Florida Bar
Advanced Labor Topics Seminar
Key West, Florida
April 30, 2004

Selected Topics in Evidence for Federal-Court Employment Cases

by

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I am grateful to my former firm, Lieff, Cabraser, Heimann & Bernstein LLP, for the assistance needed to prepare this paper. LCHB's web site is www.lchb.com.

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A. Evidence Considerations Under the Inferential Model

1. Recent Relevant Supreme Court Non-EEO Cases

United States v. Arvizu, __ **U.S.** __, 122 S. Ct. 744 (2002), a Fourth Amendment case, follows *Reeves v. Sanderson Plumbing Products, Inc.*, 530 **U.S.** 133, 82 FEP Cases 1748, 78 E.P.D. ¶ 40,045 (2000). In both cases, the Court rejected the approach of some lower courts in segmenting evidence when a determination is supposed to be made in light of all the evidence. In *Arvizu*, the Ninth Circuit considered in isolation each circumstance that led to the stop, and rejected it if the court could conceive of a possible innocent explanation. The same often occurs in appellate review of employment discrimination summary judgments. In *Arvizu*, the Court stated:

> We think that the approach taken by the Court of Appeals here departs sharply from the teachings of these cases. The court's evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the "totality of the circumstances," as our cases have understood that phrase. The court appeared to believe that each observation by Stoddard that was by itself readily susceptible to an innocent explanation was entitled to "no weight." . . . *Terry*, however, precludes this sort of divide-and-conquer analysis. The officer in *Terry* observed the petitioner and his companions repeatedly walk back and forth, look into a store window, and confer with one another. Although each of the series of acts was "perhaps innocent in itself," we held that, taken together, they "warranted further investigation."

Id. at 751 (citations omitted.) The Court recognized that the Ninth Circuit was attempting to provide more uniform guidance, but held that it went too far:

> But the Court of Appeals' approach would go considerably beyond the reasoning of *Ornelas* and seriously undercut the "totality of the circumstances" principle which governs the existence *vel non* of "reasonable suspicion." Take, for example, the court's positions that respondent's deceleration could not be considered because "slowing down after spotting a law enforcement vehicle is an entirely normal response that is in no way indicative of criminal activity" and that his failure to acknowledge Stoddard's presence provided no support because there were "no 'special circumstances' rendering 'innocent avoidance . . . improbable.' " . . . We think it quite reasonable that a driver's slowing down, stiffening of posture, and failure to acknowledge a sighted law enforcement officer might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona). Stoddard was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants. . . . To the extent that a totality of the circumstances approach may render appellate review less circumscribed by precedent than otherwise, it is the nature of the totality rule.

Id. at 752 (emphasis supplied). Bright-line tests of isolated factors, such as the "same actor" inference in some Circuits, the ten-year minimum age rule in the Seventh Circuit, the universal-and-exclusive approach to retaliation cases in the Seventh Circuit, and the like, have no place under *Arvizu*.

Miller-El v. Cockrell, __ **U.S.** __, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003), reversed the Fifth Circuit's denial of a certificate of appealability ("COA") from the denial of habeas corpus that had been sought on a *Batson* challenge to the prosecutor's striking of 10 of 11 African-American potential jurors. The standard was whether petitioner demonstrated "'that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" The Court cited *Reeves*. It relied in part on comparative evidence, buttressed by other evidence:

> A comparative analysis of the venire members demonstrates that African-Americans were excluded from petitioner's jury in a ratio significantly higher than Caucasians were. Of the 108 possible jurors reviewed by the prosecution and defense, 20 were African-American. Nine of them were excused for cause or by agreement of the parties. Of the 11 African-American jurors remaining, however, all but 1 were excluded by peremptory strikes exercised by the prosecutors. On this basis 91% of the eligible black jurors were removed by peremptory strikes. In contrast the prosecutors used their peremptory strikes against just 13% (4 out of 31) of the eligible nonblack prospective jurors qualified to serve on petitioner's jury.
>
> These numbers, while relevant, are not petitioner's whole case. During *voir dire*, the prosecution questioned venire members as to their views concerning the death penalty and their willingness to serve on a capital case. Responses that disclosed reluctance or hesitation to impose capital punishment were cited as a justification for striking a potential juror for cause or by peremptory challenge. . . . The evidence suggests, however, that the manner in which members of the venire were questioned varied by race. To the extent a divergence in responses can be attributed to the racially disparate mode of examination, it is relevant to our inquiry.
>
> Most African-Americans (53%, or 8 out of 15) were first given a detailed description of the mechanics of an execution in Texas:
>
> > "[I]f those three [sentencing] questions are answered yes, at some point[,] Thomas Joe Miller-El will be taken to Huntsville, Texas. He will be placed on death row and at some time will be taken to the death house where he will be strapped on a gurney, an IV put into his arm and he will be injected with a substance that will cause his death … as the result of the verdict in this case if those three questions are answered yes." App. 215.

Only then were these African-American venire members asked whether they could render a decision leading to a sentence of death. Very few prospective white jurors (6%, or 3 out of 49) were given this preface prior to being asked for their views on capital punishment. Rather, all but three were questioned in vague terms: "Would you share with us … your personal feelings, if you could, in your own words how you do feel about the death penalty and capital punishment and secondly, do you feel you could serve on this type of a jury and actually render a decision that would result in the death of the Defendant in this case based on the evidence? " *Id.*, at 506.

The Court cited *Reeves*. It relied in part on simple statistics, buttressed by other evidence:

> A comparative analysis of the venire members demonstrates that African-Americans were excluded from petitioner's jury in a ratio significantly higher than Caucasians were. Of the 108 possible jurors reviewed by the prosecution and defense, 20 were African-American. Nine of them were excused for cause or by agreement of the parties. Of the 11 African-American jurors remaining, however, all but 1 were excluded by peremptory strikes exercised by the prosecutors. On this basis 91% of the eligible black jurors were removed by peremptory strikes. In contrast the prosecutors used their peremptory strikes against just 13% (4 out of 31) of the eligible nonblack prospective jurors qualified to serve on petitioner's jury.

The court again relied on simple statistics later in its decision:

> There was an even more pronounced difference, on the apparent basis of race, in the manner the prosecutors questioned members of the venire about their willingness to impose the minimum sentence for murder. Under Texas law at the time of petitioner's trial, an unwillingness to do so warranted removal for cause. . . . This strategy normally is used by the defense to weed out pro-state members of the venire, but, ironically, the prosecution employed it here. The prosecutors first identified the statutory minimum sentence of five years' imprisonment to 34 out of 36 (94%) white venire members, and only then asked: "If you hear a case, to your way of thinking [that] calls for and warrants and justifies five years, you'll give it?" App. 509. In contrast, only 1 out of 8 (12.5%) African-American prospective jurors were informed of the statutory minimum before being asked what minimum sentence they would impose.

The Court cited *Reeves*. It held that a 1968 racially biased statement contained in an official manual was probative of racial bias in the 1986 peremptory challenges:

> Of more importance, the defense presented evidence that the District Attorney's Office had adopted a formal policy to exclude minorities from jury service. A 1963 circular by the District Attorney's Office instructed its prosecutors to exercise peremptory strikes against minorities: "'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'" App. 710. A manual entitled "Jury Selection in a Criminal Case" was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller-El's trial. *Id.*, at 749, 774, 783.

The court also relied on other old evidence of biased statements:

> A Dallas County district judge testified that, when he had served in the District Attorney's Office from the late-1950's to early-1960's, his superior warned him that he would be fired if he permitted any African-Americans to serve on a jury. Similarly, another Dallas County district judge and former assistant district attorney from 1976 to

1978 testified that he believed the office had a systematic policy of excluding African-Americans from juries.

2. Innocent Explanations for Pretextual Explanations

Brown v. Packaging Corp. of America, 338 F.3d 586, 92 FEP Cases 522 (**6th Cir.** 2003), affirmed judgment on a jury verdict for the ADEA defendant. The court observed that the defendant's asserted true reasons for the plaintiff's non-selection for Temporary Foreman—his conviction for arson for burning down his own house, and his bringing a nude photograph of his wife into the workplace in violation of the sexual harassment policy—were not given to the plaintiff or to the EEOC, but that this was explained to the jury as the result of the employer's desire not to embarrass and humiliate the plaintiff.

Neal v. Roche, 349 F.3d 1246, 92 FEP Cases 1601 (**10th Cir.** 2003), affirmed the grant of summary judgment to the Title VII defendant, holding that plaintiff had shown the defendant's explanation for her non-selection for a job to be pretextual, but that she had also shown it was nondiscriminatory, having been intended to shield a white employee from layoff.

3. Subjective Explanations

Chambers v. Metropolitan Property and Cas. Ins. Co., 351 F.3d 848, 855, 92 FEP Cases 1739 (**8th Cir.** 2003), affirmed the grant of summary judgment to the ADEA RIF defendant and upheld as not pretextual defendant's subjective explanation for some positions that plaintiff had too aggressive a style for the position in question, and its subjective determinations of relative qualifications. The court rejected plaintiff's general attack on the adequacy of subjective explanations, and stated that there was no evidence of fabrication of any explanation:

> In this case, Chambers had more years of experience than the younger candidates because he had been working in the insurance business longer, but otherwise, there was no overall objective disparity in the candidates' qualifications. We cannot say, as in *McCullough*, that an inference of discrimination arises because the employer chose a clearly less qualified or unqualified individual on the basis of subjective considerations alone. Here, the objective qualifications of the candidates were comparable, and the employer offered a legitimate business consideration to justify the use of the subjective criteria of which personality was a better fit for the job or the existing team. The use of this subjective consideration in this case does not give rise to an inference of discrimination because the plaintiff was unable to cast doubt on the justifications offered by the employer. "[I]t is not the role of this court to sit as a super-personnel department to second guess the wisdom of a business's personnel decisions."

Id. at 858.

B. Evidence Considerations Under Mixed Motives Analysis

1. *Desert Palace v. Costa*

Desert Palace, Inc. v. Costa, 539 **U.S.** 90, 123 S. Ct. 2148, 91 FEP Cases 1569 (2003), unanimously affirmed the Ninth Circuit, cited *Reeves*, and held that § 703(m) of the Civil Rights

Act of 1964, added by the Civil Rights Act of 1991, allows plaintiffs to obtain mixed-motives analysis if they show that race, color, national origin, sex, or religion was one of the factors motivating the challenged decision. The Court held that circumstantial evidence is sufficient, and is not disfavored in employment discrimination cases. This decision will make mixed-motives analysis available generally in intentional-discrimination cases, and will eliminate the requirement that plaintiffs show pretext as to each nondiscriminatory reason proffered by a defendant. It will make it harder for defendants to obtain summary judgment, but may give defendants two bites at the apple in the minds of jurors. It is critical for plaintiffs to emphasize deceit, in cases in which defendant has misrepresented its reasons to the plaintiff, to co-workers, to enforcement agencies, or to the courts. The Court did not address the critical question whether defendants as well as plaintiffs can trigger mixed-motives analysis. Plaintiffs will argue that they are the masters of their own cases, and that defendants cannot be allowed to transform their cases into something they did not intend. A lot of litigation lies in store. Finally, *Price Waterhouse* remains the standard for types of claims not covered by § 703(m).

2. Application of *Desert Palace* in the District Courts

Dunbar v. Pepsi-Cola General Bottlers of Iowa, Inc., 285 F.Supp.2d 1180, 92 FEP Cases 1424 (**N.D. Iowa** 2003), granted in part and denied in part defendant's motion for summary judgment. The court stated at 1197–98:

> Thus, the *McDonnell Douglas* burden-shifting paradigm must only be *modified* in light of *Desert Palace*, § 2000e-2(m), and *only in its final stage*, so that it is framed in terms of whether the plaintiff can meet his or her "ultimate burden" to prove intentional discrimination, rather than in terms of whether the plaintiff can prove "pretext." Under such a modified framework, to prevail after the defendant produces a legitimate, nondiscriminatory reason for its conduct, the plaintiff must prove by the preponderance of the evidence either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative) . . . or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another "motivating factor" is the plaintiff's protected characteristic (mixed-motive alternative). . . . The latter showing may be made with either "direct" or "circumstantial" evidence. . . . If the plaintiff prevails under the second alternative, then if the defendant is to limit the remedies available to the plaintiff to injunctive relief, attorney's fees, and costs—i.e., to escape liability for damages—the burden shifts back to the defendant to prove the affirmative defense stated in § 2000e-5(g)(2)(B), which is that the defendant "would have taken the same action in the absence of the impermissible motivating factor."

(Citations and footnote omitted; emphases in original.)

Dare v. Wal-Mart Stores, Inc., 267 F.Supp.2d 987, 991–92 (**D. Minn.** 2003), held that *Desert Palace* effectively abolished the *McDonnell Douglas* approach in all cases. The court stated at 991: "The dichotomy produced by the *McDonnell Douglas* framework is a false one. In practice, few employment decisions are made solely on basis of one rationale to the exclusion of all others. Instead, most employment decisions are the result of the interaction of various factors, legitimate and at times illegitimate, objective and subjective, rational and irrational." It held that the "same decision" test would work best in all cases.

Skomsky v. Speedway SuperAmerica, L.L.C., 267 F.Supp.2d 995, 1000, 14 AD Cases 910 (**D. Minn.** 2003), held that plaintiff pleaded a mixed-motives case by initially pursuing claims under the ADEA as well as under the ADA.

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

Estades-Negroni v. Associates Corp. of North America, 345 F.3d 25, 14 AD Cases 1478 (**1st Cir.** 2003), *leave to file for rehearing denied*, __ F.3d __, 2004 WL 243807 (**1st Cir.** Feb. 10, 2004), affirmed the grant of summary judgment to the ADEA, ADA, and Puerto Rican law defendant. Without discussion, the court considered *Desert Palace* in conjunction with plaintiff's ADEA claim, and held that it made no difference.

Hill v. Lockheed Martin Logistics Management, Inc., 354 F.3d 277, 285 n.2, 93 FEP Cases 1 (**4th Cir.** 2004) (*en banc*), affirmed the grant of summary judgment to the Title VII and ADEA defendant. The court assumed without deciding that the *Price Waterhouse* burden-shifting model still applies to ADEA cases, but held the evidence insufficient under either the § 703(m) model or the *Price Waterhouse* model. *Accord*, *Mereish v. Walker*, __ F.3d __, 2004 WL 318471 (**4th Cir.** Feb. 20, 2004) at *8 ("And maintaining the higher evidentiary burden in Price Waterhouse for ADEA claims is not implausible, given that age is often correlated with perfectly legitimate, non- discriminatory employment decisions."); *Trammel v. Simmons First Bank of Searcy*, 345 F.3d 611, 615, 92 FEP Cases 1061 (**8th Cir.** 2003) ("But even if we assume, without deciding, that the holding in *Costa* applies to ADEA claims, we do not believe that this helps Mr. Trammel because he has presented insufficient evidence to support a finding that his age was a 'motivating factor' in the decision to discharge him.").

Hedrick v. Western Reserve Care System, 355 F.3d 444, 454, 15 AD Cases 1 (**6th Cir.** 2004), affirmed the grant of summary judgment to the ADA defendant, and held that mixed-motives analysis is not available for ADA claims.

Peebles v. Potter, 354 F.3d 761, 767 n.5, 15 AD Cases 146 (8th Cir. 2004), affirmed the grant of summary judgment to the Rehabilitation Act defendant. The court stated that plaintiffs are required by the language of the Act to show that the challenged action was motivated solely by the disability.

C. Evidence Considerations Relating to Comparators

Hill v. Lockheed Martin Logistics Management, Inc., 354 F.3d 277, 295–96, 93 FEP Cases 1 (**4th Cir.** 2004) (*en banc*), affirmed the grant of summary judgment to the Title VII and ADEA defendant. The court relied in part on the fact that Safety Inspector Fultz, the only person allegedly harboring a discriminatory animus against the plaintiff, had written up male employees and that one of the males had been suspended.

Bryant v. Aiken Regional Medical Centers Inc., 333 F.3d 536, 545–46, 92 FEP Cases 233 (**4th Cir.** 2003), *cert. denied*, __ **U.S.** __, 124 S. Ct. 1048 (2004), affirmed the judgment for the Title VII and § 1981 plaintiff on a jury verdict, rejecting defendant's argument that plaintiff's claim must fail for lack of evidence of a white comparator. The court stated: "Bryant is not required as a matter of law to point to a similarly situated white comparator in order to succeed on a race discrimination claim. . . . We would never hold, for example, that an employer who

categorically refused to hire black applicants would be insulated from judicial review because no white applicant had happened to apply for a position during the time frame in question. . . . However helpful a showing of a white comparator may be to proving a discrimination claim, it is not a necessary element of such a claim." (Citation omitted.) The court also held that the jury was not required to find for defendant because of defendant's comparators: "But neither employee relied upon by ARMC here was situated similarly to Bryant. One of the applicants was not hired until several months after Bryant filed charges of racial discrimination with the EEOC. The other applicant was only hired for a part- time position. Neither hiring sufficiently rebuts the inference of discrimination to the point that no reasonable jury could have found in Bryant's favor." *Id.* at 546.

Marquez v. Bridgestone/Firestone, Inc., 353 F.3d 1037, 1038, 93 FDEP Cases 92 (**8th Cir.** 2004) (*per curiam*), affirmed the grant of summary judgment to defendant on plaintiff's claims of discriminatory discipline because there was no evidence that she was treated differently than similarly situated employees who were not Laotian. "To show that other employees were similarly situated, Marquez was required to point to individuals who 'have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances.' *Clark v. Runyon*, 218 F.3d 915, 918 (**8th Cir.** 2000)."

Joens v. John Morrell & Co., 354 F.3d 938, 941–42, 93 FEP Cases 72 (**8th Cir.** 2004), affirmed the grant of summary judgment to the Title VII hostile-environment defendant, holding that plaintiff had not shown any sex-based difference in treatment by a male co-worker who shouted at her to demand more boxes for his department, and not at a male employee under her supervision, where she was the person who ran the box-making machine and decided which type of boxes to make. The court rejected plaintiff's argument that the co-worker did not yell at the male night-shift box machine operator, because there was no evidence that the co-worker had ever been assigned to the night shift.

D. Comparative Qualifications and Evidence Bearing on Employee Performance

Thomas v. Eastman Kodak Co., 183 F.3d 38, 62–63, 80 FEP Cases 537 (**1st Cir.** 1999), *cert. denied*, 528 **U.S.** 1161 (2000), reversed the grant of summary judgment to the Title VII racial discrimination defendant, relying substantially on comparative evidence. The court held that the lower court erred when it insisted on some evidence pointing specifically to the unlawful motivation, *id.* at 56– 58, and stated that "discrimination, rarely explicit and thus rarely the subject of direct evidence, may be proven through the elimination of other plausible non-discriminatory reasons until the most plausible reason remaining is discrimination." *Id.* at 61 (citation omitted). The plaintiff was black, and had worked for the defendant for 19 years prior to her layoff in 1993. For the 13 years preceding her layoff, she worked as a Customer Service Representative ("CSR") in the Wellesley, Massachusetts, office. She received stellar evaluations, and had strong positive feedback from the customers she serviced. All of this came to an end in 1989 when Claire Flannery, a secretary who had previously worked as a CSR, was selected over the plaintiff to fill the new Customer Support Manager position. The plaintiff's appraisals became far lower, and Flannery did everything conceivable to undermine the plaintiff with management, other staff members, and customers. Because of the ratings, the plaintiff was

selected for layoff in 1993. *Id.* at 43–46. The lower court found that a reasonable jury could determine that the appraisal scores were objectively unfair or were skewed against the plaintiff, *i.e.*, that they were pretextual, and the court of appeals agreed. *Id.* at 57. The court stated that the drop in the plaintiff's ratings after Flannery became her supervisor was not due to Flannery's simply being a tough grader, because Flannery gave very high grades to others. *Id.* at 62. Nor could the three-point drop be explained by the plaintiff's promotion to a higher grade in 1989, as Kodak claimed, because one other promotee had a one-point drop and the other had a one-point increase, and because other supervisors denied the existence of Kodak's claimed rule. *Id.* The court observed that the scores for "quantity of results" involved an objectively verifiable category, and the plaintiff showed a disparity of treatment. "In 1990, for instance, Thomas received only a 3 for quantity of results—a below average score—for managing 730 machines and 110 installations, while another CSR, also in the K6 grade, received a 5 for quantity in 1991 for managing far fewer machines (504) and fewer installations (81)." *Id.* at 62–63. The court rejected the company's explanation for this disparity as relevant to persuading the jury, but not enough to render the comparison meaningless for purposes of summary judgment. *Id.* at 63.

Koster v. Trans World Airlines, Inc., 181 F.3d 24, 31–32, 80 FEP Cases 343 (**1st Cir.**), *cert. denied*, 528 **U.S.** 1021 (1999), an age discrimination case under Massachusetts law applying the standards of the three-part *McDonnell Douglas* approach, affirmed the judgment on liability for the plaintiff, based on the jury verdict. The court relied heavily on the plaintiff's comparative evidence as to Robert Spencer (then 48), who was also selected for the RIF, and Robinanne Stancavage (then 25), who was retained:

> After comparing the qualifications of Koster and Stancavage, there is abundant evidence supporting the conclusion that a reasonable employer would have found Koster significantly more qualified than Stancavage, a twenty-five year old employee with three months of supervisory experience. The jury could also reasonably conclude that Koster fit the selection criteria established by Humpherys and that Stancavage did not. Koster obviously made a long-term commitment to working for TWA, while evidence suggested that Stancavage planned to work for TWA until she returned to school. "[A]n employer's asserted strong reliance on subjective feelings about candidates may mask discrimination." . . . That three of the four retained supervisors were in the protected age class is of little importance because Koster need only show that TWA furloughed him because of his age.

Id. at 31–32 (citations omitted).

Carlton v. Mystic Transportation, Inc., 202 F.3d 129, 136, 81 FEP Cases 1449 (**2d Cir.**), *cert. denied*, 530 **U.S.** 1261 (2000), found that the plaintiff had produced adequate evidence of pretext, and reversed the grant of summary judgment to the ADEA RIF defendant. The defendant's explanation for firing the plaintiff was that a decline in business required a RIF, and that his job performance was poor. The court found problems with the RIF explanation, in part because the plaintiff was replaced three months after the RIF with a person who was 25 years younger, and in part because of their comparative salaries. "And, defendant achieved relatively insignificant savings as a result of Carlton's termination. While Carlton had received $57,200 per year, Oravets was paid $46,800 per year. All of which suggests that perhaps some other motive—beyond the company's finances—motivated Carlton's dismissal." In addition, the court

found evidence of pretext in the company's failure to produce documentation of the poor performance, particularly in light of objective evidence of good performance and comparative evidence that such documentation should exist if the plaintiff's performance was truly poor:

> We think there is evidence of inconsistency in defendant's handling of supposedly underperforming employees. For example, when Oravets was terminated from his first term of employment with Mystic in 1993, the employer filled out a pre-printed form that stated that Oravets' termination was for "insubordination." No such form exists for Carlton. Again, when Oravets was performing poorly during his prior term of employment, his salary was reduced. If Carlton's performance had declined, as defendant insists, it seems surprising that there was no contemporaneous proof of that fact.

Id. (citation omitted).

Banks v. Travelers Companies, 180 F.3d 358, 362, 80 FEP Cases 30 (**2d Cir.** 1999), affirmed the judgment of liability on a jury verdict in favor of the ADEA plaintiff. The court stated that the decisionmaker purported to follow "a methodical process of meetings and evaluations," called a "'staff adjustment' process," to determine whether to lay off the plaintiff or a younger employee, Dvorachek, in January 1994. The court stated that there was evidence from which the jury could have inferred that the process was a sham and that Dvorachek had been preselected. Part of that evidence was the plaintiff's superior qualifications. "In addition, the jury could have reasonably concluded from Banks's more extensive work experience and seniority, as well as from an earlier performance evaluation, that she was the better qualified candidate." (Footnote omitted.)

Corti v. Storage Technology Corp., 304 F.3d 336, 338–39, 89 FEP Cases 1477 (**4th Cir.** 2002), affirmed the judgment on a jury verdict for plaintiff, in the amount of $410,974.63 in back pay and prejudgment interest, and $100,000 in punitive damages. The court relied in part on evidence that the plaintiff was a top-ranked Financial Services Manager but was nevertheless selected for demotion in the RIF, and ultimate termination, while males who had never even met their quotas without special relief were retained.

Thomas v. Texas Department of Criminal Justice, 220 F.3d 389, 393–94, 83 FEP Cases 1081 (**5th Cir.** 2000), affirmed the judgment of liability on a jury verdict for the Title VII race and gender discrimination plaintiff. The plaintiff was a black woman who was denied promotion to Captain despite meeting all of the requirements for the position and presenting the testimony of correctional officers as to the excellence of her record. The court found plaintiff's comparative and other evidence sufficient to overcome the defendant's explanation:

> TDCJ argues that Thomas was less qualified because the three white males promoted all had more mid-level supervisory experience, and gave better answers at the interview. Thomas presented counter evidence showing that one of the officers who was ultimately promoted represented on his application that he had only 18 hours of college credits, and the minimum qualifications stated that 30 hours of college credit were required. One of the other officers who was ultimately promoted stated on his application that he had 38 hours of college credit, and his transcript ultimately showed he had completed only 32

> hours. Therefore, although we acknowledge that there was conflicting evidence presented to the jury regarding TDCJ's failure to promote Thomas, ultimately we conclude that Thomas presented evidence of sufficient force and persuasiveness to allow a reasonable juror to conclude that TDCJ engaged in gender and racial discrimination.

Id. (footnote omitted).

Vance v. Union Planters Corp., 209 F.3d 438, 442, 82 FEP Cases 1199 (**5th Cir.** 2000), affirmed the judgment of liability on the jury verdict for the female Title VII gender discrimination plaintiff, who had not been selected for the position of branch bank president. The court relied in part on the fact that the decisionmaker had pursued a series of male candidates but not the plaintiff, where a number of male candidates had recommended the plaintiff as the best qualified person and where the plaintiff was the only viable candidate. The court held that the jury was entitled to find discrimination where the evidence showed that the decisionmaker was "less than diligent" in checking the credentials of the male he recruited and selected, and failed to follow up on the plaintiff's glowing recommendations. *Id.* at 443. The evidence of gender-biased statements is described in more detail in Chapter 17 (Direct Proof and Stray Remarks), in Part B (Explanations of the Standard Used to Decide If a Statement or Other Evidence is "Direct Proof" or a "Stray Remark"). The court held that the jury was entitled to credit evidence "that Vance's administrative skills were at least as strong as" the male candidate's, and was entitled to infer from the selectee's recent demotion from an administrative job that his administrative skills did not motivate the decisionmaker to select him. *Id.* at 444.

Rutherford v. Harris County, 197 F.3d 173, 181–82, 81 FEP Cases 1775 (**5th Cir.** 1999), affirmed the judgment on a jury verdict for the Title VII gender discrimination plaintiff on her promotional claim, affirmed the denial of judgment as a matter of law for the defendant, and affirmed the denial of a new trial, based in part on evidence that the plaintiff's qualifications were superior to those of Remon Green, the male employee who received the promotion to a full-time position as Deputy Constable. The court held that the usual rule—restricting courts from analyzing the comparative qualifications of candidates unless the plaintiff is so clearly superior that the difference in qualifications "'are so apparent as virtually to jump off the page and slap us in the face'"—did not apply because the defendant never compared the qualifications of the candidates. *Id.* at 182 n.9. This aspect of the decision is discussed in Chapter 14 (The *McDonnell Douglas* / *Burdine* / *Hicks* Model), Part G, in the section on "Comparative Qualifications of the Plaintiff." The plaintiff showed the existence of the opening, that seniority strongly influenced promotional decisions, and that she had trained Green on some aspects of the job. The court described the plaintiff's superior qualifications:

> Green was junior in seniority to Rutherford and Tesma Walker ("Deputy Walker"), both females. At the time he was promoted, he was a civilian employee working as a radio dispatcher. He had significantly less training and field experience in traffic safety than did Rutherford. Rutherford had worked strictly on traffic safety as a reserve deputy. Green did not train in traffic safety. As a radio dispatcher, Green learned radio codes, but this knowledge did not take long to acquire and provided no benefit in working the streets as a traffic safety deputy. Rutherford had become familiar with the streets and addresses in her patrol area. She had also received training in the Intoxilyzer, radar certification, ticketing, accident reconstruction, and field sobriety. She had taught

Green how to write tickets. Green had some experience as a reserve deputy in making traffic stops and also had experience patrolling county parks, but so did Rutherford. Most of the classes that Green had taken before becoming a full-time deputy were related to communications, not traffic safety. He had not taken courses in the Intoxilyzer, field sobriety, pedestrian and bicycle accident reconstruction, or radar.

Casarez v. Burlington Northern/Santa Fe Co., 193 F.3d 334, 337–38, 81 FEP Cases 412 (**5th Cir.** 1999), *reh'g denied*, 201 F.3d 383, 81 FEP Cases 1246 (**5th Cir.** 2000), reversed the grant to the defendant of judgment as a matter of law on the plaintiff's discrimination claim, and held that the defendant's proffer of false nondiscriminatory explanations, combined with the plaintiff's "own good work record," were sufficient for a jury to infer the defendant's intent to discriminate. The court went on to state that, even if this were not considered enough, the evidence that the plaintiff was treated differently from similarly situated Caucasian Assistant Superintendents "would likewise satisfy the intent inquiry." *Id.* at 338. The plaintiff was Assistant Superintendent of the North Texas Division, which made him second-in-command. *Id.* at 335. He had received excellent evaluations until his supervisor was replaced by Lewis Rees. The court stated: "he was subjected to multiple instances of being treated differently from similarly situated Caucasian assistant superintendents: he was assigned menial tasks, he was forced to work nights, he was not permitted to leave work until he was relieved by someone else, he was not permitted to take time off to visit his ailing mother in El Paso, he was ostracized from the planning committee for Alliance and from the safety committee, and he was transferred to Zacha Junction where he was isolated from his subordinates." *Id.*

Bell v. E.P.A., 232 F.3d 546, 551–52, 84 FEP Cases 630 (**7th Cir.** 2000), reversed the grant of summary judgment to the Title VII race and national origin promotional discrimination defendant because the plaintiffs' qualifications, compared to those of the selectees, and their statistical showing, would have allowed a reasonable factfinder to infer discrimination.

Adams v. Ameritech Services, Inc., 231 F.3d 414, 429, 84 FEP Cases 178, 25 EB Cases 1101 (**7th Cir.** 2000), reversed the grant of summary judgment to the ADEA RIF defendants, in part because of the plaintiffs' comparative qualifications. "The record was full of objective evidence—far more than the plaintiffs' own evaluations of their performances—suggesting that not only were they doing their jobs well, but (more importantly) that in the comparative ratings that are required in a RIF, they could have survived had the criteria been age-neutral. The size of the merit bonuses and raises the companies paid them is one example of such evidence, as is documentation of employees' job skills, experience and past job performance."

Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 386–87, 82 FEP Cases 550 (**7th Cir.** 2000), reversed the grant of summary judgment to the ADEA RIF defendant on plaintiff Thorn's claim. The 61- year-old plaintiff contract administrator, "whose performance evaluations were uniformly glowing," *id.* at 386, was selected for discharge in a RIF while much younger employees were retained.

Hocevar v. Purdue Frederick Co., 223 F.3d 721, 726–27, 83 FEP Cases 1196 (**8th Cir.** 2000), reversed the grant of summary judgment to the defendant on the plaintiff's retaliation claim. In finding sufficient evidence of causation, Judges Lay and Gibson relied in part on the fact that the decisionmaker had previously imposed—only on the plaintiff, who was a top

producer—the requirement that she call him every day with a special report about her sales calls, and relied in part on a witness statement describing a pattern in which employees who complain eventually are gone from the organization.

Juarez v. ACS Government Solutions Group, Inc., 314 F.3d 1243, 90 FEP Cases 1104 (**10th Cir.** 2003), affirmed the judgment for the plaintiff in the amounts of $22,500 in back pay and $250,000 in punitive damages for racial and national origin discrimination in a RIF. The court relied in part on comparative evidence: "Appellee presented evidence that ACS had retained non-Hispanic computer operators with less experience and tenure than Appellee and who had lower recent performance evaluations." *Id.* at 1245. "Appellee introduced evidence that ACS retained two computer operators that were frequently tardy or absent and one that slept on the job. Appellee also introduced evidence that a retained computer operator was drinking on the job." *Id.* at 1246.

Dodoo v. Seagate Technology, Inc., 235 F.3d 522, 527, 84 FEP Cases 933 (**10th Cir.** 2000), affirmed the judgment on a jury verdict for the ADEA and Title VII plaintiff as to a promotion to a Program Manager position. The court held that the jury was entitled to infer that plaintiff was more qualified than the person selected, David Koelsch, because plaintiff had 16 years' experience compared to Koelsch's two months.

Tyler v. RE/MAX Mountain States, Inc., 232 F.3d 808, 815–16 (**10th Cir.** 2000), affirmed the judgment on a jury verdict for the § 1981 and 42 U.S.C. § 3601 plaintiff real estate broker on his claim that defendant discriminatorily failed to accept his application for a franchise. The court held that the jury could reasonably reject as pretextual the defendant's statement that it was concerned over his lack of sales associates, where it granted a franchise to the Coopers, who had no real estate agents of staff at the time they applied, and "who RE/MAX admitted were similarly situated applicants." *Id.* at 815 n.8. Moreover, Mr. Tyler and his daughter were both licensed agents.

Durley v. APAC, Inc., 236 F.3d 651, 656–57, 84 FEP Cases 1177 (**11th Cir.** 2000), reversed the grant of summary judgment to the Title VII gender discrimination defendant, holding that the jury could reasonably find discrimination from evidence of the plaintiff's superior qualifications for the job of Purchasing Agent, evidence that the defendant had falsely denied the existence of a job description prior to the EEOC's request for the description, and evidence that it had provided the EEOC with a job description that boosted the relative qualifications of the person selected. The court relied in part on plaintiff's superior qualifications for the position of Purchasing Agent, compared to Jeff Warnock, the person selected. "Durley presented evidence that she was qualified for the position and that Bair considered her to be familiar with 85% of the duties of the Purchasing Agent. Deposition testimony also demonstrated that Warnock had no formal administrative or purchasing experience. Indeed, Durley testified in her deposition that she assisted in training Warnock after Bair retired. A reasonable jury could conclude that Durley was more qualified to handle the administrative and purchasing duties performed by the Purchasing Agent." *Id.* at 656. The court held that a jury could also infer that the defendant's new job description, prepared in response to a request from the EEOC, was not a fair description of the job and was a pretext for discrimination because it assumed that the incumbent would perform shipping and receiving

duties, in which Warnock but not Durley had had experience, and a shipping/receiving clerk was hired after Warnock was promoted. *Id.* at 656–57.

Beaver v. Rayonier, Inc., 200 F.3d 723, 729 (**11th Cir.** 1999), *cert. dismissed*, 529 **U.S.** 1095 (2000), affirmed the judgment on a jury verdict for the ADEA plaintiff, holding that the defendant denied the plaintiff vacant supervisory positions for which he was qualified and had applied at the time of the RIF. The court stated: "At the trial, Beaver and three of his co-workers at the mill testified that based on their familiarity with Beaver's extensive experience throughout the mill, the duties of the available positions, and the experience of the six younger employees who were selected for the vacant positions instead of him, Beaver was more qualified than each of those employees."

E. Judicial Representation as to Comparators at SJ is Binding at Trial

Williams v. Trader Publishing Co., 218 F.3d 481, 484–85, 83 FEP Cases 668 (**5th Cir.** 2000), affirmed the judgment on liability for the Title VII gender discrimination plaintiff. The court rejected the defendant's argument that evidence of plaintiff's comparators should not have been allowed at trial inasmuch as they were not nearly identical to the plaintiff's situation. The court pointed out that the defendant had relied on the same comparators for other purposes in its motion for summary judgment, and stated:

> Evidence may only be introduced at the summary judgment phase of a trial if the evidence would be admissible at trial. See Fed. R. Civ. P. 56(e) ("Supporting and opposing affidavits . . . shall set forth such facts as would be admissible in evidence"). Thus, by introducing the evidence relating to these male employees, Trader took the position before the district court that the evidence would be relevant and admissible at trial to show its parity of treatment of employees of both genders.

Id. at 485. The comparative evidence showed sexually disparate patterns of discipline and discharge. *Id.* at 483–84.

F. Statistics

Smith v. City of Jackson, 351 F.3d 183, 197 n.15, 92 FEP Cases 1824 (**5th Cir.** 2003), *petition for cert. filed* (Feb. 11, 2004) (NO. 03–1160), reversed the grant of summary judgment to the ADEA defendant, in part because the lower court did not consider plaintiffs' statistical evidence. The court stated: "Further, the district court here apparently declined, without discussion, to consider any of the plaintiffs' evidence that the plan resulted in a disparity of four standard deviations between workers over forty and workers under forty. Such statistical evidence can be relevant to a claim of intentional discrimination."

Chambers v. Metropolitan Property and Cas. Ins. Co., 351 F.3d 848, 855, 92 FEP Cases 1739 (**8th Cir.** 2003), affirmed the grant of summary judgment to the ADEA RIF defendant and rejected plaintiff's statistical showing: "Chambers presented the additional evidence that he was one of fifteen employees terminated in his division as a result of St. Paul's reduction in force, and thirteen of the fifteen were over the age of 40. This does not raise an inference of discrimination because the entire personal insurance operation was sold, and St. Paul terminated

all persons employed in that area, regardless of age. His statistical evidence is meaningless without some analysis of the age of the entire workforce at St. Paul before and after the reduction in force."

G. Discriminatory Statements

1. Statements by Decisionmakers

Treglia v. Town of Manlius, 313 F.3d 713, 13 AD Cases 1537 (**2d Cir.** 2002), reversed the grant of summary judgment to the ADA retaliation defendant, holding that plaintiff had shown a triable issue of fact as to pretext. Plaintiff was a police officer with high evaluations and on track for promotions when he suffered epileptic seizures for the first time. He was denied promotion although he achieved the highest score on the civil service promotional examination, and two lower-scoring officers were promoted. "When Treglia confronted Chief Carbery about the failure to promote him, the Chief allegedly responded that Treglia had always done a good job but that he would not receive a promotion to sergeant 'now or ever' and that now was a 'good time for him to get out of the business.'" *Id.* at 717. After he filed his charge of discrimination, he was retaliated against in numerous ways, including being subjected to internal investigations and being denied another promotion. *Id.* at 717–18. The court relied on this remark, even though it occurred before the filing of the EEOC charge, because plaintiff's internal complaint was itself a protected activity. *Id.* at 720. "Similarly, Treglia claims that when the Chief heard about Treglia's discrimination charges the Chief told PBA President Mark Buzzard that 'if [Treglia] wants to play hard ball, we can swing the bat back and play hard ball too.'" *Id.* at 721–22. The court held that this statement was relevant even if made in the context of settling a grievance relating to plaintiff, because "it could still be evidence of retaliatory intent given Treglia's claim that the manner in which the discipline was brought and settled was itself retaliatory." *Id.* at 722.

Corti v. Storage Technology Corp., 304 F.3d 336, 338–89, 89 FEP Cases 1477 (**4th Cir.** 2002), affirmed the judgment on a jury verdict for plaintiff, in the amount of $410,974.63 in back pay and prejudgment interest, and $100,000 in punitive damages. The court relied in part on evidence that one of the decisionmakers selecting her for demotion in a RIF and ultimate termination—although on the same level as plaintiff—did not work well with women, did not tell plaintiff about important meetings, told her he was not used to having women as equals, and when part of the team went to play golf, told plaintiff and another female employee "that they should go shopping because golf was a 'guy thing.'"

Wexler v. White's Furniture, 317 F.3d 564, 570–71, 90 FEP Cases 1551 (**6th Cir.** 2003) (*en banc*), reversed the grant of summary judgment to the ADEA defendant. The court held that the following statements reflected the kinds of age stereotypes that Congress enacted the ADEA to stop, and could reasonably be taken as reflecting age bias:

> (1) Schiffman's comment, during the meeting in which Wexler was demoted, "that you're 60 years old, aren't you, Don? . . . [W]ell, we both have been in the business 117 years. You don't need the aggravation, stress of management problems, customer problems, taking care of all these salespeople's problems that keep calling you on the phone all day every day."

(2) Lively's statement, at that same meeting, that White's was "going to really be grinding their managers in the future," making them do tasks that he did not think Wexler would want to be doing.

(3) Schiffman's comment during a telephone conversation with Wexler on June 16, 1997, when he said that he would explain to the other employees why Wexler would no longer be the manager by mentioning "that you're getting older, although not as old as I am."

(4) Schiffman's statement during his announcement of the demotion that Wexler had come to him and said: "I've been in my [sic] management for a bunch of years, and I'm not sure what I want to do. Maybe I should just be worrying about my own customer[s] and not everyone else's customers. This is getting to be tiring."

(5) Schiffman's repeated references, during the same speech, to the youth of Wexler's replacement.

(6) Numerous prior references that Lively made about Wexler's age, including comments such as "a bearded, grumpy old man," "pops," and "old man."

The court relied on these statements in conjunction with other evidence of age discrimination. Judges Krupansky and Boggs dissented. *Id.* at 578–97.

2. Speakers Who Affected, But Did Not Make, the Decision

Burlington Industries, Inc. v. Ellerth, 524 **U.S.** 742, 762–63, 77 FEP Cases 1 (1998), stated:

> A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. *E.g.*, *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (**C.A.7** 1990) (noting that the supervisor did not fire plaintiff; rather, the Career Path Committee did, but the employer was still liable because the Committee functioned as the supervisor's "cat's-paw"). The supervisor often must obtain the imprimatur of the enterprise and use its internal processes. See *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59, 62 (**C.A.2** 1992) ("From the perspective of the employee, the supervisor and the employer merge into a single entity").
>
> For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. Whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate.

Reeves v. Sanderson Plumbing Products, Inc., 530 **U.S.** 133, 152, 82 FEP Cases 1748 (2000), relied on plaintiffs' evidence that Chesnut was the actual decisionmaker even though not the formal decisionmaker.

Hill v. Lockheed Martin Logistics Management, Inc., 354 F.3d 277, 283, 93 FEP Cases 1 (**4th Cir.** 2004) (*en banc*), affirmed the grant of summary judgment to the Title VII and ADEA defendant. Plaintiff had admittedly broken work rules, but argued that the second and third infractions leading to her discharge were only reported to management because of the sexual bias

and retaliatory animus of Safety Inspector Ed Fultz, "as evidenced by his calling her a 'useless old lady' who needed to be retired, a 'troubled old lady,' and a 'damn woman, on several occasions while they were working together." The court stated at 288–89: "In sum, *Reeves* informs us that the person allegedly acting pursuant to a discriminatory animus need not be the 'formal decisionmaker' to impose liability upon an employer for an adverse employment action, so long as the plaintiff presents sufficient evidence to establish that the subordinate was the one 'principally responsible' for, or the 'actual decisionmaker' behind, the action." (Citation omitted.) The court rejected plaintiff's argument that the employer should be liable if the biased subordinate "substantially influences" the decision, and it rejected the EEOC's view that "a subordinate employee substantially influences an employment decision whenever the influence is sufficient to be considered *a* cause of the employment action, even if the formal decisionmaker did not simply rubber-stamp the biased subordinate's recommendation." *Id.* at 289 (emphasis in original). The court discussed the "cat's paw" decisions of some other Circuits. It listed and then limited them:

> Second, we note that, in the wake of *Shager*, our sister circuits have often applied a "cat's paw" or "rubber stamp" theory to determine employer liability for the discriminatory acts and motivations of supervisory employees who do not exercise formal decisionmaking authority. *See e.g., Gee v. Principi,* 289 F.3d 342, 345-47 (5th Cir. 2002); *Christian v. Wal-Mart Stores, Inc.,* 252 F.3d 862, 876-78 (6th Cir. 2001); *Bergene v. Salt River Project Agric. Improvement & Power Dist.,* 272 F.3d 1136, 1141 (9th Cir. 2001); *Abramson v. William Paterson Coll. of New Jersey,* 260 F.3d 265, 285-86 (3d Cir. 2001); *Wascura v. City of South Miami,* 257 F.3d 1238, 1247 (11th Cir. 2001); *Rose v. New York City Bd. of Educ.,* 257 F.3d 156, 162 (2nd Cir. 2001); *Rios v. Rossotti,* 252 F.3d 375, 381-82 (5th Cir. 2001); *English v. Colorado Dep't of Corr.,* 248 F.3d 1002, 1011 (10th Cir. 2001); *Russell v. McKinney Hosp. Venture,* 235 F.3d 219, 226-28 (5th Cir. 2000); *Kendrick v. Penske Transp. Servs., Inc.,* 220 F.3d 1220, 1231 (10th Cir. 2000); *Stimpson v. City of Tuscaloosa,* 186 F.3d 1328, 1331 (11th Cir.1999); *Llampallas v. Mini-Circuits Lab, Inc.,* 163 F.3d 1236, 1249-50 (11th Cir.1998); *Griffin v. Washington Convention Center,* 142 F.3d 1308, 1310-11 (D.C.Cir.1998); *Ercegovich v. Goodyear Tire & Rubber Co.,* 154 F.3d 344, 354-55 (6th Cir.1998); *Eiland v. Trinity Hosp.,* 150 F.3d 747, 752 (7th Cir.1998); *Willis v. Marion County Auditor's Office,* 118 F.3d 542, 547 (7th Cir.1997); *Walden v. Georgia-Pacific Corp.,* 126 F.3d 506, 514-15 (3d Cir.1997); *Long v. Eastfield Coll.,* 88 F.3d 300, 307 (5th Cir.1996); *Stacks v. Southwestern Bell Yellow Pages, Inc.,* 27 F.3d 1316, 1325 (8th Cir.1994). In support of their positions as to how we should approach the issue, the parties have pointed us to various lines in different cases as being supportive of their view of the parameters of the theory. However, our review of the cases leads us to the conclusion that, while the courts often utilize the same terminology as that employed by the *Shager* court, they have not always described the theory in consistent ways, and rarely have they done so after a discussion of the agency principles from which the theory emerged and that limit its application.

Id. at 289–90. The court relied on agency principles and stated its holding:

> To conclude, Title VII and the ADEA do not limit the discrimination inquiry to the actions or statements of formal decisionmakers for the employer. Such a construction

> of those discrimination statutes would thwart the very purposes of the acts by allowing employers to insulate themselves from liability simply by hiding behind the blind approvals, albeit non-biased, of formal decisionmakers. . . . However, we decline to endorse a construction of the discrimination statutes that would allow a biased subordinate who has no supervisory or disciplinary authority and who does not make the final or formal employment decision to become a decisionmaker simply because he had a substantial influence on the ultimate decision or because he has played a role, even a significant one, in the adverse employment decision.
>
> We can discern no precedential or practical basis upon which to depart from the inquiry as articulated and applied by the Supreme Court in *Reeves*—and to expand the contours of the acts—by embracing a test that would impute the discriminatory motivations of subordinate employees having no decisionmaking authority to the employer, and make them agents for purposes of the employment acts, simply because they have influence or even substantial influence in effecting a challenged decision. Regarding adverse employment actions, an employer will be liable not for the improperly motivated person who merely influences the decision, but for the person who in reality makes the decision. This encompasses individuals who may be deemed actual decisionmakers even though they are not formal decisionmakers, such as in *Reeves*, where the husband of the formal decisionmaker wielded absolute power within the company, and in *Shager*, where the supervisor's reports and recommendation were merely rubber-stamped by the formal decisionmaking committee. In sum, to survive summary judgment, an aggrieved employee who rests a discrimination claim under Title VII or the ADEA upon the discriminatory motivations of a subordinate employee must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer.

Id. at 290–91 (citation omitted). The court held that Fultz had no decisionmaking authority but that, in any event, plaintiff's opportunity to dispute the basis of her reprimand and failure to do so removed this situation from the "cat's paw" line of cases. In addition, the court held, plaintiff was actually issued a written reprimand because she had not been candid about her loss of a tool on board an aircraft, a matter raising serious safety concerns. *Id.* at 292–95. The court held that Fultz's written discrepancy results leading to her third reprimand also did not make him a supervisor, because the reprimand was issued after an independent examination of these reports by her supervisor, whom she agreed was unbiased. *Id.* at 295–96. The court rejected plaintiff's fruit-of-the-poisonous-tree argument:

> Nor would it be appropriate to withhold summary judgment from an employer who has terminated an employee for rules violations, and wholly in the absence of any discriminatory motivation on the part of the decisionmakers, simply because the violations might not have been known in the absence of a subordinate's discriminatory animus that brought the infractions to light. Otherwise, an unbiased employer could never discipline or terminate an employee for an undisputed violation of company rules, including such egregious acts as fighting or stealing (or endangering the lives of those who fly on aircraft carelessly attended by a mechanic), so long as the employee could

> demonstrate that she was "turned in" by a subordinate employee "because of" a discriminatory motivation.

Id. at 296. Judge Michael dissented, joined by Judges Motz, Judge King, and Judge Gregory. *Id.* at 299–305.

Johnson v. The Kroger Co., 319 F.3d 858, 91 FEP Cases 145 (**6th Cir.** 2003), reversed the grant of summary judgment to the defendant. The court relied in part on racially-biased statements made by Newman, a store official who did not have formal responsibility for making the decision to remove plaintiff from his job, and stated: "Although remarks made by an individual who has no authority over the challenged employment action are not indicative of discriminatory intent, the statements of managerial-level employees who have the ability to influence a personnel decision are relevant." *Id.* at 868 (citation omitted). The court explained:

> Newman not only supervised Johnson on a daily basis, but also spoke with Noyes about the problems she identified during her store visits in late 1995, assisted Noyes in preparing Johnson's performance review in January of 1996, and consulted with Noyes prior to her ultimate decision to offer Johnson a new but diminished position. Based upon these facts, we conclude that a jury could reasonably find that Newman played a significant role in Noyes's decisionmaking process.

Id. District Judge Rosen dissented. *Id.* at 869–78.

Juarez v. ACS Government Solutions Group, Inc., 314 F.3d 1243, 90 FEP Cases 1104 (**10th Cir.** 2003), affirmed the judgment for the plaintiff in the amounts of $22,500 in back pay and $250,000 in punitive damages for racial and national origin discrimination in a RIF. The court relied in part on evidence of biased statements: "Appellee further presented evidence that Mr. Nesmith, ACS's Site Manager in charge of both operations and human resources at the facility where Appellee worked, had made derogatory remarks about Mexican employees shortly before the RIF. Although ACS argues that Mr. Nesmith had no role in the selection of Appellee for termination, Appellee presented sufficient evidence allowing the jury to reasonably infer that Mr. Nesmith actually did participate in the termination decision." *Id.* at 1246.

3. Other Manager Speakers Who Were Not Decisionmakers

EEOC v. Liberal R-II School District, 314 F.3d 920, 924, 90 FEP Cases 1032 (**8th Cir.** 2002), reversed the grant of summary judgment to the defendant, holding that there was direct evidence of discrimination. The age-biased statements of Superintendent Gretlein, describing the bases on which the Board had decided not to renew plaintiff's contract as a bus driver, are described above. The court rejected the defendant's objection that Gretlein was not the decisionmaker: "We stress this is not a case involving a nondecisionmaker who was not involved in the decisionmaking process and who made stray age-related remarks. Instead, this case involves a nondecisionmaker who was closely involved in the decisionmaking process and who was directed to express the decision of the decisionmakers to the employee and to the Missouri Division of Employment Security."

4. Temporal Remoteness of the Biased Remarks

Miller-El v. Cockrell, __ **U.S.** __, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003), reversed the Fifth Circuit's denial of a certificate of appealability ("COA") from the denial of habeas corpus that had been sought on a *Batson* challenge to the prosecutor's striking of 10 of 11 African-American potential jurors. The standard was whether petitioner demonstrated "'that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" The Court cited *Reeves*. It held that a 1968 racially biased statement contained in an official manual was probative of racial bias in the 1986 peremptory challenges:

> Of more importance, the defense presented evidence that the District Attorney's Office had adopted a formal policy to exclude minorities from jury service. A 1963 circular by the District Attorney's Office instructed its prosecutors to exercise peremptory strikes against minorities: "'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'" App. 710. A manual entitled "Jury Selection in a Criminal Case" was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller-El's trial. *Id.*, at 749, 774, 783.

The court also relied on other old evidence of biased statements:

> A Dallas County district judge testified that, when he had served in the District Attorney's Office from the late-1950's to early-1960's, his superior warned him that he would be fired if he permitted any African-Americans to serve on a jury. Similarly, another Dallas County district judge and former assistant district attorney from 1976 to 1978 testified that he believed the office had a systematic policy of excluding African-Americans from juries.

Vesprini v. Shaw Contact Flooring Services, Inc., 315 F.3d 37, 90 FEP Cases 1038 (**1st Cir.** 2002), affirmed the grant of summary judgment to the ADEA defendant. The 71-year-old plaintiff and his son sold their flooring business to another company and the plaintiff entered into a three-year contract to remain as President. After a reorganization, Mahan, a 41-year-old, was named as plaintiff's supervisor. The court described the allegedly biased remarks: "Vesprini's immediate supervisor, Jay Houston, advised Vesprini that he was 'not going to be [with Shaw] much longer,' that the time had come to 'step back and let the young stallions run the [day-to-day] business,' but that Vesprini nevertheless would serve as Circle Floors' 'chief executive officer' and as a 'mentor' to both Mahan and Vesprini's son, Michael." *Id.* at 39. The court held that the long time between the remarks and the barring of plaintiff from the premises after his outburst of profanity—from one and a half to two years—"severely undermines the reasonableness of any inference that there existed a causal relationship between the remarks and the subsequent decisionmaking by Shaw." *Id.* at 41–42 (citation omitted). Moreover, the court held, the remarks were susceptible to a benign interpretation and were not intended to humiliate the plaintiff. They were uttered as a "truism." *Id.* at 42.

5. Speakers Who Were Not Aware of the Reasons for the Decision

Brown v. Packaging Corp. of America, 338 F.3d 586, 92 FEP Cases 522 (**6th Cir.** 2003), affirmed judgment on a jury verdict for the ADEA defendant. The court rejected plaintiff's argument that he had direct evidence of discrimination, based on an asserted remark by his supervisor that the reason he did not get a promotion to Temporary Foreman is that the company wanted younger people and engineers to fill the job. The court held that this was not direct evidence of discrimination because there was no basis in the record to establish that the supervisor knew the reason for the decision.

6. Contentions that Biased Remarks Were Isolated

Hedrick v. Western Reserve Care System, 355 F.3d 444, 454, 15 AD Cases 1 (**6th Cir.** 2004), affirmed the grant of summary judgment to the ADA defendant, and held a single remark to plaintiff's physician, expressing concern that plaintiff's osteoarthritis might prevent her from performing the duties of other jobs for which she had interviewed, was not evidence of disability bias.

Johnson v. The Kroger Co., 319 F.3d 858, 868, 91 FEP Cases 145 (**6th Cir.** 2003), reversed the grant of summary judgment to the defendant. The court relied in part on racially-biased statements made by Newman, a store official, rejecting Kroger's contention that these remarks were not probative because they were isolated. "But Newman's comment does not stand alone. Instead, the manner in which several employees observed him behave towards Johnson—behavior that was claimed to be distinct from his interaction with Caucasian comanagers—reinforces the possibility that Newman's comment might have reflected racial animus." (Citation omitted.) District Judge Rosen dissented.

7. The Relevance of Biased Remarks by Co-Workers

Johnson v. The Kroger Co., 319 F.3d 858, 868–69, 91 FEP Cases 145 (**6th Cir.** 2003), reversed the grant of summary judgment to the defendant. The court relied in part on racially-biased statements made by Newman, a store official, rejecting Kroger's contention that these remarks were not probative because they were isolated. The court stated: "Newman's statement must also be viewed in connection with the evidence concerning racial jokes and slurs prior to Johnson's arrival at the Wheelersburg store. Kroger emphasizes that Newman did not listen to racial jokes, but instead told the department heads not to tell them, and that he never heard the racial slurs that other employees reportedly heard. A reasonable juror, however, could infer that Newman's awareness of racial jokes prior to Johnson's arrival at the store indicates that he harbored racially discriminatory views." District Judge Rosen dissented.

Bowen v. Missouri Department of Social Services, 311 F.3d 878, 884, 90 FEP Cases 782 (**8th Cir.** 2002), reversed the grant of summary judgment to the white plaintiff complaining of racial harassment by her African-American supervisor, Francine Lee. Bowen alleged that Lee twice called her a white bitch, and made menacing gestures towards her. The lower court found insufficient evidence that Lee's conduct was racially motivated. Reversing, the court of appeals stated:

> The DSS argues, and the magistrate judge found, the evidence established nothing more than Lee had an extreme, intense dislike for Bowen unrelated to her race. We do not agree. Viewing, as we must, the evidence in the light most favorable to Bowen, we conclude she produced sufficient evidence from which reasonable jurors could infer that Lee's conduct toward Bowen was based on race. Lee's two "white bitch" epithets were explicitly racial and were directed specifically to Bowen, a white woman. Because the epithets carried clear racial overtones, they permit an inference that racial animus motivated not only her overtly discriminatory conduct but all of her offensive conduct towards Bowen.

(Citations omitted.)

Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 33–34, 87 FEP Cases 673 (**1st Cir.** 2001), vacated the grant of summary judgment to the ADEA defendant, holding that a two-year series of age-biased statements by the plaintiff's direct supervisor, Larry Cancel, coupled with the lack of contemporaneous documentary support for his criticisms of her work performance and mutually conflicting accusations of poor performance by different supervisors created a jury issue. The plaintiff and others "quoted him as saying, among other things, that the ages of his accounting employees added up to more than a thousand years; that his employees were as old as Methuseleh [sic]; that they were 'old women,' 'a bunch of incapacitated people,' and 'useless old women' and that 'what I have here is Social Security.' Melendez also said that Cancel told her that she was an old hag, an old lady and that 'her age didn't allow her to think.'" *Id.*

Vance v. Union Planters Corp., 209 F.3d 438, 442, 82 FEP Cases 1199 (**5th Cir.** 2000), affirmed the judgment of liability on the jury verdict for the Title VII gender discrimination plaintiff, who had not been selected for the position of branch bank president. The decisionmaker was a man, Pat Davis, who offered the job to another man, Ed Neelly, who turned it down and recommended the plaintiff. Davis explained to Neelly that he wanted a "mature man" in the position, and went on to offer the job to a number of other men, all but one of whom turned it down and some of whom also recommended the plaintiff for the position. The court held that Davis's remark was direct material evidence of discrimination. "[W]orkplace remarks like Davis's may constitute sufficient evidence of discrimination if the remarks are (1) related to sex; (2) proximate in time to the employment action; (3) made by an individual with authority over the employment decision; and (4) related to the employment decision at issue." (Citation omitted.) The court also held that the jury was entitled to treat Davis's statement on the witness stand at trial, to the effect that he wanted the "best guy" for the job, as further evidence of gender discrimination. It rejected the defendant's effort to extend the "stray remarks" doctrine to trial testimony, and explained:

> Union Planters appears to advocate an extension of the "stray remark" caselaw to cover witnesses' statements at trial. It presented no instance in which a court has ever applied its "stray remark" jurisprudence to a witness's trial testimony. Indeed, there are at least three reasons why it would be unwise to do so in this manner. First, the "stray remark" jurisprudence is itself inconsistent with the deference appellate courts traditionally allow juries regarding their view of the evidence presented and so should be narrowly cabined. Second, one of the questions at issue in the *Krystek* test—whether the

> remark is proximate in time to the employment decision—would always be answered in the negative with respect to testimony at trial, even though words from the dock seem particularly probative of actual state of mine. Third, in-court testimony, unlike a stray remark made in the workplace, allows the jury to evaluate the context of the remark based on its observations of the witness's demeanor. We decline, therefore, to extend the doctrine in this manner.

Id. at 442 n.4. This evidence was supported by independent circumstantial evidence.

Markel v. Board of Regents of University of Wisconsin System, 276 F.3d 906, 910–11, 87 FEP Cases 1131 (**7th Cir.** 2002), affirmed the grant of summary judgment to the Title VII defendant, holding that assertedly discriminatory statements cannot be considered direct evidence of discrimination unless they are clearly discriminatory, without resort to any inference or presumption, and unless they are made contemporaneously with the challenged action.

EEOC v. University of Chicago Hospitals, 276 F.3d 326, 333, 87 FEP Cases 1089 (**7th Cir.** 2002), reversed the grant of summary judgment to the Title VII religious-discrimination constructive-discharge defendant. The court rejected the defendant's assertions that the incidents surrounding the constructive discharge themselves did not show religious discrimination. It held that the decisionmaker's references within the prior two months to the charging party as a religious fanatic, and to the problems the decisionmaker had with the charging party's religious beliefs and to her bringing religion into the workplace, her instruction to a manager that he fire the charging party, the manager's belief that the instruction was based on religious animosity, and her firing the manager when he refused to fire the charging party, were evidence of a religious bias which, in combination with other evidence, was sufficient to defeat summary judgment.

Ransom v. CSC Consulting, Inc., 217 F.3d 467, 468–70, 83 FEP Cases 155 (**7th Cir.** 2000), affirmed the grant of summary judgment to the defendant. The court rejected plaintiff's argument that the deposition testimony of CEO Douglas Gray constituted direct evidence of discrimination. Gray had testified that it was necessary to promote new people into positions as officers, and to do so it was necessary to remove less productive people. When asked why, he responded:

> Because if the young people in the organization don't see a future, they're going to leave, number one. Number two, the younger people in the organization looked at the officers in the organization in the mess that it was in. So the younger people, right or wrong, the younger people in the organization look at the officers and say, these are the people who put us in the position we're in now. They can't be that good. So a) in order to provide--keep the younger people from leaving, and b) presumably to refresh the officer group, you've got to have people coming in. So that's the reason for it.

Id. at 468–69. The court held that this statement was not even probative of age discrimination, because the testimony was as to corporate practices generally, and was not specifically directed at the plaintiff. Moreover, the reference to "younger people in the organization" was to more junior, lower-paid employees. *Id.* at 469. The court also held that the word "refresh" does not have an age-biased connotation. *Id.* at 470. The court did not discuss whether a jury might be

free to draw inferences different from those it drew on behalf of the movant.

Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 389, 82 FEP Cases 550 (**7th Cir.** 2000), affirmed the grant of summary judgment to the ADEA RIF defendant as to the claim of plaintiff Curran. The court rejected the plaintiff's argument that an instruction that the decisionmaker should retain employees with the "longest-term potential" was tantamount to an instruction to retain the youngest employees. It stated: "Since younger employees tend to be more mobile than older ones, there is no basis for an inference that employers interested in the long-term potential of an employee prefer young to old." *Id.* The court stated that the fact that the defendant had tried to alter the decisionmaker's deposition testimony on this point was "too thin a thread on which to hang a verdict" for the plaintiff. *Id.* at 390.

Comment on *Thorn v. Sundstrand Aerospace Corp.*: The court did not identify any record evidence supporting its assumption of greater mobility among younger employees, or that would support an inference that the defendant had adopted the same assumption, or that the defendant had acted on such an assumption, or that a jury would be required as a matter of law to indulge in the same assumption. The court provided no information indicating that its assumption was a matter suitable for judicial notice. It simply took its own notion of what made business sense, forced Curran to lie on its Procrustean bed, and executed his claim because the court could imagine a "spin" under which discrimination need not have occurred. Plaintiffs can legitimately be required to produce evidence from which discrimination may be inferred; it asks too much it they are also required to produce evidence so strong as to evade every simplistic assumption judges may make as to how employers behave.

McCowan v. All Star Maintenance, Inc., 273 F.3d 917, 926, 87 FEP Cases 596 (**10th Cir.** 2001), reversed the grant of summary judgment to the Title VII and § 1981 defendant on both their hostile-environment claim and their discriminatory-discharge claim. The facts of the hostile environment claim are described below. The court held that the "totality of the circumstances" test applies to the discharge claim as well as the harassment claim, and that plaintiffs did not need to establish a nexus between the harassing remarks and their termination unless they were claiming that the remarks were direct evidence of discrimination in their discharges.

H. Discovery of Electronic Evidence

Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 91 FEP Cases 1574 (**S.D. N.Y.** May 13, 2003), a Title VII sex discrimination case, ordered the defendant to produce in discovery e-mails that had been deleted and that now resided only on 94 back-up tapes, at its own expense, estimated to be about $175,000. The court noted that requiring plaintiff to pay the expenses of such discovery could often make the discovery inaccessible regardless of its relevance:

> Courts must remember that cost-shifting may effectively end discovery, especially when private parties are engaged in litigation with large corporations. As large companies increasingly move to entirely paper-free environments, the frequent use of cost-shifting will have the effect of crippling discovery in discrimination and retaliation cases. This will both undermine the "strong public policy favor[ing] resolving disputes on their merits," and may ultimately deter the filing of potentially meritorious claims."

Id. at 317–18 (footnote omitted). The court stated that the production of electronic discovery can be cheaper than the production of paper discovery:

> Many courts have automatically assumed that an undue burden or expense may arise simply because electronic evidence is involved. This makes no sense. Electronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, key words can be run for privilege checks, and the production can be made in electronic form obviating the need for mass photocopying.

Id. at 318 (footnotes omitted). Finally, the court announced a new seven-factor test to determine who should pay for the discovery of electronic records:

> Set forth below is a new seven-factor test based on the modifications to Rowe discussed in the preceding sections.
>
> 1. The extent to which the request is specifically tailored to discover relevant information;
> 2. The availability of such information from other sources;
> 3. The total cost of production, compared to the amount in controversy;
> 4. The total cost of production, compared to the resources available to each party;
> 5. The relative ability of each party to control costs and its incentive to do so;
> 6. The importance of the issues at stake in the litigation; and
> 7. The relative benefits to the parties of obtaining the information.

Id. at 322. The court elaborated:

> Whenever a court applies a multi-factor test, there is a temptation to treat the factors as a check-list, resolving the issue in favor of whichever column has the most checks. But "we do not just add up the factors." When evaluating cost-shifting, the central question must be, does the request impose an "undue burden or expense" on the responding party? Put another way, "how important is the sought-after evidence in comparison to the cost of production?" The seven-factor test articulated above provide some guidance in answering this question, but the test cannot be mechanically applied at the risk of losing sight of its purpose.

Id. at 322–23.

I. Evidence Considerations Relating to Disparate Impact

Sledge v. Goodyear Dunlop Tires North America, Ltd., 275 F.3d 1014, 87 FEP Cases 823, 81 E.P.D. ¶ 40,828 (**11th Cir.** 2001) (*per curiam*), reversed the grant of summary judgment to the Title VII and § 1981 racial discrimination defendant and held that a reasonable jury could find that the black plaintiff was qualified to be a maintenance mechanic and that the company's examinations for mechanic "were nothing more than a pretext for racial discrimination." *Id.* at 1019. The plaintiff applied for vacant mechanic positions and was not interviewed. At his request, his supervisors signed a letter to Human Resources stating that he was qualified. The Plant Engineer then devised a test. The plaintiff applied for the next two openings, and was not

allowed to take the test. Two whites who had not taken the test were promoted. He protested, but applied for another vacancy, and was not allowed to take the test. The white promotee had failed the test. The Plant Engineer then rewrote the test to include drawing and verbal problems. A white applicant was told to disregard the word problems and passed. The company finally allowed the plaintiff to take the test, but insisted he take it at the end of a twelve-hour shift. He passed the practical but failed the word problems. The union pursued a grievance on behalf of a white employee, and an arbitrator ruled that the white employee could take the test again. The plaintiff was also given the opportunity to take the test again. A new test was devised, neither man passed, and the white employee received the promotion. *Id.* at 1016–18. The court noted that, at the time the plaintiff filed suit, there was only one black Mechanic in the Maintenance Department, out of 107. *Id.* at 1019. It described the evidence of discrimination as "compelling." *Id.* at 1020.

J. Evidence Considerations Relating to Constructive Discharge

EEOC v. University of Chicago Hospitals, 276 F.3d 326, 332, 87 FEP Cases 1089 (**7th Cir.** 2002), reversed the grant of summary judgment to the Title VII constructive-discharge defendant. The court held that a plaintiff can show constructive discharge not only by showing an intolerable working environment, but also by showing that the employer has acted "in a manner so as to have communicated to a reasonable employee that she will be terminated," and that the employee has then resigned. The lower court had held that the conditions at the time the plaintiff submitted her resignation letter—such as the fact that she had been told by her supervisor while she was on vacation that an asserted mistake was the "'last straw'" and, when she returned, she found that her belongings were packed and her office was being used for storage space—were irrelevant, because she had prepared the resignation letter ahead of time. Reversing, the court of appeals stated that even though the letter had been prepared ahead of time, "her decision to *submit* that letter could have surely been based on" those conditions, (Emphasis in original.)

K. Evidence Considerations Relating to Reductions in Force

Windham v. Time Warner, Inc., 275 F.3d 179, 190, 87 FEP Cases 843 (**2nd Cir.** 2001), vacated the grant of summary judgment to the Title VII racial-discrimination RIF defendant because the lower court failed to understand the plaintiffs' argument. Plaintiffs did not argue that the defendant made a bad decision by choosing to terminate three black employees in a RIF, but argued that the decisionmaker did not consider white employees for the RIF. "From the admitted facts and the inferences raised by the record, a reasonable jury could find Harvey gave McLoughlin and Sherman additional responsibilities to make their jobs indispensable after she knew the department was overstaffed." In addition, the court found that all employees had engaged in the types of negative conduct that the decisionmaker had relied on to justify the termination of the plaintiffs.

L. Evidence Considerations Relating to Compensation

Goodwin v. General Motors Corp., 275 F.3d 1005, 1013, 87 FEP Cases 1651 (**10th Cir.** 2002), reversed the grant of summary judgment to the Title VII gender discrimination defendant, holding that the district court erred in considering only the amounts of percentage increases in

pay rather than the absolute amounts of pay raises, where the plaintiff alleged that she had been paid less from the beginning of her employment.

M. Evidence Considerations Relating to Harassment

1. What is Actionable Conduct?

a. *National R.R. Passenger Corp. v. Morgan*

National R.R. Passenger Corp. v. Morgan, 536 **U.S.** 101, 122 S. Ct. 2061, 2074, 88 FEP Cases 1601 (2002), rejected the doctrine of continuing violations under Title VII for discrete actions, but upheld the doctrine for hostile-environment cases, subject to a laches defense of uncertain scope. The Court quoted *Harris*, stating: "In determining whether an actionable hostile work environment claim exists, we look to 'all the circumstances,' including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'"

b. Failure to Conduct a Reasonable Investigation

Hatley v. Hilton Hotels Corp., 308 F.3d 473, 475–76, 89 FEP Cases 1861 **(5th Cir.** 2002), reversed the grant of judgment as a matter of law on plaintiffs' Title VII sexual harassment claims. The court relied in part on the defendant's inadequate investigation and failure to provide relief on earlier complaints.

> In addition, the plaintiffs presented sufficient evidence to support the jury's finding that Bally's had not made out the *Ellerth* affirmative defense. . . . . Both plaintiffs testified that after they made formal complaints about the harassment, Bally's failed to effectively separate them from the harassing supervisors, and the harassment continued until their departure. James Bostain, a beverage supervisor at Bally's, testified that previous sexual harassment complaints had "fallen through the cracks" when submitted to Davidson. And four other cocktail waitresses testified about their own earlier complaints to Davidson of sexual harassment, particularly with regard to Stotts' and Perkins' behavior, and the failure of Bally's to respond to such complaints. Such evidence supports the jury's finding that the investigation was inadequate and that Bally's did not take reasonable measures to correct or prevent the harassment. While Bally's presented evidence to the contrary, the jury was free to choose between the conflicting versions of events. . . . The district court could not substitute its own determination of the witnesses' credibility for that of the jury; in doing so, it erred.

(Citations and footnote omitted.) The court held that the testimony of other employees was relevant to show that defendant had been placed on notice that Stotts and Perkins might be harassing women. *Id.* at 476 n.1.

Flanagan v. Ashcroft, 316 F.3d 728, 90 FEP Cases 1416 (**7th Cir.** 2003), affirmed the grant of summary judgment to the defendants, holding that an investigations into allegations of sexual harassment, and the subsequent disciplinary actions against plaintiffs, are not actionable sexual harassment.

c. Not Minor Events or Separately Actionable Events

Felton v. Polles, 315 F.3d 470, 485, 90 FEP Cases 812 (**5th Cir.** 2002), reversed the denial of qualified immunity and held in part that the plaintiff's allegations did not rise to the level of actionable racial harassment. They involved the denial of leave during turkey hunting season, internal investigations, denial of a promotion, and an "unsatisfactory performance evaluation, resulting in Carter's being placed on a performance improvement plan and missing approximately one month of an annual wage increase (*loss of approximately $25*)." (Emphasis in original.)

Vasquez v. County of Los Angeles, 307 F.3d 884, 893, 89 FEP Cases 1705 (**9th Cir.** 2002), affirmed the grant of summary judgment to the Title VII defendant on plaintiff's racial harassment claim. The court held that a reference to plaintiff as having "'a typical Hispanic macho attitude'" and that he should consider transferring to the field because "'Hispanics do good in the field,'" being yelled at twice, and having negative evaluations twice in the space of a year, did not rise to the level of a hostile environment. Judge Ferguson dissented. *Id.* at 897–906.

d. Severity or Pervasiveness

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

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

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

Lee-Crespo v. Schering-Plough Del Caribe Inc., 354 F.3d 34, 46, 93 FEP Cases 47 (**1st Cir.** 2003), affirmed the grant of summary judgment to the Title VII same-sex sexual harassment defendant. The court held that the asserted harassment was neither severe nor pervasive. "Here, the complained of conduct was episodic, but not so frequent as to become pervasive; was never severe; was never physically threatening (though occasionally discomforting or mildly humiliating); and significantly, was never, according to the record, an impediment to Lee-Crespo's work performance." The court also held that "a supervisor's unprofessional managerial approach and accompanying efforts to assert her authority are not the focus of the discrimination laws." *Id.* at 46–47.

Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 19, 89 FEP Cases 1361 (**1st Cir.** 2002), affirmed the jury's finding of Title VII liability for sexual harassment. The court described the operative facts as to the conduct of Ramón Cárdenas, the Vice President for sales:

> Here, the jury reasonably could have found that Marrero was subjected to harassment on a daily basis, including humiliating sexual remarks and innuendos. For example, Cárdenas constantly referred to Marrero as "the redhead" and frequently made comments such as "the redhead is really hot," "the redhead is on fire," or "if this is what hell is like then the devil can take me with him." Cárdenas also made repeated comments about Marrero's lips, legs, and clothing. He even used Marrero's hypoglycemia as an avenue for innuendo: making a reference to his diabetes, Cárdenas told her "what goes down in you goes up in me," and asked her "are you sweet to men?" At other times, Cárdenas was more explicit: he once asked Marrero "what are you going to do with the thing you have between your legs?" Finally, the jury could have found that Cárdenas's "Halloween presents" comment was a sexual invitation, coupled with a threat that Marrero would be fired if she did not accept.

Plaintiff suffered depression and mental breakdowns, obtained psychiatric care, and was off work for extended periods while recuperating. The court held that the combination of the above incidents allowed a reasonable jury to find harassment, and emphasized that this was not a case of isolated remarks spread out over time: "It bears emphasis that the harassment here was more or less constant from Marrero's first day of work in April of 1995 until she left in November of 1996." *Id.* Unlike isolated teasing situations, this case involved "the constant attentions of a lascivious supervisor." *Id.* It included numerous incidents of unwanted touchings, and comments to others about plaintiff's appearance, including one occasion in which Cárdenas asked a male employee to speculate on the type of underwear plaintiff had on. *Id.* at 19–20. The court held that a reasonable jury could find her work was affected, because of the drop in her performance evaluations from "excellent" to "regular." *Id.* at 20.

Hatley v. Hilton Hotels Corp., 308 F.3d 473, 475, 89 FEP Cases 1861 **(5th Cir.** 2002), reversed the grant of judgment as a matter of law on plaintiffs' Title VII sexual harassment claims. The court held that consistent evidence of "repeated inappropriate touching, vulgar comments, propositioning, and physical aggression by Jesse Stotts ('Stotts'), their supervisor,

and Charles Perkins ('Perkins'), the Director of Food and Beverages," was sufficient for a jury to find a hostile environment.

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

> First, we note that there were several overtly sexual comments made by Judge Sappington to Ms. Robinson including Judge Sappington's offer to purchase Ms. Robinson a sexual device . . .; Judge Sappington's comment that the attorneys were only speaking to her because she was wearing revealing clothing . . . and the twice-repeated comment that Judge Sappington would like Ms. Robinson to "sit on his face" . . . . In addition to these comments, there is strong evidence that Judge Sappington took an inappropriate interest in Ms. Robinson's relationships with men, first inquiring as to the status of her marriage and later, on two occasions, expressing outrage at the possibility of her romantic involvement with anyone else.
>
> Second, we believe that much of Judge Sappington's conduct reasonably could be construed as intimidating and threatening. Judge Sappington monitored Ms. Robinson's actions both within the courthouse and after hours, going so far as to fly an aircraft over the farm of Ms. Robinson's mother when he knew Ms. Robinson was visiting there. Judge Sappington exhibited anger when he believed other men showed interest in Ms. Robinson. He also subjected Ms. Robinson to hearing the details of a gruesome murder and suggested that she might face a similar fate. Finally, on one occasion, Judge Sappington grabbed Ms. Robinson's face and told her point-blank that, if she "shacked up" with anyone else, he would kill her.
>
> Finally, Ms. Robinson was the recipient of other gestures that, although innocuous in themselves, when put in the larger context, served as constant reminders of Judge Sappington's interest in her and in exercising control over her. Specifically, Judge Sappington called her beautiful, a "blonde Demi Moore" or a golden goddess on a daily basis. He took her to lunch and became angry if Ms. Robinson did not eat lunch with him. Additionally, for a period of several weeks, he shook Ms. Robinson's hand on a daily basis to experience physical contact with her.

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

Quantock v. Shared Marketing Services, Inc., 312 F.3d 899, 90 FEP Cases 883 (**7th Cir.** 2002), reversed the grant of summary judgment to the Title VII sexual harassment defendant. The court held that three sexual propositions by the company President (one request for oral sex, one for a threesome, and one for phone sex), during the same meeting, *id.* at 902, were sufficiently severe to be actionable even though they were not pervasive. *Id.* at 904. The court relied on the fact that the case involved rapid-fire requests for sexual activity during a short time period, made directly to the plaintiff by a high-level official with whom she was forced to work closely. *Id.* The court rejected the lower court's view that harassing conduct must be both severe and pervasive, and held that either will do. *Id.* at 904 n.2. The court also held that

plaintiff's internal complaint, seeking out of psychiatric care, and testimony that she felt humiliated, adequately showed that she considered the conduct severe. *Id.*

Shaver v. Independent Stave Co., 350 F.3d 716, 720–23, 14 AD Cases 1889 (**8th Cir.** 2003), held that the ADA plaintiff had not shown an actionably hostile environment although other employees routinely called him "platehead" because of the plate in his skull, and did so because defendant wrongly disclosed information from his medical records to co-workers. The court rejected defendant's fine distinction between being called this nickname because of the plate in his skull, and being called this nickname because of his impairment. "We think that this distinction may be too fine for us, but in any case the meaning of the statements (that is, what inference to draw from the words used) is properly a matter for the jury. There is certainly nothing in the record to suggest that those who called Mr. Shaver 'platehead' made the distinction suggested by Salem. The distinction itself, moreover, may well be meaningless: Even if one calls a person 'pegleg' because he has a peg leg rather than because he has trouble walking, it is nevertheless the case that the nickname was chosen because the person was disabled." *Id.* at 721. The court relied in part on the fact that nicknames were common in the workplace. The court held that the wrongful disclosure of plaintiff's medical records could not be considered part of the harassment and thus make it actionable. *Id.* at 723. The court also refused to consider plaintiffs' denials of promotion part of the hostile environment on which he was suing, because it was not clear that he had personal knowledge of the matters to which he testified at trial. *Id.*

Eich v. Board of Regents for Central Missouri State University, 350 F.3d 752, 759, 92 FEP Cases 1812 (**8th Cir.** 2003), reversed the grant of JMAL in favor of the Title VII sexual harassment defendant. The court held that plaintiff had presented sufficient evidence of severity and pervasiveness to support the jury verdict:

> In the present case, we emphasize the sexual touching and sexual innuendos made in Eich's presence over a continuous period of time. Her attempts to rebuff this harassment by reporting to her superiors was to no avail. We hold the facts as presented by this record, continuing over a period of seven years and involving numerous touchings and sexual innuendos, were sufficient for the jury to conclude that Deborah Eich was subjected to sexual harassment sufficiently severe or pervasive to establish a hostile work environment.

The court continued at 761:

> In the present case, as the detailed facts clearly demonstrate, Eich experienced more than the mere touching of the hand. On several occasions, Drake brushed up against her breasts, and frequently ran his fingers through her hair, rubbed her shoulders, and ran his finger up her spine. On more than one occasion he stood behind Eich and simulated a sexual act while Eich was bent over during handcuff training sessions. In the presence of Eich, the same officer simulated sexual acts with a nightstick by sliding the stick in and out of his hands and constantly rendered sexual innuendos directed to her and other female employees in the Department. Eich testified that Gillespie rubbed his hand up and down her leg, brushed up against her when they spoke, and pressed his groin into her shoulder while standing behind her.

It stated: "Judgment as a matter of law is proper only when there is a complete absence of probative facts to support the conclusion reached so that no reasonable juror could have found for the nonmoving party." *Id.*

Bowen v. Missouri Department of Social Services, 311 F.3d 878, 884, 90 FEP Cases 782 (**8th Cir.** 2002), reversed the grant of summary judgment to the white plaintiff complaining of racial harassment by her African-American supervisor, Francine Lee. Bowen alleged that Lee twice called her a white bitch, and made menacing gestures towards her, among other actions. The lower court held that, because the incidents spanned a period of only 18 months, plaintiff failed to show they were pervasive. The court of appeals rejected this conclusion, and held that plaintiff was required only to show that the incidents were *either* severe *or* pervasive. The court explained:

> The frequency of the discriminatory conduct, discussed by the magistrate, is only one of several factors to be considered. Other factors include the severity of the discriminatory conduct; whether the offensive conduct was physically threatening or humiliating, as opposed to a mere offensive utterance; and whether the offensive conduct unreasonably interfered with the employee's work performance. . . . Finally, a court should consider the effect of the misconduct on the victim's psychological well-being in determining whether the victim subjectively perceived the environment to be hostile or abusive. . . . "[N]o single factor is required."

Id. at 884–85 (citations omitted.) The court then applied these standards to the case at bar:

> Our independent review of the evidentiary record leads us to conclude Bowen produced sufficient evidence to demonstrate the cumulative effect of Lee's discriminatory conduct towards her was sufficiently severe to defeat summary judgment. While Lee's discriminatory conduct towards Bowen was not frequent, neither was it infrequent. Reasonable jurors could find that Lee's hostility towards Bowen pervaded the work environment, commencing in July 1997 with Lee's "white bitch" epithet and menacing remarks, continuing with Lee's frequent hostile stares, intensifying in January 1999 with Lee's violent act of destroying Bowen's cake, escalating on January 21, 1999, when Lee called Bowen a "menopausal white bitch" and threatened her with a physical beating, and climaxing when Lee intimidated Bowen by running directly at her. Bowen's co- workers had warned Bowen that Lee did not like white people and that Lee had threatened to shoot fellow employees. Lee's serious misconduct and Bowen's subjective fear of bodily harm adequately demonstrate, for summary judgment purposes, that Lee's conduct was both objectively and subjectively hostile or abusive.

Id. at 885.

Duncan v. General Motors Corp., 300 F.3d 928, 934–35, 89 FEP Cases 1105 (**8th Cir.** 2002), *petition for cert. filed*, (**U.S.**, Feb. 13, 2003) (No. 02–1201), reversed the denial of judgment as a matter of law to the defendant. The court held that the boorish behavior was not sufficiently severe or pervasive to constitute actionable harassment.

> Booth's actions were boorish, chauvinistic, and decidedly immature, but we cannot say they created an objectively hostile work environment permeated with sexual harassment. Construing the evidence in the light most favorable to Duncan, she presented evidence of four categories of harassing conduct based on her sex: a single request for a relationship, which was not repeated when she rebuffed it, four or five isolated incidents of Booth briefly touching her hand, a request to draw a planter, and teasing in the form of a poster and beliefs for an imaginary club. It is apparent that these incidents made Duncan uncomfortable, but they do not meet the standard necessary for actionable sexual harassment.

Id. at 935. Judge Richard Arnold dissented. *Id.* at 936–38.

e. Yes, if Neutral in Form But Motivated by a Prohibited Motive

Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 20, 89 FEP Cases 1361 (**1st Cir.** 2002), affirmed the jury's finding of Title VII liability for sexual harassment. Plaintiff proved substantial sexually-explicit conduct. In addition., the court described the operative facts as to harassment that was nonsexual in form:

> On other occasions, Cárdenas harassed Marrero in ways that were not explicitly sexual. Using his power as her supervisor, he altered her work hours knowing that it would exacerbate her hypoglycemia. He often stood at her desk and stared angrily at her, and when she did not pay attention to him he would pound her desk with his fist to startle her. He criticized her work unfairly, sometimes embarrassing her by yelling at her in front of her co- workers. Our cases make clear that, "where a plaintiff endures harassing conduct, although not explicitly sexual in nature, which undermines her ability to succeed at her job, those acts should be considered along with overtly sexually abusive conduct in assessing a hostile work environment claim."

(Citation omitted.)

Duncan v. General Motors Corp., 300 F.3d 928, 933–34, 89 FEP Cases 1105 (**8th Cir.** 2002), *petition for cert. filed*, (**U.S.**, Feb. 13, 2003) (No. 02–1201), reversed the denial of judgment as a matter of law to the defendant. The court held that the behavior of the male alleged harasser to the female plaintiff was sexual in nature although half of the incidents were not sexual in nature, and although some boorish behavior was directed at men.

f. Improper Physical Contact

Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 20, 89 FEP Cases 1361 (**1st Cir.** 2002), affirmed the jury's finding of Title VII liability for sexual harassment. The court relied in part on evidence of numerous incidents of unwanted touchings.

g. Same-Race Harassment

Kang v. U. Lim America, Inc., 296 F.3d 810, 817, 89 FEP Cases 566 (**9th Cir.** 2002), reversed the grant of summary judgment to the defendant. The court stated: "Generally, a plaintiff alleging racial or national origin harassment would present facts showing that he was

subjected to racial epithets in the workplace. Here, however, Kang alleged that he and other Korean workers were subjected to physical and verbal abuse because their supervisor viewed their national origin as superior. The form is unusual, but such stereotyping is an evil at which the statute is aimed." (Citation omitted.) The court continued:

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

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

h. Disability-Based Harassment

Gowesky v. Singing River Hospital Systems, 321 F.3d 503, 509–11, 13 AD Cases 1711 (**5th Cir.** 2003), affirmed the grant of summary judgment to the ADA harassment defendant. Plaintiff was an emergency room physician who accidentally contracted Hepatitis C while caring for a patient. After being off work for two years while undergoing treatment, the hepatitis was in remission and she sought to regain her job. Hospital administrators remarked that it was not clear she could go back to the emergency room, that she would need clearance from a neutral physician, that she might have to have weekly blood draws and attend a refresher course, and that she might need to provide assurances she was not infectious. However, the hospital repeatedly scheduled her to return to work. The court held that there was no actionable harassment:

> It is not difficult to conclude on this slender evidence that no actionable disability-based harassment occurred. The conditions that Rimes and Weldon placed on Gowesky were, given the nature of Gowesky's work, eminently reasonable. Taken as a whole, the conditions amount to three requirements: that she not present the risk of infection to employees and patients, that she be able to reassure employees and patients of her continuing non-infectious status, and that she be fully capable of resuming her duties. Moreover, even if these conditions were "unreasonable," it is unclear that an "unreasonable" return-to-work condition could raise a genuine material fact issue concerning "harassment." Gowesky has failed to present any authority, and we have located none, for the proposition that an unreasonable condition alone constitutes "harassment" under the ADA or its model, Title VII.

Id. at 510. The court also expressed concern about extending actionable harassment to a situation in which the plaintiff had not yet returned to work. *Id.* at 510–11.

2. Actionable Period

Boyler v. Cordant Technologies, Inc., 316 F.3d 1137, 90 FEP Cases 1249 (**10th Cir.** 2003), reversed the grant of summary judgment to the defendant, holding in light of *Morgan* that

the plaintiff's claims of a racially and sexually hostile environment going back to 1982 were timely raised in her 1997 charge.

3. Failure to Complain

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

4. Existence and Adequacy of the Policy

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

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

5. Alternative Remedies

Higgins v. Metro-North R. Co., 318 F.3d 422, 425, 90 FEP Cases 1583 (**2d Cir.** 2003), affirmed the grant of summary judgment to the defendant but held that claims of intentional infliction of emotional distress can be brought under the Federal Employers' Liability Act. Quoting from the Seventh Circuit standard used by the lower court, the court stated that the sexual harassment plaintiff "may prevail in an intentional tort case by showing either that the intentional tort was committed in furtherance of the employer's objectives or that the employer was negligent in hiring, supervising, or failing to fire the employee." The plaintiff here did not make any of these showings. Judge Sotomayor concurred in the result.

N. Evidence Considerations Relating to Summary Judgment

1. General

Fierros v. Texas Department of Health, 274 F.3d 187, 190–91, 87 FEP Cases 503 (**5th Cir.** 2001), reversed the grant of summary judgment to the Title VII retaliation defendant. The court cited *Reeves*, stating:

> The Supreme Court recently emphasized the paramount role that juries play in Title VII cases, stressing that in evaluating summary judgment evidence, courts must refrain from the making of "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts," which "are jury functions, not those of a judge."

2. Effect of Contradictions in the Employer's Case

Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 87 FEP Cases 673 (**1st Cir.** 2001), vacated the grant of summary judgment to the ADEA defendant, based in part on the fact that the defendant's officials could not get their stories straight. Some accused her of things that others exonerated her for, and defended her for things that the others attacked her for, and there was no contemporaneous documentation supporting any of it.

Allen v. Chicago Transit Authority, 317 F.3d 696, 699–700, 90 FEP Cases 1229 (**7th Cir.** 2003), reversed the grant of summary judgment to the defendant. The court stated: "When a witness repeatedly contradicts himself under oath on material matters, and contradicts as well documentary evidence likely to be accurate (the time sheets, for example, whose reliability was attested by several witnesses), the witness's credibility becomes an issue for the jury; it cannot be resolved in a summary judgment proceeding." (Citations omitted.)

McCowan v. All Star Maintenance, Inc., 273 F.3d 917, 921, 87 FEP Cases 596 (**10th Cir.** 2001), reversed the grant of summary judgment to the Title VII and § 1981 defendant, because the lower court failed to indulge all reasonable inferences in favor of the nonmoving party, and "ignored some of the facts presented, permitting it to resolve what otherwise would be material facts more appropriately reserved for a rational jury." The court summarized the evidence of racial harassment and the contradictions in the defendant's evidence as to the plaintiffs' firing, and cautioned against the grant of summary judgment in such circumstances:

> Thus, All Star's "business judgment" with the jargon of economics, efficiency, bottom lines and profit is not impervious to alternative proof. The court's inquiry is not whether the employer made the best choice, but whether it was the *real* choice for terminating Plaintiffs. With no evidence of the criteria used to evaluate the basis for the decision to retain one painting crew over the other in the face of the inconsistencies and contradictions in the record, the court improperly resolved questions of fact reserved for the jury.

Id. at 926.

3. Harassment Cases

Cardenas v. Massey, 269 F.3d 251, 261–62, 87 FEP Cases 19 (**3rd Cir.** 2001), reversed the grant of summary judgment to the defendants on the plaintiff's Title VII and New Jersey Law Against Discrimination racial harassment claim against certain defendants. The alleged harassment included performance evaluations and the practice of assigning all minority employees to the one unit headed by a minority manager. The court stated: "We cannot say that the District Court's evaluation of the evidence was not a reasonable one for a trier of fact to reach. However, the District Court declined to examine the possibility that defendants' "management decisions" masked discriminatory intent. As this court has previously emphasized, the advent of more sophisticated and subtle forms of discrimination requires that we analyze the aggregate effect of all evidence and reasonable inferences therefrom, including those concerning incidents of facially neutral mistreatment, in evaluating a hostile work environment claim."

McCowan v. All Star Maintenance, Inc., 273 F.3d 917, 926, 87 FEP Cases 596 (**10th Cir.** 2001), reversed the grant of summary judgment to the Title VII and § 1981 racial and ethnic harassment defendant. The court held that whether there was actionable conduct depended on the "totality of the circumstances" test, and suggested that summary judgment is not an appropriate means to resolve at least some such cases:

> Finally, we would observe the totality of the circumstances analysis in cases like the one before us obviates what would otherwise be the court's call in deciding how many racist comments constitute harassment or whether general profanity and vulgarity mixed with specific racial, ethnic, or sexual epithets equate to the sum of pervasiveness required by *Harris*. Rather, by framing the evidence of *summary judgment* within the context of this particular workplace, we eliminate the suggestion that a certain number of comments is or is not actionable, as All Star has advanced, and leave the resolution to the trier of fact.

4. Summary Judgment in Pattern-and-Practice Cases

Thiessen v. General Electric Capital Corp., 267 F.3d 1095, 1108–09 (**10th Cir.** 2001), *petition for cert. filed*, 70 USLW 3410 (**U.S.**, Dec. 14, 2001) (No. 01–881), reversed the grant of summary judgment to the ADEA defendant. The court reversed the lower court's decertification of the class, and discussed the effect of a pending pattern-and-practice claim on summary judgment adjudication:

> As with defendants' motion to decertify, proper consideration of defendants' motion for summary judgment must take into account the fact that Thiessen and the opt-in plaintiffs were asserting a pattern-or- practice claim. Although there is little case authority discussing summary judgment motions in pattern-or-practice cases, we see no reason why summary judgment motions cannot be aimed at both the first and second stage issues. Presumably, however, such motions must be analyzed in light of the orders of proof peculiar to pattern-or-practice cases, and must be filed and considered at an appropriate stage of the proceedings. During the first stage of a pattern-or-practice case, for example, a summary judgment motion (whether filed by plaintiffs or defendants)

> must focus solely on whether there is sufficient evidence demonstrating that defendants had in place a pattern or practice of discrimination during the relevant limitations period. . . . Until the first stage is resolved, we question whether it is proper for a court to consider summary judgment motions regarding second stage issues (i.e., whether individual plaintiffs are entitled to relief). Even assuming, arguendo, such motions can properly be considered prior to resolution of the first stage, it is clear they would not be analyzed under the typical McDonnell-Douglas framework. . . . Instead, they would operate under the presumption that (1) defendants had in place a pattern or practice of discrimination, and (2) all employment decisions regarding the class plaintiffs were made pursuant to that pattern or practice. . . .

(Footnote and citations omitted.)

O. Evidentiary Rulings

1. Admissible Form

Weberg v. Franks, 229 F.3d 514, 526 n.13, 84 FEP Cases 291 (**6th Cir.** 2000), reversed the grant of summary judgment to the defendant Michigan correctional officials and officers but held that many of the statements in plaintiff's verified Complaint must be disregarded "because they were not made with Plaintiff's personal knowledge, or were otherwise based on hearsay." (Citation omitted.)

Markel v. Board of Regents of University of Wisconsin System, 276 F.3d 906, 912, 87 FEP Cases 1131 (**7th Cir.** 2002), affirmed the grant of summary judgment to the Title VII defendant. The court held that an affidavit could not be considered when it was not sworn, not certified, and signed by plaintiff's counsel instead of by the witness.

2. Admissions

Allen v. Chicago Transit Authority, 317 F.3d 696, 700, 90 FEP Cases 1229 (**7th Cir.** 2003), reversed the grant of summary judgment to the defendant. The court held that the lower court erred by failing to consider the defendant's investigator's stated disbelief of the decisionmaker as a nonbinding evidentiary admission. The court explained:

> The district court refused to give any weight to the finding by the CTA's own investigator that Tapling's explanation for Reilly's promotion was not credible. This was another error. The finding was admissible as an admission made by an employee of a party opponent within the scope of his employment, Fed. R. Evid. 801(d)(2)(D) . . . ; and as an investigative report of a public agency. Fed. R. Evid. 803(8)(C) . . . . How much weight to give such admissions (for they are evidentiary rather than judicial admissions and hence not binding . . . is for the jury to decide, not the judge in ruling on a motion for summary judgment.

(Citations omitted.)

Bell v. E.P.A., 232 F.3d 546, 551–52, 84 FEP Cases 630 (**7th Cir.** 2000), reversed the grant of summary judgment to the Title VII race and national origin promotional discrimination

defendant because the plaintiffs' qualifications, compared to those of the selectees, and their statistical showing, would have allowed a reasonable factfinder to infer discrimination. The court also held that an internal EPA document, a memorandum written by a member of the selection panel stating that some of the plaintiffs were superior to the selectees, was admissible under FED. R. EVID. 801(d)(2)(D) as an admission by a party opponent.

Michas v. Health Cost Controls of Illinois, Inc., 209 F.3d 687, 689, 82 FEP Cases 913 (**7th Cir.** 2000), affirmed the grant of summary judgment to the ADEA RIF defendant. The court held that the plaintiff's Local Rule 12(N) statement of contested facts was not an adequate response to the defendant's statement of uncontested facts, because it did not meet the requirement of the local rule that each statement of contested fact be supported by citations to the record. "'An answer that does not deny the allegations in the numbered paragraph with citations to supporting evidence in the record constitutes an admission.'" (Citation omitted.) The court held that the plaintiff's submission of evidence of additional contested facts could not undo his admissions, but would be considered along with his admissions.

3. Ineffective Denials

Tinder v. Pinkerton Security, 305 F.3d 728, 735–36, 89 FEP Cases 1537 (**7th Cir.** 2002), affirmed the lower court's confirmation of the arbitration award. Following the standard used for summary judgment, the court stated that, where the defendant presented competent evidence as to the existence of a fact, the plaintiff cannot rebut it by stating that she "does not recall" its having happened.

4. Prior Claims of Discrimination

Mathis v. Phillips Chevrolet, Inc., 269 F.3d 771, 774–77, 87 FEP Cases 219, 81 E.P.D. ¶ 40,807 (**7th Cir.** 2001), affirmed the $50,000 judgment on a jury verdict for the ADEA plaintiff. The court held that the lower court did not abuse its discretion in barring evidence of the plaintiff's prior discrimination claims with respect to six other employers at which he had applied. The court held that the evidence of a series of false or insincere applications at other dealerships cannot be admitted Under Rule 404(b), F. R. Evid., to show that the plaintiff was litigious, but could be admitted under the same rule to show a plan, scheme, or modus operandi. Even if relevant, however, the court held that the lower court acted within its discretion in barring the evidence because its probative value was outweighed by the danger of prejudice against the plaintiff.

5. Other Employees' Claims of Discrimination

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

Fine v. Ryan International Airlines, 305 F.3d 746, 753, 89 FEP Cases 1543 (**7th Cir.** 2002), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff. The court rejected defendant's argument that the lower court erred in admitting the testimony of two other female employees who testified to numerous instances of sexual harassment and discrimination. The court held that this testimony was relevant to Ryan's good-faith belief that she was complaining of actionable sexual discrimination. *Id.* at 753–54.

Molnar v. Booth, 229 F.3d 593, 603–04, 83 FEP Cases 1756 (**7th Cir.** 2000), affirmed the judgment on the jury verdict for plaintiff on her § 1983 and Title VII sexual harassment and retaliation claims against the East Chicago Community School Corp and defendant Principal Booth. The court held that the lower court did not abuse its discretion by admitting evidence of defendant Principal Booth's "come on" to a former employee, Christine Kolavo, because "Rule 404(b) allows the admission of evidence of other acts if it tends to prove facts like intent, preparation, and absence of mistake." *Id.* at 603. Even if the lower court had erred in allowing the evidence, held the court, it would have been harmless error. "Both defendants took advantage of ample opportunities at trial to argue that Booth's actions toward Kolavo were not discriminatory and that East Chicago did not derive any notice from them. Furthermore, the evidence did not report shocking behavior; it was about a simple social request that the listener found inappropriate and that was rebuffed. The jury was thus able to place this one piece of evidence in its proper perspective.

6. Disaggregating the Evidence

O'Rourke v. City of Providence, 235 F.3d 713, 727–33 (**1st Cir.**), reversed the lower court's grant of judgment as a matter of law to defendant after the first trial and directed reinstatement of the first jury's verdict for the Title VII sex discrimination and sexual harassment plaintiff. The evidence involved repeated acts of harassment against the plaintiff. The court held that "a jury may consider a broad range of conduct that can contribute to the creation of a hostile work environment," that the incidents need not be motivated by sexual desire, and may include "work-sabotaging pranks," the "'silent treatment,'" and any act "which undermines her ability to succeed at her job." *Id.* at 729. The court then discussed the manner in which such evidence is to be assessed:

> Courts should avoid disaggregating a hostile work environment claim, dividing conduct into instances of sexually oriented conduct and instances of unequal treatment, then discounting the latter category of conduct. Such an approach defies the *Meritor* Court's directive to consider the totality of circumstances in each case and "rob[s] the incidents of their cumulative effect." . . . Moreover, such an approach not only ignores the reality that incidents of nonsexual conduct--such as work sabotage, exclusion, denial of support, and humiliation--can in context contribute to a hostile work environment, it also nullifies the harassing nature of that conduct. An employer might escape liability, even if it knew about certain conduct, if that conduct is isolated from a larger pattern of acts that, as a whole, would constitute an actionable hostile work environment. Thus, employers would lack the incentive to correct behavior that, like more overtly sexual forms of harassment, works against integrating women into the workforce.

Id. at 730 (citations and footnote omitted).

7. Prior Statements As Limiting Trial Testimony

Flannery v. Recording Industry Ass'n of America, 354 F.3d 632, 638, 93 FEP Cases 65 (**7th Cir.** 2004), reversed the Rule 12(b)(6) dismissal of the ADEA and ADA plaintiff's Complaint, holding that statements in plaintiff's EEOC charge that were arguably inconsistent with those in the Complaint to which it was attached and Amended Complaint did not estop him from making the assertion in his Complaints and were only evidentiary admissions that could be used to impeach him at trial. The court stated that "this court has long held that, when a document contradicts a complaint to which it is attached, the document's facts or allegations trump those in the complaint. . . . This principle is a sister doctrine of our rule applied in the summary judgment context that a party cannot create a genuine issue of material fact by contradicting prior sworn testimony." It continued: "These doctrines, however, must be applied with caution. As we said in *Bank of Illinois*, "[a] definite distinction must be made between discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence." . . . Credibility and weight are issues of fact for the jury, and we must be careful not to usurp the jury's role. . . . For this reason, these doctrines are only triggered upon a threshold determination of a 'contradiction,' which only exists when the statements are 'inherently inconsistent,' . . . not when the later statement merely clarifies an earlier statement which is ambiguous or confusing on a particular issue." (Footnote and citations omitted.) The court noted that neither the EEOC nor notice pleading required "a detailed elaboration of the events underlying the plaintiff's claim," *id.* at 639, and stated: "The statements at issue could be read differently and infer an inconsistency, but the mere necessity of making that inference confirms that the inconsistency is not inherent." *Id.* at 640.

Fine v. Ryan International Airlines, 305 F.3d 746, 753, 89 FEP Cases 1543 (**7th Cir.** 2002), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff. The court rejected defendant's argument that plaintiff's deposition testimony limited her claim. The court explained:

> Ryan also seems to believe that Fine cannot now argue that any of the events she complained about in her October 2 letter were discriminatory because she stated in her deposition that there were no incidents that she considered sexually harassing from April 25, 1996, until the date of her termination. But why not? A party is free to contradict her deposition testimony at trial, although her opponent may then introduce the prior statement as impeachment. . . . The jury could have reasonably believed that Fine's earlier statement was an error or that her statement referred only to workplace harassment and not to disparate treatment in regard to training and personnel files. There was enough evidence for the jury to find that Fine had a good-faith, objectively reasonable belief that Ryan was discriminating against her on the basis of her sex, and we will not disturb its finding.

(Citation omitted.)

8. Competence

Lang v. Kohl's Food Stores, Inc., 217 F.3d 919, 924–25, 83 FEP Cases 311 (**7th Cir.** 2000), affirmed the grant of summary judgment to the Title VII pay discrimination defendant.

The plaintiffs were female bakery and deli clerks, who were classified as department clerks in the collectively-bargained pay scale and claimed that they should be paid the same as produce clerks, most of whom were male, who were classified as regular clerks in the CBA pay scale. The court held that the lower court properly excluded the analysis of Dr. Howard Risher, plaintiffs' expert, and spoke in terms suggesting the testimony was incompetent as well as failing to meet the standards required for expert testimony. "Talking off the cuff—deploying neither data nor analysis—is not an acceptable methodology." *Id.* at 924 (citations omitted).

Pryor v. Seyfarth, Shaw, Fairweather & Geraldson, 212 F.3d 976, 980, 82 FEP Cases 1217 (**7th Cir.** 2000), reversed the grant of summary judgment to the defendant on plaintiff's Title VII retaliation claim. The court accepted, for purposes of summary judgment, the plaintiff's evidence that the defendant had a progressive discipline policy that it did not follow with respect to the plaintiff. The court rejected, as "absurd," the defendant's argument that an employee is not competent to testify to the existence of an employment policy.

Stuart v. General Motors Corp., 217 F.3d 621, 635–36 n.20, 84 FEP Cases 871 (**8th Cir.** 2000), affirmed the grant of summary judgment to the Title VII retaliation defendant. The court held that two sets of handwritten notes could not be considered as part of the summary judgment record because they were authenticated based on personal knowledge. "To be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of FED. R. CIV. P. 56(e). Documents which do not meet those requirements cannot be considered."

Dodoo v. Seagate Technology, Inc., 235 F.3d 522, 528–29, 84 FEP Cases 933 (**10th Cir.** 2000), affirmed the judgment on a jury verdict for the ADEA and Title VII plaintiff as to promotions to a Program Manager position and a Product Line Manager position. The court held that the lower court did not abuse its discretion in allowing plaintiff's former supervisor, Dr. Randy Clark, to testify about his evaluations of the plaintiff and his opinion that plaintiff was the best applications engineer in the Oklahoma facility, although the defendant's decisionmakers did not rely on Clark's evaluations, because the testimony helped establish that plaintiff was qualified for the positions at issue, and its probative value outweighed any prejudicial effect.

9. Plaintiff's Own Testimony

Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 53, 83 FEP Cases 569 (**1st Cir.** 2000), affirmed in part, and reversed in part, the grant of summary judgment to the Title VII sex discrimination and retaliation defendant. The court rejected the defendant's and Magistrate Judge's views that the plaintiff's affidavit, executed after receipt of the defendant's summary judgment motion, contains "self-serving statements" that "should be given less credibility than other evidence in the record." The court did not mention any basis for distinguishing the statements made in the defendant's affidavits as less self-serving than the plaintiff's statements. It stated:

> The law regarding this dispute is clear. To the extent that affidavits submitted in opposition to a motion for summary judgment merely reiterate allegations made in the complaint, without providing specific factual information made on the basis of personal

> knowledge, they are insufficient. . . . However, a "party's own affidavit, containing relevant information of which he has first-hand knowledge, may be self-serving, but it is nonetheless competent to support or defeat summary judgment." . . . Santiago-Ramos' affidavit contains more than the allegations made in her complaint: it provides specific factual information based upon her personal knowledge. It may be self-serving, but it complies with the requirements of the federal rules, and we therefore must consider it together with the other evidence before the magistrate judge.

(Citations omitted.)

Szymanski v. Rite-Way Lawn Maintenance Co., Inc., 231 F.3d 360, 364–65 (**7th Cir.**), reversed the grant of summary judgment to the ADA termination defendant. The court rejected the lower court's holding that plaintiff's unsupported assertions that he had been hired were "self-serving" and insufficient to defeat summary judgment. The court held that this doctrine was inapplicable. It had originated in a case in which defendants repeatedly altered their testimony to create disputed facts. Here, by contrast, both sides relied on affidavit and deposition testimony. The court held that defendant's submissions in support of summary judgment were just as unsupported and self-serving as plaintiff's submissions in opposition, and that this was no ground for considering plaintiff's submission to be nonprobative. "Where the moving party's version of material facts is supported solely by self-serving assertions, self-serving assertions to the contrary by the nonmoving party may be sufficient to create a credibility dispute which is best resolved at trial." *Id.* at 365.

Pryor v. Seyfarth, Shaw, Fairweather & Geraldson, 212 F.3d 976, 978 (**7th Cir.**), affirmed the grant of summary judgment to the defendant on plaintiff's Title VII sexual harassment claim, holding that no actionable conduct was involved. The court refused to consider plaintiff's post-deposition affidavit, stating that "she gives us no reason to depart from the presumption that an affidavit which seeks to bolster a party's prior deposition is not entitled to consideration." (Citations omitted.)

10. Inferences Arising from Destruction of Records

Caparotta v. Entergy Corp., 168 F.3d 754, 79 FEP Cases 752 (**5th Cir.** 1999), vacated the judgment on a jury verdict for the plaintiff and remanded the case for a new trial. A box of documents in the custody of the defendant's in-house counsel was inadvertently destroyed, including one irreplaceable file: the Supervisor's File on the plaintiff. The lower court conducted a pretrial evidentiary hearing and found that the defendant had not acted in bad faith and that the plaintiff was not entitled to an adverse inference. Over the objection of the defendant, the in-house counsel for the defendant was called to the stand during the jury trial to testify about the inadvertent destruction of documents. The destruction of documents was a prominent feature of plaintiff's opening and closing statements. *Id.* at 756–57. The court of appeals stated that the destruction of the evidence might have harmed the plaintiff, but that it was unduly prejudicial to reveal the facts of the destruction to the jury through the testimony of one of the defendant's counsel seated at its counsel table. *Id.* at 757–58. The court stated:

> Certainly, the prejudicial impact of such testimony from Entergy's counsel was substantial. Additionally, it was confusing to the jury because it was unclear as to which

> issue the evidence was relevant. At points throughout the trial, it appeared that the parties were relitigating the spoliation issue which had been resolved by the district court at an earlier evidentiary hearing. To say the least, this was a highly extraordinary method of informing the jury that documents were inadvertently destroyed. It would have been more appropriate for the district court to have informed the jury that the documents had been inadvertently destroyed and that the district court found no bad faith on the part of Entergy.

Id. The court stated that the probative value of the evidence was minimal, if any, and that its admission affected the substantial rights of the defendant. Judge Dennis dissented. *Id.* at 758–62.

Hall v. Bodine Electric Co., 276 F.3d 345, 358–59, 87 FEP Cases 1240 (**7th Cir.** 2002), affirmed the grant of summary judgment to the Title VII sexual harassment defendant. The court held that no inference of pretext arose from the fact that the investigator destroyed his original notes after typing them up on a computer. It stated that employers are not required to keep every piece of scrap paper, and that the investigator's reasons for throwing out his original notes—that the original notes were rough and contained misspellings and cross-outs, that the typed version contained virtually everything in the notes, and to preserve confidentiality—were plausible. The court did not question the consistency of the second and third reasons. Moreover, there was substantial evidence supporting the investigator's conclusion that the plaintiff had herself sexually harassed other men at work, including the accused perpetrator. *Id.* at 359.

Mathis v. John Morden Buick, Inc., 136 F.3d 1153, 76 FEP Cases 352 (**7th Cir.** 1998), affirmed the judgment for defendant entered after a bench trial. The plaintiff did not have the benefit of documents with which to impeach the defendant dealership's testimony as to the reasons the African-American plaintiff was not promoted to the job of Sales Manager. Id. at 1154. The dealership went out of business in 1992. Its assets were sold and the owner found a new tenant for a building he had leased to the dealership. "The documents apparently were destroyed in 1995 when a new tenant moved into the dealership's former premises. Morden had a legal obligation to preserve the documents, and perhaps the reason he failed to do this is that he knew (and feared) what they would reveal; but perhaps the explanation is benign." *Id.* at 1155. The destruction occurred shortly before the deposition of the defendant's owner. The court stated:

> Federal regulations require employers to preserve documents relevant to claims of discrimination in particular, records concerning persons hired (or not hired) for the position sought by the complainant. 29 C.F.R. § 1602.14. Mathis did not rely wholly on the regulation. He served a document-production request under Fed. R. Civ. P. 34. Instead of complying or seeking relief under Rule 26(b), the dealership threw the documents away. In response, the court could have entered judgment for Mathis or taken any of the lesser steps authorized by Fed. R. Civ. P. 37(b)(2). Surprisingly, Mathis's counsel (a different lawyer from the one who represents him on appeal) did not file a motion for sanctions under Rule 37. Instead he raised the subject during cross-examination of Morden at trial, and in post-trial papers Mathis asked the magistrate judge to disbelieve Morden's explanation for his selection of sales managers, or to infer that the

> documents would have been unfavorable perhaps because they would have showed that one or more sales managers lacked prior supervisory experience.
>
> Mathis's perplexing failure to seek sanctions under Rule 37 forecloses access to the substantial weaponry in the district court's arsenal. . . . What remains the possibility of an adverse inference depends on persuading the court that the evidence was destroyed in "bad faith". . . . That the documents were destroyed intentionally no one can doubt, but "bad faith" means destruction for the purpose of hiding adverse information. Mathis argues that only the documents' contents could explain their destruction; the competing explanation is that they were destroyed incident to the end of the corporation's existence.

Id. (citations omitted). The court stated that "bad faith" is "a question of fact like any other, so the trier of fact is entitled to draw any reasonable inference." *Id.* The magistrate judge did not address the question specifically, and the court mentioned several speculative possibilities. The court stated that the missing documents may not have been of much help, in any event, on the central question whether all of the defendant's sales managers had had supervisory experience. "From what we can see, however, this is principally a semantic dispute. One person operated a used car lot before joining Morden as sales manager. Mathis insists that this is not the kind of experience Morden says was a prerequisite, supporting an inference that the reasons for rejecting Mathis were pretextual; Morden replies that a used car dealer must appraise autos, handle financing and insurance, and so on, gaining the skills a manager at a new car dealer needs. How the missing documents would have helped the magistrate judge make progress in resolving this disagreement is unclear." *Id.* at 1155–56. The court stated that the magistrate judge should have been more explicit, "but Mathis bears part of the responsibility for omitting a Rule 37 motion and not raising the issue forcefully during trial. Judges must be vigilant to prevent the destruction of evidence, but litigants who are not diligent in the defense of their own interests cannot expect rescue by appellate courts." *Id.* at 1156.

Aramburu v. The Boeing Co., 112 F.3d 1398, 1407, 6 AD Cases 1217 (**10th Cir.** 1997), stated that "the general rule is that bad faith destruction of a document relevant to proof of an issue at trial gives rise to an inference that production of the document would have been unfavorable to the party responsible for its destruction." The court continued: "The adverse inference must be predicated on the bad faith of the party destroying the records. . . . Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case." The court held that no adverse inference should have been drawn from the decisionmaker's misplacing of part of the plaintiff's attendance record for the year of his discharge, where this was inadvertent and where the company brought forth other records showing the plaintiff's attendance in that year.

11. Determinations of the EEOC and State and Local Agencies

Lang v. Kohl's Food Stores, Inc., 217 F.3d 919, 925–28 (**7th Cir.**), affirmed the judgment on a jury verdict for the Equal Pay Act defendant, and held that the trial court did not abuse its discretion in informing the jury that the EEOC had found in favor of the defendant. The lower court had initially granted plaintiffs' motion *in limine* barring the defendant from informing the jury of this determination, "but the judge changed her mind after plaintiffs' counsel told the jury that Kohl's agreed 'under pressure of this lawsuit' to reduce the pay

differential among the departments." *Id.* at 925. The court stated that this assertion implied not only that the suit had merit, but that the defendant knew of its merit; the defendant thus had a right to counteract the implication by showing that what it knew "implied that it would prevail on the merits." *Id.* at 926. The court noted that the EEOC's report was "more thorough" than the "superficial" decisions normally issued, quoted extensively from the decision, and described it as "damning" to plaintiffs' claims. *Id.* The lower court did not inform the jury of the reasoning on which the EEOC's conclusion was based. The court rejected plaintiffs' argument that they had not "opened the door" because the EEOC had rescinded its decision prior to the defendant's agreement to a new pay scale in collective bargaining. It pointed out that plaintiffs had requested reconsideration, the EEOC had granted it and revoked its right-to-sue letter, and before the EEOC could do anything else "plaintiffs asked for a new right-to-sue letter, which the EEOC was obliged to issue forthwith, and the EEOC called off all further activities. *Id.* at 926–27. While the district court mistakenly thought, at the time she informed the jury of the EEOC's determination, that the collective-bargaining negotiations took place prior to the EEOC's rescission of its decision, she asked them to disregard the report as soon as she learned of her mistake in timing. The court of appeals held that the mistake of timing did not require reversal, because the parties had drafted an instruction that the defendant had a determination at the time of the negotiations. "Plaintiffs deny that they 'stipulated' to the language, but no matter; they did not *object* to it, and that is that. FED. R. CIV. P. 51." *Id.* at 927 (emphasis in original). The court continued:

> Because plaintiffs sought to persuade the jury that Kohl's recognized its culpability, Kohl's was entitled to rebut this contention using the best available evidence: a decision by the EEOC that the positions were not substantially equal. . . . Decisions by public bodies do not vanish into thin air or become un-documents when parties ask for reconsideration or settle their differences. . . . When negotiating with the unions, Kohl's knew the EEOC's view, which had been withdrawn as a result of plaintiffs' strategy but had not been disclaimed as erroneous. The 1998 negotiations occurred against a background that included the EEOC's support of Kohl's position, and this was relevant to the strength of the inference that Kohl's and the unions acted under the "pressure of this lawsuit" as plaintiffs asserted.
>
> Doubtless there was a risk that the jury would overestimate the significance of the EEOC's ruling; this is why such conclusions generally are not admitted (on behalf of either side) in jury trials. . . . Plaintiffs note that the jury asked a question about the report during deliberations, implying that the EEOC's view assumed unusual significance. By opening the door to disclosure, however, plaintiffs took that risk; they could not argue as they did and then defang the best response. . . . Nor can they avoid the consequence of their opening statement by contending on appeal (as they do) that "[w]hy Kohl's *narrowed* the gap in late 1998 is entirely peripheral" (emphasis in original). That may be, but it was plaintiffs who injected this subject into the case and entitled Kohl's to supply an answer. Plaintiffs did not argue to the district judge that the scope of the answer was too prejudicial and never suggested any possible response that was less prejudicial. The district judge protected plaintiffs' substantial rights by excluding the EEOC's actual language and reminding the jury that the conclusion had been rescinded. In response to the jury's question, the judge reread the instruction and added that the only issue properly under consideration was "whether the jobs are equal" rather than why

> Kohl's and the union changed the pay scales in 1998. The evidence and the instructions as a whole ensured that the jury focused on, and answered, the right questions. Plaintiffs had a fair trial.

Id. at 927–28 (emphasis in original).

Halloway v. Milwaukee County, 180 F.3d 820, 827 n.9, 80 FEP Cases 367 (**7th Cir.** 1999), affirmed the grant of summary judgment to the ADEA defendants. The court held that the lower court did not abuse its discretion in failing to conclude that a genuine issue of triable fact was created by the probable-cause determination of the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations. The court stated that administrative findings are sometimes admissible, but that the trial court has substantial discretion in deciding whether to admit them. In finding that there was no abuse of discretion, the court stated:

> The Equal Rights Division's initial determination explicitly states that the finding would not even be considered in the state hearing on the matter. Moreover, for the most part, the finding does not look past the bare allegations made in the complaint. Commissioner Halloway does not contest that the conclusory assessment of the investigation was not based on sworn affidavits or depositions from both sides.

In any event, stated the court, admission of the finding would not have changed the result of the case.

Bassett v. City of Minneapolis, 211 F.3d 1097, 1103 n.12, 83 FEP Cases 643 (**8th Cir.** 2000), reversed the grant of summary judgment to the Title VII and Minnesota Human Rights Act retaliation and racial discrimination defendant. The court relied in part on the findings of the Minnesota Department of Civil Rights, which has investigated the plaintiff's claims "by examining over 1,000 pages of documents and reviewing numerous taped conversations and interviews with" plaintiff's supervisor, her co-workers, and the plaintiff herself. The MDCR found probable cause that the plaintiff was (1) subjected to disparate scrutiny based on her race, and (2) retaliated against because she had attempted to pursue 'legitimate channels' to stop the alleged discriminatory behavior in her department." The court concluded: "While not determinative on the question of discrimination, the finding of probable cause demonstrates that upon distillation of all the evidence presented, reasonable minds could disagree over the material fact of retaliation and intentional discrimination." (Citations omitted.) The court gave "no credence" to the ten-page ALJ report after three days of hearings, or to the Minneapolis Civil Service Commission rejecting it, but held that the ALJ's findings that there was no "just cause" for firing the plaintiff "are germane to our determination that a disputed fact exists" as to the plaintiff's allegedly deficient performance. *Id.* at 1104 n.15.

Coleman v. Quaker Oats Co., 232 F.3d 1271, 1283–84, 84 FEP Cases 602 (**9th Cir.** 2000), affirmed the grant of summary judgment to the ADEA RIF defendants. The court held that the lower court properly admitted the EEOC reasonable-cause determination, but that such letters vary widely in quality and detail. The court held that the letter at issue was not enough to create a triable issue of fact because it was conclusory. "It is impossible from this letter to know what facts the EEOC considered and how it analyzed them. Examining similarly conclusory

EEOC letters, other circuits have concluded that when the letters only report 'bare conclusions,' they have little probative value." *Id.* at 1284 (citations omitted). The court observed that the Circuit had previously upheld summary judgment against the Commission when it was suing, and that that "then, a priori, a conclusory EEOC reasonable cause letter, at least by itself, does not create an issue of material fact." *Id.* The court reached a similar conclusion as to plaintiff Coleman's reasonable cause determination. "In fact it appears to have been a form letter." *Id.* at 1289. The court continued: "Indicative of its conclusory nature and lack of probative value, the EEOC letter in Coleman's case includes the recitation that Quaker discriminated against older employees as a class despite the fact that there was no class in 1995 when Coleman was terminated. Coleman was the only employee laid off in that RIF who filed an EEOC charge, and the EEOC had no information regarding other employees terminated that year." Judge Fletcher dissented from a different holding. *Id.* at 1297–1300.

Beachy v. Boise Cascade Corp., 191 F.3d 1010, 1014–16, 9 AD Cases 1258 (**9th Cir.** 1999), *cert. denied*, 529 **U.S.** 1021 (2000), affirmed the judgment on a jury verdict for the ADA defendant and held that the lower court erred in admitting, over the plaintiff's objection, a Notice of Dismissal and a Dismissal Memo of the Oregon Bureau of Labor and Industries ("BOLI"), but held that the error was harmless. The Notice stated that BOLI would not proceed with the plaintiff's case because it had not found sufficient evidence to justify a continuation, and the Dismissal Memo described the investigation. The court held that a document that appears to be a final decision of an investigating agency creates a much greater risk of unfair prejudice than a finding of probable cause:

> We now hold that an agency's determination that insufficient facts exist to continue an investigation is not per se admissible in the same manner as an agency's determination of probable cause. Whereas the latter type of determination indicates only that there is probable cause to believe a violation has occurred, the former type of determination in effect constitutes a finding of no probable cause and terminates the agency's inquiry. In this sense, a determination of insufficient facts is a final ruling by the agency. There is a much greater risk of unfair prejudice involved in introducing a final agency ruling as opposed to a probable cause determination, because a jury might find it difficult to evaluate independently evidence of discrimination after being informed of the investigating agency's final results. . . . Accordingly, we have held that a district court asked to admit an agency's letter of violation must weigh the letter's prejudicial effect against its probative value pursuant to Rule 403. . . . We conclude that the same rule should apply when a district court is asked to admit an agency's determination that insufficient facts exist to continue an investigation.

Id. at 1015 (citations and footnote omitted). The court held that the lower court's failure to weigh the prejudicial effect of these documents against their probative value was harmless error, because the plaintiff's case "was not particularly strong," and the defendant produced substantial evidence of its nondiscriminatory reasons.

McGarry v. Board of County Commissioners of County of Pitkin, 175 F.3d 1193, 1198–99 n.2, 79 FEP Cases 964 (**10th Cir.** 1999), reversed the grant of summary judgment to the defendants. However, the court noted that the EEOC's determination letter, stating that its investigation had not established a violation of Title VII, "would be admissible under FED. R.

EVID. 803(8)(C)." (Citation omitted.)

Lathem v. Department of Children and Youth Services, 172 F.3d 786, 791–92, 79 FEP Cases 1267 (**11th Cir.** 1999), affirmed the judgment on a jury verdict for the plaintiff. The court rejected the defendant's argument that the lower court had abused its discretion in declining to admit the EEOC's and Georgia Commission on Equal Opportunity's no-cause findings. "Although trial courts admit EEOC determinations in bench trials, this liberal admissibility rule does not apply to jury trials. . . . Instead, the district court must make the admissibility determination on an individual basis, considering the evidence's probative value and the danger of unfair prejudice." *Id.* at 791 (citation omitted; footnote omitted). The defendant argued that the refusal to admit the findings prejudiced it because the plaintiff had not identified one of her two comparators to the agencies. "Lathem, however, argued that the district court should not admit the reports because the EEOC and CEO failed to interview certain witnesses and review certain documents during its investigation. District courts have broad discretion with respect to the admissibility of evidence. . . . Because Lathem offered a legitimate reason why the reports may have unfairly prejudiced her case, we find that the district court did not abuse its discretion when it refused to admit in this jury trial the EEOC's and CEO's no-cause determinations." *Id.* at 791–92 (citation omitted).

12. Hearsay and its Exceptions

EEOC v. University of Chicago Hospitals, 276 F.3d 326, 333, 87 FEP Cases 1089 (**7th Cir.** 2002), reversed the grant of summary judgment to the Title VII religious-discrimination constructive-discharge defendant. The court held that the statements of the charging party's former supervisor, as to the intentions of the decisionmaker, and his testimony as to the charging party's statements, were not hearsay because they were not admitted to prove the truth of the matter asserted, but the state of the plaintiff's mind as she returned to work.

Alston v. King, 231 F.3d 383, 387, 17 IER Cases 1013 (**7th Cir.** 2000), reversed the award of nominal damages of one dollar for the deprivation of the plaintiff's due process right to a pretermination hearing, and remanded the case for a new determination of damages. The court held that the lower court did not abuse its discretion in barring evidence on the damage to plaintiff's reputation, his removal from the Black History Month program, and his inability to use his educational degrees, because he attempted to present this evidence only through his own hearsay testimony, and not from persons who could have presented these matters properly.

Stewart v. Henderson, 207 F.3d 374, 377–78, 82 FEP Cases 517 (**7th Cir.** 2000), affirmed the grant of summary judgment to the Title VII racial discrimination defendant on the claims of plaintiffs Stewart and Williams. The plaintiffs had applied for a managerial position, but were screened out by a three-member review committee before the interview stage. *Id.* at 376. The defendant relied on the affidavit of Walter Hess, the chairperson of the review committee. "That affidavit stated, in relevant part, that all three reviewers rated Williams as one of the weakest candidates, and that the consensus on Williams was that his written application responses to the KSAs showed an adversarial quality that would be detrimental in the position. Hess further attested that he initially rated Stewart as one of his top four candidates, but that the other two disagreed. Those reviewers convinced Hess that his rating was too high because in his application Stewart did not document 'Actions' that he had taken himself, as is required, but

instead had "'too many we's—not anything he did himself.'" *Id.* at 377. The court rejected the plaintiffs' challenge to the affidavit as hearsay, stating that "it rests largely on a misunderstanding of the concept of hearsay." *Id.* The court pointed out that Hess's statement about the opinions of other committee members was not offered to establish that Stewart's application included too may "'we's,'" but was offered to prove only what motivated Hess to change his initial, more favorable rating. The court also held that there was no need for each committee member to testify, because "Hess was a participant in the teleconference, and thus has personal knowledge of what was decided and why." *Id.* The court stated that the logical extreme of the plaintiff's argument would be that "each committee member could only testify as to his or her personal opinion, but no one could testify as to what the group as a whole decided." *Id.* It stated that there is no legal support for such a rule. The court rejected as frivolous the plaintiffs' argument that, if the reasons of other committee members were to be considered, it was also necessary to consider another part of Hess's affidavit in which he stated that one of the committee members had mentioned plaintiff Williams' EEO complaint. "The affidavit makes clear, however, that *after* the decision not to recommend Williams was made, one member indicated that Williams previously had filed an EEO complaint, and that comment motivated Hess to retain his notes. The affidavit thus negates any claim that the EEO discussion affected the decision, since the decision preceded it." *Id.* at 377–78. The court emphasized that there was no evidence contradicting the affidavit: "The plaintiffs offer nothing to the contrary. In fact, the plaintiffs never even deposed any member of the review committee, despite having more than a year to do so." *Id.* at 378.

Swinton v. Potomac Corp., 270 F.3d 794, 807–08, 87 FEP Cases 65 (**9th Cir.** 2001), affirmed the judgment on a jury verdict for the § 1981 and Washington State-law racial harassment plaintiff. The court held that the trial court did not err in admitting summaries of the plaintiff's accounts of the harassment as part of exhibits prepared by psychologists he consulted, because these records came under the hearsay exception in FED. R. EVID. 803(4) for "statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

Abuan v. Level 3 Communications, Inc., 353 F.3d 1158, 1170–72, 93 FEP Cases 94 (**10th Cir.** 2003), affirmed the judgment for the ADEA plaintiff. The court upheld the lower court's admission of a statement, by a corporate Vice-President (and former supervisor of the plaintiff), at a luncheon commemorating the Vice-President's resignation, that one of the reasons he was resigning was the company's unethical treatment of the plaintiff. The court held that the statement was admissible under Fed. R. Evid. 801(d)(2)(D) because it was the statement of an official of the defendant, as to a matter within the scope of his authority to speak, made while he was an official and had such authority.

13. The Balancing Test

Marcano-Rivera v. Pueblo International, Inc., 232 F.3d 245, 255, 11 AD Cases 105 (**1st Cir.** 2000), affirmed the judgment on a jury verdict for the ADA plaintiff, rejecting defendant's argument that the admission of evidence of pre-1992 failures to accommodate plaintiff was so prejudicial that no curative instruction would suffice. The court held that the curative instruction "was clear and emphatic," and stated that "the defendant has not suggested any sufficient basis

for its conjecture that the jury failed to follow the specific curative instructions repeatedly given by the district court." (Citation omitted.)

Swinton v. Potomac Corp., 270 F.3d 794, 808, 87 FEP Cases 65 (**9th Cir.** 2001), affirmed the judgment on a jury verdict for the § 1981 and Washington State-law racial harassment plaintiff. The court held that the lower court did not abuse its discretion in barring evidence that the plaintiff only sought psychological consulting two days after consulting with his attorney, because the defendant had had ample opportunity to cross-examine the plaintiff about his emotional distress.

14. Testimony on Advice of Counsel

Farias v. Instructional Systems, Inc., 259 F.3d 91, 100–01 (**2nd Cir.** 2001), affirmed the judgment of liability on a jury verdict for Title VII retaliation plaintiff Robinson, and affirmed the denial of punitive damages. The court held that the lower court did not abuse its discretion in barring the testimony of defense counsel to the effect that counsel had advised the defendant not to offer a severance payment because the plaintiff had filed an EEOC charge. It explained:

> But nothing would prevent ISI from offering the severance in exchange for a release, which no doubt included actual claims as well as hypothetical ones. Dunn's testimony therefore would only have reinforced the jury's finding that the denial of severance benefits was retaliatory, and his testimony therefore could not evidence a motive that was both legitimate and non-retaliatory. The retaliatory finding rests on cause and effect, regardless of whether Kaminer acted out of animus and revenge or on the advice of counsel. We need not decide whether there are circumstances where the advice of counsel could constitute or assist a defense to a claim of retaliation.

The court went on to state that the admissibility of this testimony as to punitive damages was a different question, but any error was harmless in light of the reversal of punitive damages. *Id.* at 101.

15. Judge's Questions

Swinton v. Potomac Corp., 270 F.3d 794, 808–09, 87 FEP Cases 65 (**9th Cir.** 2001), affirmed the judgment on a jury verdict for the § 1981 and Washington State-law racial harassment plaintiff. The court held that the trial judge's questioning of one of the two co-plant managers was proper clarification of testimony, and revealed little of consequence. Although the trial judge did elicit that plaintiff was the only black employee of the plant, other witnesses had already testified to this.

16. Counsel's Failure to Follow Through

Swinton v. Potomac Corp., 270 F.3d 794, 809, 87 FEP Cases 65 (**9th Cir.** 2001), affirmed the judgment on a jury verdict for the § 1981 and Washington State-law racial harassment plaintiff. Finally, the court rejected the defendant's contention that the district court improperly excluded an exhibit, when the lower court only reserved ruling on its admission and plaintiff's objection, the defendant never asked for an immediate ruling, used it to refresh the

recollection of the witness as it had begun to do before offering the exhibit, and never again moved to introduce it.

17. Evidence of Post-Event Occurrences

Swinton v. Potomac Corp., 270 F.3d 794, 811–17, 87 FEP Cases 65 (**9th Cir.** 2001), affirmed the judgment on a jury verdict for the § 1981 and Washington State-law racial harassment plaintiff. The plaintiff was subjected to a frequent barrage of racist slurs and jokes, some of them in the presence of a member of management. The defendant argued that it was entitled to a new trial because the lower court had excluded evidence of one of the post-suit steps it had taken to remedy discrimination. The court distinguished a number of cases excluding evidence of post-event occurrences because they involved the issue of liability, and evidence irrelevant to liability may still be relevant to the imposition of punitive damages. After surveying the law in Federal and State courts, the court held that lower courts have the discretion to decide whether to allow evidence of post-event remedial actions, "as a means to mitigate punitive damages." *Id.* at 814. The court stated that, under *Faragher* and *Ellerth*, the employer has the right to show that it took prompt and effective remedial action, and that this right cannot be cut off by the plaintiff's simultaneous quitting under a contention of constructive discharge and filing of suit under § 1981. "The point is that the timing and nature of remedial action are case-specific and will not always fit in a neat box." *Id.* at 815. This case is discussed further in the section on punitive damages below.

18. Reprimand of Supervisor for Imposing Insufficient Discipline

Sellers v. Mineta, 350 F.3d 706, 92 FEP Cases 1665 (**8th Cir.** 2003), affirmed the denial of a new trial in plaintiff's assault and battery case against John Joseph, a co-worker at the FAA, for allegedly attempting to rape her in her home, harassing her at work, and pinching her buttocks at work. When the FAA finally investigated plaintiff's complaints, the following occurred:

> FAA supervisor Willie Moore interviewed Joseph and, at the end of the interview, told Joseph to stay away from Sellers. Afterward, a letter officially reprimanding Moore for inadequately handling the matter (hereinafter "the Moore reprimand letter") was placed in Moore's personnel file. The Moore reprimand letter states as one of the grounds for reprimand: "Failure to assess the proper penalty when the facts are known and disciplinary action is warranted (including acts of sexual harassment or other types of prohibited discrimination)."
>
> At trial, over the objections of both Joseph and the Secretary, Sellers was permitted to introduce the Moore reprimand letter into evidence during her case-in-chief. Four days after the Moore reprimand letter was introduced, Joseph requested that the letter be stricken from the record or, alternatively, that a limiting instruction be given. The district court denied both requests.

Id. at 709. Joseph argued that the letter was too prejudicial to be admitted under the F.R.E. 703 balancing test, that the lower court improperly commented on the letter (see below), and that "was hearsay evidence offered for the truth of the statement that acts of sexual harassment had

occurred." *Id.* at 710–11. The court disagreed, stating that the letter "was relevant to show, not that sexual harassment had actually taken place, but that the FAA did not take adequate steps to respond to the problem and that Sellers found the pinching incident to be offensive (an issue which Joseph contested at trial)." *Id.* at 711.

19. Exclusion of Evidence Not Produced in Discovery

Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020, 1027–28, 92 FEP Cases 641 (**9th Cir.** 2003), *petition for cert. filed*, 72 USLW 3451 (Dec. 22, 2003) (No. 03–944), affirmed the § 1981 jury verdict for $360,000 in compensatory damages and $2,600,000 in punitive damages, $86,000 in lost wages on the on the breach of contract claim, and a remitted $86,000 in double damages for willful withholding of wages and benefits under Washington law. The court held that the trial court did not abuse its discretion in refusing to admit an unsigned, undated antidiscrimination policy produced for the first time at trial and facially applicable only to a related company, where there was no evidence that any employee of defendant had ever seen it. The court held that failure to produce the document in discovery was by itself an adequate basis for its exclusion, and that defendant's excuse that "'there was a rash of discovery'" was inadequate. Alternatively, the court held that the lack of foundation was an adequate basis for its exclusion.

20. Exclusion of Witness Not Listed in Pretrial Order

Sellers v. Mineta, 350 F.3d 706, 711–12, 92 FEP Cases 1665 (**8th Cir.** 2003), affirmed the denial of a new trial in plaintiff's assault and battery case against John Joseph, a co-worker at the FAA, for allegedly attempting to rape her in her home, harassing her at work, and pinching her buttocks at work. The court held that the lower court did not abuse its discretion in barring the testimony of a witness Joseph wanted to call, who had not been listed in the pretrial order. "Joseph also argues that, even though Warren was not on his pretrial witness list, the prospect of her testimony could not have surprised Sellers because Warren's name was on both Sellers's and the Secretary's pretrial witness lists. In any event, Joseph suggests, the more appropriate remedy would have been to grant a continuance, not to exclude Warren's testimony entirely." Rejecting all of these arguments, the court stated:

> In the present case, Joseph provided no justification for failing to include Warren on his pretrial witness list, nor did he suggest any reason why Sellers should have expected Warren to testify on *his* behalf. Had Warren been identified on Joseph's witness list, Sellers might have taken additional steps to prepare for her testimony, including, for example, taking her deposition. Warren's anticipated testimony, as described at trial by Joseph's attorney (i.e., that Sellers had looked for Joseph and perhaps that the two had been seen together), even if true, would not necessarily disprove or even undermine Sellers's allegations against Joseph. Finally, as to the suggestion that a continuance would have been appropriate, it does not appear that Joseph ever asked for a continuance. Even if he had, the district court could properly have denied the request. The issue arose late in the trial, at a point where a continuance would undoubtedly have been disruptive to the proceedings and everyone involved. The district court did not abuse its discretion in refusing to allow Warren to testify on Joseph's behalf.

Id. at 712.

P. Judge's Comments and Involvement

Acevedo-Garcia v. Monroig, 351 F.3d 547, 561–62 (**1st Cir.** 2003), rejected defendants' objections to the lower court's comments on the evidence, and questioning of witnesses, in the presence of the jury, in large part because the trial had been long and contentious. The court explained (citations omitted):

> Defendants allege that at various junctures during the trial the district court inaccurately and prejudicially commented on the evidence, truncated the defendants' cross-examination of several plaintiffs, and chastised defense witnesses in front of the jury. As we have previously observed, it is well settled that the trial judge "has a perfect right—albeit a right that should be exercised with care—to participate actively in the trial proper." . . .
>
> . . . Defendants also fail to demonstrate "serious prejudice" arising from the court's participation during plaintiffs' case in chief. This was a lengthy and contentious trial featuring dozens of witnesses, numerous sidebar conferences, and a myriad of other procedural delays arising, *inter alia*, from the inartful labeling and introduction of exhibits, translation difficulties, and a continuing stream of objections from both parties. Under these challenging circumstances, the court's efforts to accelerate the pace of the trial with infrequent commentary on the evidence and the occasional prodding of witnesses were amply justified and well within its discretion.

Sellers v. Mineta, 350 F.3d 706, 92 FEP Cases 1665 (**8th Cir.** 2003), affirmed the denial of a new trial in plaintiff's assault and battery case against John Joseph, a co-worker at the FAA, for allegedly attempting to rape her in her home, harassing her at work, and pinching her buttocks at work. When the court admitted the Moore reprimand letter discussed above, it stated: "Mr. Moore obviously made a finding that there was a basis for a claim . . . ." Joseph argued that this comment was improper because "Mr. Moore's informal investigation lacked the most fundamental protections provided by the Administrative Procedure Act, the Due Process clause, and fundamental fairness." *Id.* at 710–11. The court rejected his claim, stating: "As to the district court's comment that Moore 'obviously made a finding that there was a basis for a claim,' we disagree that the jury reasonably could have inferred from it that Moore had conducted a formal investigation. In any case, the district court instructed the jury several times that its comments were not evidence and should never be taken as an indication of what the verdict should be." *Id.* at 711.

Q. Rule 412, Fed. R. Evid.

Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 855–56, 75 FEP Cases 1228, 73 E.P.D. ¶ 45,317 (**1st Cir.** 1998), affirmed the Title VII judgment of liability against the defendant employer and its owner. "Defendants continually sought to make an issue of plaintiff's sexual history. In the course of this litigation, defendants attempted to paint the plaintiff as sexually insatiable, as engaging in multiple affairs with married men, as a lesbian, and as suffering from a sexually transmitted disease. Defendants claimed that plaintiff had an

affair with a married man that caused her to become distracted from work, and led to the lapses for which she was fired." (Footnote omitted). Nor was this all. "During discovery, defendants requested that plaintiff submit to an AIDS test, apparently to substantiate their allegations of promiscuity. The request was denied." *Id.* at 856 n.2. The court stated that Rule 412 "reverses the usual approach . . . by requiring that the evidence's probative value 'substantially outweigh' its prejudicial effect." *Id.* at 856. The district court excluded "evidence concerning plaintiff's moral character or promiscuity and the marital status of her boyfriend," but "allowed defendants to introduce evidence directly relevant to their theory that plaintiff's relationship distracted her from work" and allowed evidence "concerning plaintiff's allegedly flirtatious behavior toward Miranda . . . to determine whether Miranda's advances were in fact 'unwanted.'" *Id.* The court of appeals held that these rulings "were well within the district court's discretion." *Id.* The court rejected the defendants' claim of a double standard on evidentiary rulings, because "Fed. R. Evid. 412 required the district court to apply a stricter standard with regard to admission of evidence of plaintiff's sexual history than to the evidence admitted under the more liberal standard of Fed. R. Evid. 402 & 403." *Id.* at 857 (emphasis in original). The court's discussion of the $500 fine imposed on a defense attorney for violating the court's Rule 412 rulings at trial is described in Chapter 56 (Sanctions).

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

> Moreover, the evidence elicited in response to defendant's questions should not have been admitted under the criteria set forth in the Rule. Defendants argue that questions regarding Wolak's viewing of pornography were relevant to the subjective prong of the hostile work environment test whether she was actually offended and to damages. We conclude that the evidence was of, at best, marginal relevance. Whether a sexual advance was welcome, or whether an alleged victim in fact perceived an environment to be sexually offensive, does not turn on the private sexual behavior of the alleged victim, because a woman's expectations about her work environment cannot be

> said to change depending upon her sexual sophistication. . . . Even if a woman's out-of-work sexual experiences were such that she could perhaps be expected to suffer less harm from viewing run-of-the-mill pornographic images displayed in the office, pornography might still alter her status in the workplace, causing injury, regardless of the trauma inflicted by the pornographic images alone. Thus, defendants failed to establish that "the probative value" of Wolak's admissions concerning her activities outside the office, "substantially outweighed the danger of harm . . . and of unfair prejudice," and the evidence was not admissible. FED. R. EVID. 412(6)(2).

Id. at 160–61 (citations omitted). The court held that the error was harmless because the plaintiff failed to introduce any evidence of injury, including evidence that she took offense at the pictures, thus failing to establish an essential element of her claim. *Id.* at 161–62. See the discussion of this case in Chapter 41 (Trial Management Issues), in the section on "Continuance."

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

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

B.K.B. v. Maui Police Department, 276 F.3d 1091, 1103–06, 87 FEP Cases 1306 (**9th Cir.** 2002), *modified in other respects*, __ F.3d __, 2002 WL 237764 (**9th Cir.** Feb. 20, 2002), reversed the lower court's denial of plaintiff's motion for a new trial after defense counsel introduced trial testimony as to the plaintiff's sexually-oriented statements and conduct, without complying with Rule 412. "Having failed in two previous motions to obtain the court's approval to introduce Rule 412 material, the defendants instead simply sprang the offending testimony upon the court and then misrepresented the nature of Becraft's testimony to the trial judge in response to plaintiff's objections that the defense intended to violate Rule 412." *Id.* at 1104–05. The court held that Becraft's testimony as to the plaintiff's sexual practices did not involve any admissions by the plaintiff as to the advances she rejected, and "Plaintiff's alleged statements regarding her sexual habits were not probative as to the welcomeness of any harassing conduct by her coworkers." *Id.* at 1105. The court held that no instruction could have cured the prejudice of Becraft's "lurid" testimony, but that the lower court's curative instruction was in any event not forceful and was diminished in effect by its having been prefaced with a jocular reference to its being nearly lunchtime. *Id.* at 1105–06 & n.7. The court ordered damages as sanctions.

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

K. Determinations of the EEOC and State and Local Agencies

Lang v. Kohl's Food Stores, Inc., 217 F.3d 919, 925–28 (**7th Cir.**), affirmed the

judgment on a jury verdict for the Equal Pay Act defendant, and held that the trial court did not abuse its discretion in informing the jury that the EEOC had found in favor of the defendant. The lower court had initially granted plaintiffs' motion *in limine* barring the defendant from informing the jury of this determination, "but the judge changed her mind after plaintiffs' counsel told the jury that Kohl's agreed 'under pressure of this lawsuit' to reduce the pay differential among the departments." *Id.* at 925. The court stated that this assertion implied not only that the suit had merit, but that the defendant knew of its merit; the defendant thus had a right to counteract the implication by showing that what it knew "implied that it would prevail on the merits." *Id.* at 926. The court noted that the EEOC's report was "more thorough" than the "superficial" decisions normally issued, quoted extensively from the decision, and described it as "damning" to plaintiffs' claims. *Id.* The lower court did not inform the jury of the reasoning on which the EEOC's conclusion was based. The court rejected plaintiffs' argument that they had not "opened the door" because the EEOC had rescinded its decision prior to the defendant's agreement to a new pay scale in collective bargaining. It pointed out that plaintiffs had requested reconsideration, the EEOC had granted it and revoked its right-to-sue letter, and before the EEOC could do anything else "plaintiffs asked for a new right-to-sue letter, which the EEOC was obliged to issue forthwith, and the EEOC called off all further activities. *Id.* at 926–27. While the district court mistakenly thought, at the time she informed the jury of the EEOC's determination, that the collective-bargaining negotiations took place prior to the EEOC's rescission of its decision, she asked them to disregard the report as soon as she learned of her mistake in timing. The court of appeals held that the mistake of timing did not require reversal, because the parties had drafted an instruction that the defendant had a determination at the time of the negotiations. "Plaintiffs deny that they 'stipulated' to the language, but no matter; they did not *object* to it, and that is that. FED. R. CIV. P. 51." *Id.* at 927 (emphasis in original). The court continued:

> Because plaintiffs sought to persuade the jury that Kohl's recognized its culpability, Kohl's was entitled to rebut this contention using the best available evidence: a decision by the EEOC that the positions were not substantially equal. . . . Decisions by public bodies do not vanish into thin air or become un-documents when parties ask for reconsideration or settle their differences. . . . When negotiating with the unions, Kohl's knew the EEOC's view, which had been withdrawn as a result of plaintiffs' strategy but had not been disclaimed as erroneous. The 1998 negotiations occurred against a background that included the EEOC's support of Kohl's position, and this was relevant to the strength of the inference that Kohl's and the unions acted under the "pressure of this lawsuit" as plaintiffs asserted.
>
> Doubtless there was a risk that the jury would overestimate the significance of the EEOC's ruling; this is why such conclusions generally are not admitted (on behalf of either side) in jury trials. . . . Plaintiffs note that the jury asked a question about the report during deliberations, implying that the EEOC's view assumed unusual significance. By opening the door to disclosure, however, plaintiffs took that risk; they could not argue as they did and then defang the best response. . . . Nor can they avoid the consequence of their opening statement by contending on appeal (as they do) that "[w]hy Kohl's *narrowed* the gap in late 1998 is entirely peripheral" (emphasis in original). That may be, but it was plaintiffs who injected this subject into the case and entitled Kohl's to supply an answer. Plaintiffs did not argue to the district judge that the scope of the

> answer was too prejudicial and never suggested any possible response that was less prejudicial. The district judge protected plaintiffs' substantial rights by excluding the EEOC's actual language and reminding the jury that the conclusion had been rescinded. In response to the jury's question, the judge reread the instruction and added that the only issue properly under consideration was "whether the jobs are equal" rather than why Kohl's and the union changed the pay scales in 1998. The evidence and the instructions as a whole ensured that the jury focused on, and answered, the right questions. Plaintiffs had a fair trial.

Id. at 927–28 (emphasis in original).

Halloway v. Milwaukee County, 180 F.3d 820, 827 n.9, 80 FEP Cases 367 (**7th Cir.** 1999), affirmed the grant of summary judgment to the ADEA defendants. The court held that the lower court did not abuse its discretion in failing to conclude that a genuine issue of triable fact was created by the probable-cause determination of the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations. The court stated that administrative findings are sometimes admissible, but that the trial court has substantial discretion in deciding whether to admit them. In finding that there was no abuse of discretion, the court stated:

> The Equal Rights Division's initial determination explicitly states that the finding would not even be considered in the state hearing on the matter. Moreover, for the most part, the finding does not look past the bare allegations made in the complaint. Commissioner Halloway does not contest that the conclusory assessment of the investigation was not based on sworn affidavits or depositions from both sides.

In any event, stated the court, admission of the finding would not have changed the result of the case.

Bassett v. City of Minneapolis, 211 F.3d 1097, 1103 n.12, 83 FEP Cases 643 (**8th Cir.** 2000), reversed the grant of summary judgment to the Title VII and Minnesota Human Rights Act retaliation and racial discrimination defendant. The court relied in part on the findings of the Minnesota Department of Civil Rights, which has investigated the plaintiff's claims "by examining over 1,000 pages of documents and reviewing numerous taped conversations and interviews with" plaintiff's supervisor, her co-workers, and the plaintiff herself. The MDCR found probable cause that the plaintiff was (1) subjected to disparate scrutiny based on her race, and (2) retaliated against because she had attempted to pursue 'legitimate channels' to stop the alleged discriminatory behavior in her department." The court concluded: "While not determinative on the question of discrimination, the finding of probable cause demonstrates that upon distillation of all the evidence presented, reasonable minds could disagree over the material fact of retaliation and intentional discrimination." (Citations omitted.) The court gave "no credence" to the ten-page ALJ report after three days of hearings, or to the Minneapolis Civil Service Commission rejecting it, but held that the ALJ's findings that there was no "just cause" for firing the plaintiff "are germane to our determination that a disputed fact exists" as to the plaintiff's allegedly deficient performance. *Id.* at 1104 n.15.

Beachy v. Boise Cascade Corp., 191 F.3d 1010, 1014–16, 9 AD Cases 1258 (**9th Cir.**

1999), *cert. denied*, 529 **U.S.** 1021 (2000), affirmed the judgment on a jury verdict for the ADA defendant and held that the lower court erred in admitting, over the plaintiff's objection, a Notice of Dismissal and a Dismissal Memo of the Oregon Bureau of Labor and Industries ("BOLI"), but held that the error was harmless. The Notice stated that BOLI would not proceed with the plaintiff's case because it had not found sufficient evidence to justify a continuation, and the Dismissal Memo described the investigation. The court held that a document that appears to be a final decision of an investigating agency creates a much greater risk of unfair prejudice than a finding of probable cause:

> We now hold that an agency's determination that insufficient facts exist to continue an investigation is not per se admissible in the same manner as an agency's determination of probable cause. Whereas the latter type of determination indicates only that there is probable cause to believe a violation has occurred, the former type of determination in effect constitutes a finding of no probable cause and terminates the agency's inquiry. In this sense, a determination of insufficient facts is a final ruling by the agency. There is a much greater risk of unfair prejudice involved in introducing a final agency ruling as opposed to a probable cause determination, because a jury might find it difficult to evaluate independently evidence of discrimination after being informed of the investigating agency's final results. . . . Accordingly, we have held that a district court asked to admit an agency's letter of violation must weigh the letter's prejudicial effect against its probative value pursuant to Rule 403. . . . We conclude that the same rule should apply when a district court is asked to admit an agency's determination that insufficient facts exist to continue an investigation.

Id. at 1015 (citations and footnote omitted). The court held that the lower court's failure to weigh the prejudicial effect of these documents against their probative value was harmless error, because the plaintiff's case "was not particularly strong," and the defendant produced substantial evidence of its nondiscriminatory reasons. The court's discussion of the hearsay objection to the descriptions of witness statements in the Dismissal Memo is described in section M., Hearsay and Its Exceptions, below.

McGarry v. Board of County Commissioners of County of Pitkin, 175 F.3d 1193, 1198–99 n.2, 79 FEP Cases 964 (**10th Cir.** 1999), reversed the grant of summary judgment to the defendants. However, the court noted that the EEOC's determination letter, stating that its investigation had not established a violation of Title VII, "would be admissible under FED. R. EVID. 803(8)(C)." (Citation omitted.)

Lathem v. Department of Children and Youth Services, 172 F.3d 786, 791–92, 79 FEP Cases 1267 (**11th Cir.** 1999), affirmed the judgment on a jury verdict for the plaintiff. The court rejected the defendant's argument that the lower court had abused its discretion in declining to admit the EEOC's and Georgia Commission on Equal Opportunity's no-cause findings. "Although trial courts admit EEOC determinations in bench trials, this liberal admissibility rule does not apply to jury trials. . . . Instead, the district court must make the admissibility determination on an individual basis, considering the evidence's probative value and the danger of unfair prejudice." *Id.* at 791 (citation omitted; footnote omitted). The defendant argued that the refusal to admit the findings prejudiced it because the plaintiff had not identified one of her two comparators to the agencies. "Lathem, however, argued that the district court should not

admit the reports because the EEOC and CEO failed to interview certain witnesses and review certain documents during its investigation. District courts have broad discretion with respect to the admissibility of evidence. . . . Because Lathem offered a legitimate reason why the reports may have unfairly prejudiced her case, we find that the district court did not abuse its discretion when it refused to admit in this jury trial the EEOC's and CEO's no-cause determinations." *Id.* at 791–92 (citation omitted).

R. New Privileges

1. Employee Assistance Programs

Oleszko v. State Compensation Ins. Fund, 243 F.3d 1154, 85 FEP Cases 483 (**9th Cir.**), *cert.* denied, 534 U.S. 892 (2001), a Title VII case, extended the psychotherapist-patient privilege to Employee Assistance Program personnel.

2. Ombuds

Carman v. McDonnell Douglas Corp., 114 F.3d 790, 73 FEP Cases 1793 (**8th Cir.** 1997), refused to recognize a corporate ombuds' privilege in an ADEA, ERISA, and Missouri Human Rights Act case, and ordered disclosure of employee communications to the ombud.

3. Peer Review Records

Virmani v. Novant Health Inc., 259 F.3d 284 (**4th Cir.** 2001), a § 1985(3) race discrimination case, refused to recognize a privilege for peer review records.

S. Cumulative Evidence

Weisgram v. Marley Co., 528 **U.S.** 440 (2000), affirmed the Eighth Circuit's direction that the district court enter judgment as a matter of law for the defendants, where the lower court determined that expert evidence was erroneously admitted at trial and that the remaining evidence was not sufficient to be submitted to the jury. The wrongful-death plaintiffs had introduced the testimony of three experts to prove that an alleged defect in a heater caused the death of Bonnie Weisgram. There was no other evidence of causation. The jury returned a verdict for plaintiffs. On appeal, the Eighth Circuit held that the testimony of the experts was inadmissible because it was based on speculation. It refused to remand the matter for a new trial, stating that the plaintiffs had had a fair opportunity to prove their strict-liability claim and there was no reason to give them a second chance. *Id.* at 1015–16. Affirming, the Court rejected plaintiffs' argument that they relied on the admission of the expert testimony, and that they should be given the opportunity to introduce other evidence of causation:

> As *Neely* recognized, appellate rulings on post-trial pleas for judgment as a matter of law call for the exercise of "informed discretion" . . . and fairness to the parties is surely key to the exercise of that discretion. But fairness concerns should loom as large when the verdict winner, in the appellate court's judgment, failed to present sufficient evidence as when the appellate court declares inadmissible record evidence essential to the verdict winner's case. In both situations, the party whose verdict is set aside on

> appeal will have had notice, before the close of evidence, of the alleged evidentiary deficiency. See Fed. Rule Civ. Proc. 50(a)(2) (motion for judgment as a matter of law "shall specify . . . the law and facts on which the moving party is entitled to the judgment"). On appeal, both will have the opportunity to argue in support of the jury's verdict or, alternatively, for a new trial. And if judgment is instructed for the verdict loser, both will have a further chance to urge a new trial in a rehearing petition.
>
> Since *Daubert*, moreover, parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet. . . . It is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail. We therefore find unconvincing Weisgram's fears that allowing courts of appeals to direct the entry of judgment for defendants will punish plaintiffs who could have shored up their cases by other means had they known their expert testimony would be found inadmissible. . . . In this case, for example, although Weisgram was on notice every step of the way that Marley was challenging his experts, he made no attempt to add or substitute other evidence. . . . ("[A] litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk.").

Id. at 1020–21 (footnotes and citations omitted). The court noted that the plaintiffs "offered no specific grounds for a new trial," *id.* at 1021, even in their petition for rehearing below, *id.* at 1021–22, and that the court of appeals had concluded "that this was 'not a close case.'" *Id.* at 1022. It suggested that a remand for a new trial, instead of directing the entry of judgment for the verdict loser, may be appropriate "when, for example, the trial court excluded evidence that would have strengthened the verdict winner's case or 'itself caused the insufficiency . . . by erroneously [imposing] too high a burden of proof.'" *Id.* at 1021 n.13.

> **Comment by Richard Seymour on *Weisgram v. Marley Co.*:** As a practical matter, this case will require any party having the burden of proof on an issue, and having introduced any evidence to which another party had objected, to present what would otherwise be considered cumulative evidence in order to preserve the opportunity for a new trial in the event that the initial evidence is ultimately ruled inadmissible. This will extend the length of trials and complicate the task of keeping the jury's attention. Counsel for all parties may wish to enter into stipulations providing for new trials instead of judgment in the event of a reversal of a decision admitting particular evidence, in order to keep trials shorter and to keep the jury's attention.