemison and Thomas were discriminated against by the same supervisor, Farley, so the experiences of Jemison and Thomas are probative of Farley's intent to discriminate. Steber was involved in the termination decisions of all four individuals, so the experiences of Jemison, Peoples, and Thomas are probative of Steber's intent." The court held that the evidence was also admissible under Rule 402 to prove a hostile work environment. *Id.* at 1286. The court held that the evidence was also admissible on other grounds we well:

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

Id. at 1286–87 (citations omitted).

2. The EEOC "Reasonable Cause" Determination

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

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

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

defense, was especially relevant where uttered on company premises, and was relevant to impeach the officials. The racial slurs, in short, were relevant.

4. The Courtroom Deputy's Testimony

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

> Bagby Elevator was not unfairly prejudiced by the courtroom deputy's testimony. Bagby Elevator was aware of the policy of the district court that its courtroom deputy would report stray remarks. The courtroom deputy had previously reported a comment made by a black juror who was later dismissed because of the comment, and Bagby Elevator did not object to the application of this policy to dismiss the juror.
>
> Bagby Elevator had the benefit of several procedural safeguards to prevent any undue prejudice. Bagby Elevator cross-examined the courtroom deputy on the comment. . . . Bagby Elevator recalled Ward to elicit testimony about this alleged comment, and the courtroom deputy testified only after Ward stated that he did not remember hearing the comment. The district court instructed the jury that the courtroom deputy's testimony should not suggest that the district court or its employees had an opinion about the merits of the case. In the light of these safeguards, Bagby Elevator was not unduly prejudiced when the district admitted the testimony of the courtroom deputy.

(Citation omitted.)

5. The Time Period for Which Evidence Was Permitted

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

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

Id. at 167.

6. Criminal Conviction Followed by Pardon

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

7. Secret Tape Recordings

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

G. The Jury Verdict

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

H. Front Pay

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

I. Punitive Damages

1. Upholding Entitlement

EEOC v. Federal Express Corp., 513 F.3d 360, 20 AD Cases 204 (4th Cir. 2008),

affirmed the award of $100,000 in punitive damages for a failure to accommodate the charging party's profound deafness by providing a certified ASL translator for meetings and important documents. The court described the four *Lowery* factors relevant to entitlement to punitive damages:

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

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

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

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

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

> the FedEx-BWI Ramp when Lockhart filed his charge of discrimination with the EEOC in October 2001.

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

Abner v. Kansas City Southern R. Co., 513 F.3d 154, 102 FEP Cases 616 (5th Cir. 2008), affirmed the award of $125,000 in punitive damages to the Title VII and § 1981 racial harassment plaintiffs, although the jury did not award compensatory damages and no back pay was involved. The court stated at 160: "We agree with the conclusion of several of our sister circuits that a punitive damages award under Title VII and § 1981 need not be accompanied by compensatory damages. We base our holding on the language of the statute, its provision of a cap, and the purpose of punitive damages under Title VII." The court relied in part on the provisions of the Civil Rights Act of 1991 treating compensatory and punitive damages as independent. It continued:

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

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

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

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

> Here, Plaintiffs, supervisors, and other witnesses testified to incidents of racially discriminatory behavior that occurred within the ten-year time frame of evidence permitted by the court. Elgie Abner testified about picking up a toolbox on which someone had written, "You lazy ni_ _ _ _s" and that, when he presented the box to a supervisor, the supervisor laughed. He also testified that a cement pillar in the workshop contained a large marking of "KKK" for a number of years, as did the fuel tanks and roofs of many locomotives in the shop, and that in May of 2005, "Abner is a lazy racist" was written on the walls in the bathroom of the workshop. "Ni_ _ _r go home" and "Lazy ni_ _ _ _s" were also written on the walls. Harry Brooks testified that foreman Gary Moore would, on the night shift, wait until a large thunderstorm came and then, laughing, send the workers out in the storm. He also testified that an electrical wire in the form of a noose was hanging outside of the workshop, that there was graffiti in the workshop bathrooms that said, "Ni_ _ _ _s stink" and "Ni_ _ _ _s go home," and that supervisors "knew" of the graffiti and the noose. Napoleon Player testified that a supervisor called him "boy" in 1995 and that Gary Moore referred to him as a "rice-eating Ethiopian" and said that he was going to run two "black a_ _ es off." In 1995, Moore also allegedly referred to Napoleon Player's shift as the "c_ _n shift." Napoleon Player also testified that he did not recall receiving any racial harassment training prior to retiring in June of 2003. Mr. Odom similarly testified that "the first [racial harassment policy] I got was ... if I'm not mistaken, August 2003." Donald Harville testified that a company surgeon told him, when he arrived late for work in November of 2001, "That's it for you and your ni_ _ _ _ buddies." This and other evidence supports the jury's conclusion that KCSR supervisors caused and/or failed to properly respond to numerous instances of racially derogatory behavior in the workplace.

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

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

Id. at 165 (footnotes omitted).

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

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

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

Id. at 1281–82.

2. Amounts

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

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

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

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

> Although Lockhart suffered no physical harm from the actions complained of, his supervisors at FedEx were plainly indifferent to the fact that their failure to accommodate his disability could jeopardize his safety, and potentially implicate the safety of others. Because Lockhart was denied the ADA accommodations necessary for him to understand and participate in employee meetings and training sessions, he consistently missed

> updates about important subjects such as workplace safety, handling dangerous goods, interpreting hazardous labels, and potential anthrax exposure. Finally, Lockhart's supervisors were familiar with the mandate of the ADA and perceived the risk that their conduct was unlawful. Under the evidence, the jury was thus entitled to find that FedEx higher management officials, including Cofield and Hanratty, had acted reprehensibly with respect to Lockhart's need for ADA accommodations.

Id. at 377. The court also rejected defendant's argument that the 12.5 ratio of punitive to compensatory damages was unconstitutionally excessive, holding that such ratios are merely instructive and do not establish bright lines. *Id.* at 377–78. Moreover, the court held that the fact the total award was well below the $300,000 statutory cap showed it was reasonable.

Abner v. Kansas City Southern R. Co., 513 F.3d 154, 165, 102 FEP Cases 616 (5th Cir. 2008), affirmed the award of $125,000 in punitive damages to the Title VII and § 1981 racial harassment plaintiffs, although the jury did not award compensatory damages and no back pay was involved. The court reviewed recent decisions, and stated: "We similarly refuse to strike down the jury award here, as it fell well below the cap, and there is no indication that it resulted from jury bias or insufficient evidence of malice."

Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1282–85, 102 FEP Cases 716 (11th Cir. 2008), affirmed the lower court's refusal to order a remittitur on the jury award of $500,000 in punitive damages, on top of the award of $27,160.59 in back pay and $27,160.59 in damages for mental anguish for the Title VII and § 1981 retaliation plaintiff.

> One factor that suggests that the misconduct of Bagby Elevator was reprehensible is that Goldsmith suffered both economic harm and emotional and psychological harm. Goldsmith's relationships with his family suffered, he attended counseling after his termination, and his termination made him feel "hurt" and "upset." . . . The record also establishes that Goldsmith was financially vulnerable and had to borrow money after he was terminated.
>
> Another factor that suggests that the misconduct of Bagby Elevator was reprehensible is that Bagby Elevator engaged in a pattern of retaliatory and discriminatory misconduct. Three other employees who had filed EEOC charges or complained about racial slurs were terminated before Goldsmith. There also was substantial evidence, as discussed above, that Bagby Elevator engaged in a pattern of reckless indifference to its employees' federal rights.

Id. at 1283. The court also rejected defendant's argument that the 9.2-to-1 ratio of punitive to compensatory damages (including back pay) was excessive. The court stated that a higher ratio could also have been upheld. It noted that Bagby had 150 employees, and a Title VII damages cap of $100,000. It held that "an award of five times that amount is not excessive." *Id.* at 1284.

J. 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).

Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1291–92, 102 FEP Cases 716 (11th Cir. 2008), affirmed the lower court's award of approximately $160,000 in fees to the successful Title VII and § 1981 retaliation plaintiff, who recovered $500,000 in punitive damages, $27,160.59 in back pay, and $27,160.59 in damages for mental anguish. The court held that the lower court did not abuse its discretion in declining to reduce the award because plaintiff had lost approximately half the issues. The court stated at 1292:

> The district court did not abuse its discretion. A review of the record establishes that evidence supporting Goldsmith's successful claim of retaliation was inextricably intertwined with evidence supporting his unsuccessful claims, and the punitive damages award was supported by evidence underlying the unsuccessful claims. The "me too" evidence was admissible both as evidence of the intent of Bagby Elevator to retaliate against Goldsmith and as evidence of Goldsmith's hostile work environment claim. The evidence regarding Goldsmith's failure to promote claim provided the basis for Goldsmith's first EEOC charge, which was in turn necessary for Goldsmith to prove his claim of retaliation. The evidence regarding the EEOC investigation and cause determination supported all of Goldsmith's claims. Because Goldsmith's successful claim of retaliation was related to his unsuccessful claims and he "won substantial relief," we conclude that the refusal of the district court to reduce the amount of attorney's fees and costs was not an abuse of discretion.

K. Costs

Little v. Mitsubishi Motors North America, Inc., 514 F.3d 699, 102 FEP Cases 977 (7th Cir. 2008) (*per curiam*), affirmed the lower court's award under 28 U.S.C. § 1920 of the costs of both video-taping and stenographically transcribing depositions. The court also held that the costs of computerized research were recoverable under § 1920.

VII. Taxes

1. 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.

VIII. Appellate Tips for Effective Advocacy

Garg v. Potter, 521 F.3d 731, 736-37, 20 AD Cases 705 (**7th Cir.** 2008), affirmed the grant of summary judgment to the Rehabilitation Act defendant U.S. Postal Service because plaintiff did not perform the essential functions of her job even with reasonable accommodation. The court held that plaintiff waived any argument that the accommodations afforded her were not reasonable, because her entire brief on appeal was devoted to arguing that she was disabled, and she did not address the reasonableness of the accommodations.