ALI-ABA

Advanced Employment Law and Litigation

Washington, D.C.
December 5, 2008

Current Evidentiary Problems in Employment Cases

by

Richard T. Seymour*

* Law Office of Richard T. Seymour, P.L.L.C., 1150 Connecticut Avenue N.W., Suite 900, Washington, D.C. 20036-4129. Telephone: 202-862-4320. Cell: 202-549-1454. Facsimile: 800-805-1065. E-mail: rick@rickseymourlaw.net. Some of the information in this paper is used with permission from an upcoming edition of Richard T. Seymour and John F. Aslin, Equal Employment Law Update (Bureau of National Affairs, Washington, D.C., 2007), copyright © American Bar Association, 2007. For copies, contact BNA at 1-800-960-1220; members of the Labor and Employment Law Section are entitled to a 25% discount as a benefit of Section membership. Mention priority code EQL in order to receive the discount.

My web site, www.rickseymourlaw.com contains a number of my CLE papers, which are downloadable.

Table of Contents

I. Legal Developments 1
A. Evidence Considerations Under the Inferential Model 1
1. Other Instances of Discrimination 1
B. Evidence Considerations Under Mixed Motives Analysis 11
C. Circumstantial Evidence 14
1. General 14
2. Too Expensive to Fire 14
3. Reverse Temporal Proximity 15
4. Changing Stories 15
5. Failure to Follow Employer’s Own Policies 15
6. Discriminatory Statements 15
7. Absence of Female Supervisors 16
8. “Counterwight” Evidence 16
D. Comparators 16
1. The Supreme Court 16
2. Defendant’s Lack of Comparators 20
3. Defendant’s Comparators Accepted 20
4. Rejection of Defendant’s Comparators 20
5. Plaintiff’s Lack of Comparators 21
6. Acceptance of Plaintiff’s Comparators 22
7. Rejection of Plaintiff’s Comparators 23
8. Comparators Showed the Fourth Prong of the *Prima Facie* Case 23
9. Comparability Should Be Exact as to Material Elements 23
10. Comparability Need Not Be Exact 24
E. Comparative Qualifications and Evidence Bearing on Employee Performance 26
F. Judicial Representation as to Comparators at SJ is Binding at Trial 34
G. Statistics 35
H. Discriminatory Statements 39
1. Recent Noteworthy Decisions 39
2. Courts Refusing to Rely on Biased Statements 43
3. Courts Relying on Biased Statements 44
4. Statements by Decisionmakers 45
5. Speakers Who Affected, But Did Not Make, the Decision 49
6. Speakers Who Were Not Aware of the Reasons for the Decision 51
7. Other Manager Speakers Who Were Not Decisionmakers 52
8. Temporal Remoteness of the Biased Remarks 52
9. Contentions that Biased Remarks Were Isolated 53
10. The Relevance of Biased Remarks by Co-Workers 54
I. Independent Investigations 57
1. The Effect of Independent Investigations 57
2. Rebuttals to Independent-Investigation Defenses 61
J. Evidence Considerations Relating to Disparate Impact 62
K. Evidence Considerations Relating to Constructive Discharge 63
L. Evidence Considerations Relating to Reductions in Force 63

M. Evidence Considerations Relating to Summary Judgment 63
1. Effect of Contradictions in the Employer's Case 63
2. Harassment Cases 64
3. Summary Judgment in Pattern-and-Practice Cases 65
N. Defense Mental Examinations, Often Misnamed "Independent" 66
O. Evidentiary Rulings 66
1. Admissible Form 66
2. Hearsay 67
3. Reprimand of Supervisor for Imposing Insufficient Discipline 67
4. Exclusion of Evidence Not Produced in Discovery 68
5. Exclusion of Witness Not Listed in Pretrial Order 68
6. Admissions 69
7. Ineffective Denials 70
8. Prior Claims of Discrimination 71
9. Other Employees' Claims of Discrimination 71
10. Disaggregating the Evidence 73
11. Prior Deposition Testimony As Limiting Trial Testimony 74
12. Competence 74
13. Plaintiff's Own Testimony 75
14. Inferences Arising from Destruction of Records 76
15. Determinations of the EEOC and State and Local Agencies 78
16. The EEOC "Reasonable Cause" Determination 78
17. Hearsay and its Exceptions 82
18. The Balancing Test 83
19. Testimony on Advice of Counsel 84
20. The Time Period for Which Evidence Was Permitted 84
21. Judge's Questions 84
22. Counsel's Failure to Follow Through 85
23. Criminal Conviction of the Harasser 86
24. Criminal Conviction Followed by Pardon 86
25. Evidence of Post-Event Occurrences 86
26. The Courtroom Deputy's Testimony 87
P. Rule 412, Fed. R. Evid. 87
Q. Privilege 93
1. Attorney-Client Privilege 93
2. Employee Assistance Programs 94
3. Ombuds 94
4. Peer Review Records 94
R. Experts 94
S. Cumulative Evidence 94
T. Electronic Evidence 96
1. Authentication of E-Mails 96
2. Presumption of Authenticity? 97
3. Counsel's Say-So 98
4. Inauthentic E-Mails 98
U. Curative Actions 99

V. Employer's Access to Employee Communications Over the Employer's Electronic Systems ... 99
II. Practical Considerations ... 100
A. Case Selection Information ... 100
B. Whose Electronic Evidence? ... 101
C. Privilege Considerations ... 102
D. Identifying Potential In-House Electronic Evidence ... 102
E. Ensuring the Preservation of Electronic Evidence ... 103
F. Objects of Discovery ... 103
1. Data Bases ... 103
2. Getting Documents in their Native Format ... 104
3. E-Mails ... 105
4. Document "Retention" Policies ... 106
G. Meeting of Counsel on Electronic Discovery ... 107
H. Reducing Transaction Costs ... 107
I. The Role of the Court in Managing Electronic Discovery ... 108
J. The Use of Computer Files at Trial ... 108

I. LEGAL DEVELOPMENTS

A. Evidence Considerations Under the Inferential Model

1. Other Instances of Discrimination

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

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

Id. at 1147.

United States v. Arvizu, 534 **U.S.** 266 (2002), a Fourth Amendment case, follows *Reeves v. Sanderson Plumbing Products, Inc.*, 530 **U.S.** 133, 82 FEP Cases 1748 (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 274–75 (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 275–76.

Comment by Richard Seymour on *U.S. v. Arvizu*: The Ninth Circuit's balkanization of the evidence in this Fourth Amendment case is a mirror image of the balkanization of evidence of discrimination and of pretext by some judges. "Totality of the circumstances" tests permeate the law of employment discrimination, and *Arvizu* and *Reeves* require looking at each case as a whole. Bright-line tests of isolated factors, such as the "same actor" inference in some Circuits, the presumptive 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*, although such factors can continue to be considered as part of the case as a whole. The Court's concluding recognition that precedent necessarily plays a smaller role under a "totality of the circumstances" test (unless the prior case was "on all fours") is as true for employment cases as for any other type of case subject to this rule.

Miller-El v. Dretke, 545 **U.S.** 231 (2005), reversed the denial of *habeas corpus* and held that petitioner had shown racial discrimination in the prosecutor's peremptory challenges by clear and convincing evidence. The court stated: "The rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected." *Id.* at 231. The Court cited *Reeves v. Sanderson Plumbing Products*, *id.* at 241, underscoring the relevance of this decision to employment law.

> As for law, the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it. . . . It is true that peremptories are often the subjects of instinct . . . and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The

> Court of Appeals's and the dissent's substitution of a reason for eliminating Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.

Id. at 251–52 (citations omitted). The Court also held that evidence of the prosecution's manipulation of procedures, through jury shuffles that re-order the venire, supported the inference of discrimination. *Id.* at 253–55. The Court rejected the defendant's speculation that there mighthave been innocent reasons for its jury shuffles, and rejected the Fifth Circuit's "see no evil" approach:

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

Id. at 254–55. The Court emphasized a common-sense "best fit" approach to the determination of motivation:

> The State's attempt at a race-neutral rationalization thus simply fails to explain what the prosecutors did. But if we posit instead that the prosecutors' first object was to use the graphic script to make a case for excluding black panel members opposed to or ambivalent about the death penalty, there is a much tighter fit of fact and explanation.[29] Of the 10 nonblacks whose questionnaires expressed ambivalence or opposition, only 30% received the graphic treatment. But of the seven blacks who expressed ambivalence or opposition, 86% heard the graphic script. As between the State's ambivalence explanation and Miller-El's racial one, race is much the better, and the reasonable inference is that race was the major consideration when the prosecution chose to follow the graphic script.
>
> The same is true for another kind of disparate questioning, which might fairly be called trickery. The prosecutors asked members of the panel how low a sentence they would consider imposing for murder. Most potential jurors were first told that Texas law provided for a minimum term of five years, but some members of the panel were not, and if a panel member then insisted on a minimum above five years, the prosecutor would suppress his normal preference for tough jurors and claim cause to strike. Two Terms ago, we described how this disparate questioning was correlated with race . . . .
>
> The State concedes that the manipulative minimum punishment questioning was used to create cause to strike . . . but now it offers the extenuation that prosecutors omitted the 5-year information not on the basis of race, but on stated opposition to the death penalty, or ambivalence about it, on the questionnaires and in the *voir dire*

> testimony. *Id.,* at 34–35. On the State's identification of black panel members opposed or ambivalent, all were asked the trick question. But the State's rationale flatly fails to explain why most white panel members who expressed similar opposition or ambivalence were not subjected to it. It is entirely true, as the State argues, *id.,* at 35, that prosecutors struck a number of nonblack members of the panel (as well as black members) for cause or by agreement before they reached the point in the standard *voir dire* sequence to question about minimum punishment. But this is no answer; 8 of the 11 nonblack individuals who voiced opposition or ambivalence were asked about the acceptable minimum only after being told what state law required. Hence, only 27% of nonblacks questioned on the subject who expressed these views were subjected to the trick question, as against 100% of black members. Once again, the implication of race in the prosecutors' choice of questioning cannot be explained away.
>
> ---
>
> [29] The dissent posits that prosecutors did not use the graphic script with panel members opposed to the death penalty because it would only have antagonized them. See *post,* at 2359. No answer is offered to the question why a prosecutor would take care with the feelings of a panel member he would excuse for cause or strike yet would antagonize an ambivalent member whose feelings he wanted to smoke out, but who might turn out to be an acceptable juror.

Id. at 260–63 (footnotes omitted). There was a great deal of evidence of discrimination. See the discussion of this case below. The Court sharply criticized the Fifth Circuit's unwillingness to see the discrimination so plainly laid before it:

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

> meant to induce qualms about applying the death penalty (and thus explain a strike), and 100% of blacks but only 27% of nonblacks were subjected to a trick question about the minimum acceptable penalty for murder, meant to induce a disqualifying answer. The State's attempts to explain the prosecutors' questioning of particular witnesses on nonracial grounds fit the evidence less well than the racially discriminatory hypothesis.
>
> If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year old manual of tips on jury selection, as shown by their notes of the race of each potential juror. By the time a jury was chosen, the State had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones.
>
> It blinks reality to deny that the State struck Fields and Warren, included in that 91%, because they were black. The strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State. The State's pretextual positions confirm Miller-El's claim, and the prosecutors' own notes proclaim that the Sparling Manual's emphasis on race was on their minds when they considered every potential juror.
>
> The state court's conclusion that the prosecutors' strikes of Fields and Warren were not racially determined is shown up as wrong to a clear and convincing degree; the state court's conclusion was unreasonable as well as erroneous.

Id. at 260–63. The Court also drew the inference of racial discrimination from prosecutor James Nelson's offering of a pretextual reason:

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

Id. at 245–46. The Court criticized the Fifth Circuit for its failure to appreciate the importance of the prosecutor's effort to advance an untruthful explanation:

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

Id. at 246–47. The Court also held that evidence of the manipulation of procedures supported the inference of discrimination:

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

Id. at 253–54. The Court rejected the defendant's speculation that there mighthave been innocent reasons for its jury shuffles, and rejected the Fifth Circuit's "see no evil" approach:

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

Id. at 254–55. The Court also held that the State manipulated the process by the type of questions it asked different venire members about their feelings on the death penalty. 94% of

white venire members were given an abstract description of the death penalty and were then asked about their feelings on it. A "graphic script" describing the death penalty—intended to motivate venire members into expressing misgivings about the death penalty and providing an occasion to strike them for cause—was given to 6% of white venire members and 53% of black venire members before they were asked about their feelings on the death penalty. *Id.* at 256. The court discussed each of the State's professed reasons for disparate use of the graphic script, and found that the facts did not support the reasons. It continued:

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

Id. at 260 (footnotes omitted). The Court next turned to a form of manipulation it termed "trickery."

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

Id. at 261. The State informed 94% of white venire members, and only 12.5^ of blacks, about the minimum sentence for murder, allowing them to engage in the trickery questions with 87.5% of blacks, and only 6% of whites. *Id.* Justice Breyer concurred. *Id.* at 266–73. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissented. *Id.* at 274–307.

Miller-El v. Cockrell, 537 **U.S.** 322 (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 and 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.
>
> 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.

Id. at 331–32. The Court cited *Reeves*. *Id.* at 340. The court again relied on simple statistics:

> 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.

Id. at 332–33. 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.

Id. at 334–35. 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.

Id. at 334.

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

> Fleetwood also tries to suggest that WorkSTEPS bears responsibility for the decision to remove Duncan from his job. According to Fleetwood, the essential job functions for the position of material handler "were set forth in a job description created by an independent entity, WorkSTEPS" and thus the company should be insulated from any allegation of discriminatory motive. This contention is nonsensical, most importantly because there is absolutely nothing in the record to suggest that Fleetwood did not play a dominant role in creating the job description. Indeed, Fleetwood's representation that WorkSTEPS created the job description is not supported by any evidence at all, apart from the appearance of the WorkSTEPS name on the document. There is no evidence that the WorkSTEPS consultant ever visited the Fleetwood facility, performed any evaluation, made any observations, or interviewed anyone. The only evidence about the job description is the document itself, which Fleetwood's personnel manager knew nothing about, other than that it was the job description on file. And despite signature lines for WorkSTEPS and Fleetwood representatives, the document is not signed or dated by anyone. Similarly, Fleetwood introduced no testimony from the occupational therapist hired to verify the WorkSTEPS job description. A defendant's

> legitimate, nondiscriminatory reason must be "clearly set forth, through the introduction of admissible evidence." . . . . Fleetwood did not introduce any admissible evidence about what the material handler job required, so Duncan's uncontradicted testimony about the job requirements would be enough for a jury to conclude that Fleetwood's explanation was phony.

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

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

(Citations omitted.)

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

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

discriminatory work assignments, they materially affected the terms and conditions of Davis's employment."

Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1285–87, 102 FEP Cases 716 (**11th Cir.** 2008), affirmed the judgment on a jury verdict for the Title VII and § 1981 retaliation plaintiff. The court held that the lower court did not abuse its discretion in admitting evidence of other instances of discrimination, although for the wrong reason. The court rejected the lower court's reliance on Fed. R. Evid. 406, because four instances of termination after filing an EEOC charge are not enough to show a habit. The court held that the evidence was properly admissible under Rule 303(b) to show defendant's motive, intent, and plan to discriminate and retaliate. The court stated: "Goldsmith and coworkers Jemison and Thomas were discriminated against by the same supervisor, Farley, so the experiences of Jemison and Thomas are probative of Farley's intent to discriminate. Steber was involved in the termination decisions of all four individuals, so the experiences of Jemison, Peoples, and Thomas are probative of Steber's intent." The court held that the evidence was also admissible under Rule 402 to prove a hostile work environment. *Id.* at 1286. The court held that the evidence was also admissible on other grounds we well:

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

Id. at 1286–87 (citations omitted).

B. Evidence Considerations Under Mixed Motives Analysis

Desert Palace, Inc. v. Costa, 539 **U.S.** 90, 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. 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. *Price Waterhouse* remains the standard for types of claims not covered by § 703(m).

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

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

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

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

(Citations omitted.)

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

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

Griffith v. City of Des Moines, 387 F.3d 733, 735, 94 FEP Cases 993 (**8th Cir.** 2004), affirmed the grant of summary judgment to the Title VII and Iowa Human Rights Act defendant on plaintiff's claim of discriminatory discipline. The court held that *Costa* did not affect summary-judgment practice: "At the summary judgment stage, the issue is whether the plaintiff has sufficient evidence that unlawful discrimination was a motivating factor in the defendant's adverse employment action. If so, the presence of additional legitimate motives will not entitle the defendant to summary judgment. Therefore, evidence of additional motives, and the question whether the presence of mixed motives defeats all or some part of plaintiff's claim, are trial issues, not summary judgment issues. Thus, *Desert Palace*, a decision in which the Supreme Court decided only a mixed motive jury instruction issue, is an inherently unreliable basis for district courts to begin ignoring this Circuit's controlling summary judgment precedents." The court continued:

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

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

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

C. Circumstantial Evidence

1. General

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

> Circumstantial evidence of discrimination is evidence which allows the trier of fact to infer intentional discrimination by the decisionmaker. . . . This Circuit has recognized three types of "circumstantial" evidence of intentional discrimination: (1) suspicious timing, ambiguous oral or written statements, or behavior toward or comments directed at other employees in the protected group; (2) evidence, whether or not rigorously statistical, that similarly situated employees outside the protected class received systematically better treatment; and (3) evidence that the employee was qualified for the job in question but was passed over in favor of a person outside the protected class and the employer's reason is a pretext for discrimination. . . . Sun's evidence falls into the first two categories.

(Citations omitted.)

2. Too Expensive to Fire

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

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

support an inference that Holcomb was terminated on the basis of his interracial marriage.

3. Reverse Temporal Proximity

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

4. Changing Stories

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

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

5. Failure to Follow Employer's Own Policies

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

6. Discriminatory Statements

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

7. Absence of Female Supervisors

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

8. "Counterwight" Evidence

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

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

(Citation omitted.)

D. Comparators

1. The Supreme Court

Miller-El v. Dretke, 545 U.S. 231, 241 (2005), reversed the denial of *habeas corpus* and held that petitioner had shown racial discrimination in the prosecutor's peremptory challenges by clear and convincing evidence. The Court cited *Reeves v. Sanderson Plumbing Products*, *id.*, underscoring the relevance of this decision to employment law. The Court relied heavily on comparators:

> More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove

> purposeful discrimination to be considered at *Batson*'s third step. *Cf. Reeves v. Sanderson Plumbing Products, Inc.*, 530 **U.S.** 133, 147, 82 FEP Cases 1748 (2000) (in employment discrimination cases, "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive"). While we did not develop a comparative juror analysis last time, we did note that the prosecution's reasons for exercising peremptory strikes against some black panel members appeared equally on point as to some white jurors who served.

The Court then discussed in detail two sets of comparisons. "The prosecution used its second peremptory strike to exclude Billy Jean Fields, a black man who on *voir dire* expressed unwavering support for the death penalty," *id.* at 242, and who stated that the possibility of rehabilitation would not lead him to vote against the death penalty. The Court focused not only on comparisons of the substance of the responses of Fields and of white venire members who were not struck, but also on differences in prosecutor James Nelson's questioning of Fields, and his questioning of white venire members

> Fields was struck peremptorily by the prosecution, with prosecutor James Nelson offering a race-neutral reason:
>
> > "[W]e . . . have concern with reference to some of his statements as to the death penalty in that he said that he could only give death if he thought a person could not be rehabilitated and he later made the comment that any person could be rehabilitated if they find God or are introduced to God and the fact that we have a concern that his religious feelings may affect his jury service in this case." *Id.,* at 197 (alteration omitted).
>
> Thus, Nelson simply mischaracterized Fields's testimony. He represented that Fields said he would not vote for death if rehabilitation was possible, whereas Fields unequivocally stated that he could impose the death penalty regardless of the possibility of rehabilitation. Perhaps Nelson misunderstood, but unless he had an ulterior reason for keeping Fields off the jury we think he would have proceeded differently. In light of Fields's outspoken support for the death penalty, we expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike.
>
> If, indeed, Fields's thoughts on rehabilitation did make the prosecutor uneasy, he should have worried about a number of white panel members he accepted with no evident reservations. Sandra Hearn said that she believed in the death penalty "if a criminal cannot be rehabilitated and continues to commit the same type of crime." *Id.,* at 429. Hearn went so far as to express doubt that at the penalty phase of a capital case she could conclude that a convicted murderer "would probably commit some criminal acts of violence in the future." *Id.,* at 440. "People change," she said, making it hard to assess the risk of someone's future dangerousness. "[T]he evidence would have to be awful strong." *Ibid.* But the prosecution did not respond to Hearn the way it did to Fields, and without delving into her views about rehabilitation with any further question, it raised no objection to her serving on the jury. White panelist Mary Witt said she would take the

> possibility of rehabilitation into account in deciding at the penalty phase of the trial about a defendant's probability of future dangerousness, 6 Record of *Voir Dire* 2433 (hereinafter Record), but the prosecutors asked her no further question about her views on reformation, and they accepted her as a juror. *Id.,* at 2464–2465. Latino venireman Fernando Gutierrez, who served on the jury, said that he would consider the death penalty for someone who could not be rehabilitated, App. 777, but the prosecutors did not question him further about this view. In sum, nonblack jurors whose remarks on rehabilitation could well have signaled a limit on their willingness to impose a death sentence were not questioned further and drew no objection, but the prosecution expressed apprehension about a black juror's belief in the possibility of reformation even though he repeatedly stated his approval of the death penalty and testified that he could impose it according to state legal standards even when the alternative sentence of life imprisonment would give a defendant (like everyone else in the world) the opportunity to reform.

Id. at 243–45 (footnotes omitted). The Court continued:

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

Id. at 245–46. The Court continued, emphasizing that comparators need not be identical for the comparison to have probative force:

> In sum, when we look for nonblack jurors similarly situated to Fields, we find strong similarities as well as some differences.[6] But the differences seem far from significant, particularly when we read Fields's *voir dire* testimony in its entirety. Upon that reading, Fields should have been an ideal juror in the eyes of a prosecutor seeking a death sentence, and the prosecutors' explanations for the strike cannot reasonably be accepted. . . .

> [6] The dissent contends that there are no white panelists similarly situated to Fields and to panel member Joe Warren because "'"[s]imilarly situated" does not mean matching any one of several reasons the prosecution gave for striking a potential juror—it means matching all of them.'" . . . None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. Nothing in the combination of Fields's statements about rehabilitation and his brother's history discredits our grounds for inferring that these purported reasons were pretextual. A *per se* rule that a defendant cannot win a

> *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.

Id. at 247. The Court next addressed the prosecution's strike of Joe Warren, a black venire member. The State did not strike white venire members who expressed the same views as Warren. *Id.* at 247–50. The State urged that it struck Warren when it still had a number of peremptory challenges left, and did not strike whites with similar views because it then had fewer peremptory challenges. Rejecting this argument, the Court stated:

> If that were the explanation for striking Warren and later accepting panel members who thought death would be too easy, the prosecutors should have struck Sandra Jenkins, whom they examined and accepted before Warren. Indeed, the disparate treatment is the more remarkable for the fact that the prosecutors repeatedly questioned Warren on his capacity and willingness to impose a sentence of death and elicited statements of his ability to do so if the evidence supported that result and the answer to each special question was yes . . . whereas the record before us discloses no attempt to determine whether Jenkins would be able to vote for death in spite of her view that it was easy on the convict . . . . Yet the prosecutors accepted the white panel member Jenkins and struck the black venireman Warren.

Id. at 249. The Court held that the comparative evidence as to Warren was not undermined by the fact that Warren's brother-in-law had been convicted of food-stamp fraud:

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

Id. at 250 n.8. The Court also held that the State manipulated the process by the type of questions it asked different venire members about their feelings on the death penalty. 94% of white venire members were given an abstract description of the death penalty and were then asked about their feelings on it. A "graphic script" describing the death penalty was given to 6% of white venire members and 53% of black venire members before they were asked about their feelings on the death penalty. *Id.* at 255–56. The Court used comparative evidence to reject the State's explanation:

> The State concedes that this disparate questioning did occur but argues that use of the graphic script turned not on a panelist's race but on expressed ambivalence about the death penalty in the preliminary questionnaire. Prosecutors were trying, the argument goes, to weed out noncommittal or uncertain jurors, not black jurors. And while some white venire members expressed opposition to the death penalty on their questionnaires, they were not read the graphic script because their feelings were already clear. The State

says that giving the graphic script to these panel members would only have antagonized them. Brief for Respondent 27-32.

> This argument, however, first advanced in dissent when the case was last here . . . and later adopted by the State and the Court of Appeals, simply does not fit the facts. Looking at the answers on the questionnaires, and at *voir dire* testimony expressly discussing answers on the questionnaires, we find that black venire members were more likely than nonblacks to receive the graphic script regardless of their expressions of certainty or ambivalence about the death penalty, and the State's chosen explanation for the graphic script fails in the cases of four out of the eight black panel members who received it.

Id. at 256–58 (footnotes omitted). Justice Breyer concurred. *Id.* at 266–73. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissented. *Id.* at 274–307.

2. Defendant's Lack of Comparators

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

3. Defendant's Comparators Accepted

Hill v. Lockheed Martin Logistics Management, Inc., 354 F.3d 277, 295–96, 93 FEP Cases 1 (**4th Cir.** 2004) (*en banc*), *cert. dismissed*, 543 **U.S.** 1132 (2005), 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. Judge Michael dissented, joined by Judges Motz, Judge King, and Judge Gregory. *Id.* at 299–305.

4. Rejection of Defendant's Comparators

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

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

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

5. Plaintiff's Lack of Comparators

Czekalski v. Peters, 475 F.3d 360, 365–66, 99 FEP Cases 1121 (**D.C. Cir.** 2007), reversed the grant of summary judgment to the Title VII gender discrimination defendant, holding that plaintiff was not required to show that a comparator male employee was treated more favorably. It held that evidence as to comparators was only one way in which an inference of discrimination can arise. "In a discharge case, we explained, another way would be to show that 'the discharge was not attributable to the two [most] common legitimate reasons for discharge: performance below the employer's legitimate expectations or the elimination of the plaintiff's position altogether.' . . . The same suffices in a reassignment case like this one." *Id.* at 366 (citation omitted). It stated that the provision of false explanations is also evidence from which discrimination can be inferred. *Id.*

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

Bryant v. Aiken Regional Medical Centers Inc., 333 F.3d 536, 545–46, 92 FEP Cases 233 (**4th Cir.** 2003), *cert. denied*, 540 **U.S.** 1106 (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.

6. Acceptance of Plaintiff's Comparators

Jackson v. FedEx Corporate Services, Inc., 518 F.3d 388, 102 FEP Cases 1543 (**6th Cir.** 2008), reversed the grant of judgment as a matter of law to the Title VII and § 1981 racial discrimination defendant. The trial court granted judgment as a matter of law to defendant on the conclusion of plaintiff's evidence, after finding that plaintiff had presented no evidence of comparators who were similarly situated, for purposes of his *prima facie* case. The lower court had stated: "to be similarly situated . . . with whom the Plaintiff seeks to compare treatment must have the same supervisor, be subject to the same standards, having engaged in similar conduct without differentials or mitigation . . . It means these individuals have to have similar background, education, experience, job responsibilities, and performance. It means that the job responsibilities must require the same skills and abilities. And the job responsibilities are equal and interchangeable." *Id.* at 391. The court of appeals disagreed, stating at 396-97:

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

(Citation omitted.) Judge Rogers dissented.

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

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

7. Rejection of Plaintiff's Comparators

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

8. Comparators Showed the Fourth Prong of the *Prima Facie* Case

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

9. Comparability Should Be Exact as to Material Elements

Fane v. Locke Reynolds, LLP, 480 F.3d 534, 540–41, 100 FEP Cases 6 (**7th Cir.** 2007), affirmed the grant of summary judgment to the § 1981 defendant law firm on the plaintiff former paralegal's claim that she was fired because of her race. The court stated: "An employee is similarly situated to a plaintiff if the two employees deal with the same supervisor, are subject to the same standards, and have engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." *Id.* at 540 (citation omitted). The court rejected plaintiff's effort to compare herself to a secretary on the ground that both paralegals and secretaries were exempt and were support personnel subject to the Director of Human Resources, and relied on the defendant's Handbook placing them in different classes of employees, as well as on the obvious differences in duties. The court rejected plaintiff's second comparator, a paralegal who reported to the same practice group supervisor, because plaintiff failed to identify the conduct for which that comparator had been given a vague criticism, and there was thus no basis for concluding that it was the same as, or worse, than, plaintiff's conduct triggering complaints from the firm's clients, from co-workers, or from her supervisor, or that the putative comparator had blinded herself to her conduct as rigorously as plaintiff. *Id.* at 540–41.

10. **Comparability Need Not Be Exact**

Humphries v. CBOCS West, Inc., 474 F.3d 387, 404–05, 99 FEP Cases 872 (**7th Cir.** 2007), *aff'd on other grounds*, __ U.S. __, 128 S. Ct. 1951 (2008), reversed the grant of summary judgment to defendant on plaintiff's § 1981 retaliation claim. The court rejected defendant's attack on plaintiff's comparators:

> According to Cracker Barrel, similarly situated comparators must have the same supervisors, the same job duties, the same work performance histories, and must have engaged in the same bad conduct as the plaintiff. In other words, they must be essentially identical to the plaintiff, and, under Cracker Barrel's view, Humphries's two comparators, Stinnett and Dowd, fail that test.
>
> Cracker Barrel's view of our similarly situated requirement is too rigid and inflexible. This requirement "should not be applied mechanically or inflexibly." . . . True, we have sometimes stated the similarly situated requirement in the "must" terms that Cracker Barrel argues, but a more sensitive reading of our cases indicates that we have often stated that the similarly situated requirement "normally entails a showing that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." . . . In other words, we have emphasized that the similarly situated inquiry is a flexible one that considers "all relevant factors, the number of which depends on the context of the case." . . . "As to the relevant factors, an employee need not show complete identity in comparing himself to the better treated employee, but he must show substantial similarity." . . .
>
> In addition, our case law does not provide any "magic formula for determining whether someone is similarly situated." . . . Instead, courts should apply a "common-sense" factual inquiry—essentially, are there enough common features between the individuals to allow a meaningful comparison? . . . Put a different way, the purpose of the similarly situated requirement is to eliminate confounding variables, such as differing roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable: complaints about discrimination. . . .
>
> It is important not to lose sight of the common-sense aspect of this inquiry. It is not an unyielding, inflexible requirement that requires near one-to-one mapping between employees—distinctions can always be found in particular job duties or performance histories or the nature of the alleged transgressions. . . . Now, it may be that the degree of similarity necessary may vary in accordance with the size of the potential comparator pool, as well as to the extent to which the plaintiff cherry-picks would-be comparators . . . but the fundamental issue remains whether such distinctions are so significant that they render the comparison effectively useless. In other words, the inquiry simply asks whether there are sufficient commonalities on the key variables between the plaintiff and the would-be comparator to allow the type of comparison that, taken together with the other prima facie evidence, would allow a jury to reach an inference of discrimination or retaliation--recall that the plaintiff need not prove anything at this stage.

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

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

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

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

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

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)."

E. Comparative Qualifications and Evidence Bearing on Employee Performance

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

> Under this Court's decisions, qualifications evidence may suffice, at least in some circumstances, to show pretext. See *Patterson v. McLean Credit Union*, 491 **U.S.** 164, 187–188, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989) (indicating a plaintiff "might seek to demonstrate that respondent's claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position"), superseded on other grounds by 42 U.S.C. § 1981(b); *Texas Dept. of Community Affairs v. Burdine*, 450 **U.S.** 248, 259, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) ("The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination"); *cf. Reeves v. Sanderson Plumbing Products, Inc.*, 530 **U.S.** 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) ("[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated").
>
> The visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications. Federal courts, including the Court of Appeals for the Eleventh Circuit in a decision it cited here, have articulated various other standards, *see*, *e.g.*, *Cooper*, *supra*, at 732 (noting that "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question" (internal quotation marks omitted)); *Raad v. Fairbanks North Star Borough School Dist.*, 323 F.3d 1185, 1194 (**C.A.9** 2003) (holding that qualifications evidence standing alone may establish pretext where the plaintiff's qualifications are " 'clearly superior' " to those of the selected job applicant); *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1294 (**C.A. D.C.** 1998) (*en banc*) (concluding the factfinder may infer pretext if "a reasonable employer would have found the plaintiff to be significantly better qualified for the job"), and in this case the Court of Appeals qualified its statement by suggesting that superior qualifications may be probative of pretext when combined with other evidence, see 129 Fed.Appx., at 533. This is not the occasion to define more precisely what standard should govern pretext claims based on superior qualifications. Today's decision, furthermore, should not be read to hold that petitioners' evidence necessarily showed pretext. The District Court concluded otherwise. It suffices to say here that some formulation other

than the test the Court of Appeals articulated in this case would better ensure that trial courts reach consistent results.

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

Salazar v. Washington Metropolitan Transit Authority, 401 F.3d 504, 95 FEP Cases 681 (**D.C. Cir.** 2005), reversed the grant of summary judgment to the Title VII defendant, in large part because plaintiff showed departures from ordinary procedures that suggested defendant weighted the process to bar plaintiff's advancement. After several promotional denials, plaintiff complained that Superintendent of Plant Equipment Maintenance Lewis stacked promotional panels with his friends, and would not promote Latinos. The General Manager promised that Lewis would have no influence over the panel with respect to the promotion at issue. Instead, the panel was expanded, Lewis named the chair, Lewis worked with the chair to establish the weightings for various qualifications, and the weightings downplayed plaintiff's strengths. The court stated: "We agree with Salazar that a jury could infer something 'fishy' from the fact that Lewis placed himself squarely at the center of a process designed to exclude him. Specifically, a jury could conclude that WMATA failed to provide a "fairly administered selection process" and that its claim to the contrary is pretextual." *Id.* at 508–09 (citations omitted.) The court held that the inference remained even though the panel chair, Buddie Jaggie, did not vote materially differently than the other members and there was no contention that the others were disposed to discriminate. Even without Jaggie's scores, plaintiff would have come in fourth with the weightings in place. The court continued: "The possibility that the interview process for the Metro Center job may not have been fairly designed increases in light of the fact that Tucker, the successful candidate, never held that job. Instead, Lewis transferred Tucker to what Salazar described as a less difficult job in Greenbelt—a characterization not contested by WMATA. From this, we think a reasonable jury could infer that Tucker was unsuited for the Metro Center job and that the selection process was geared not to finding the best person for the position, but rather to keeping Salazar from advancing." *Id.* at 509. The court held that a reasonable jury could find defendant's explanation pretextual. Judge Williams dissented, and the panel majority criticized the dissent for raising arguments defendant never raised, and for engaging in speculation that there might be innocent reasons for the oddities, instead of drawing inferences in plaintiff's favor. *Id.* at 509–12.

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.*

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

> Whether qualifications evidence will be sufficient to raise a question of fact as to pretext will depend on whether a plaintiff presents other evidence of discrimination. In the case in which a plaintiff does provide other probative evidence of discrimination, that evidence, taken together with evidence that the plaintiff was as qualified as or better qualified than the successful applicant, might well result in the plaintiff's claim surviving summary judgment. . . . On the other hand, in the case in which there is little or no other probative evidence of discrimination, to survive summary judgment the rejected applicant's qualifications must be so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former. In negative terms, evidence that a rejected applicant was as qualified or marginally more qualified than the successful candidate is insufficient, in and of itself, to

> raise a genuine issue of fact that the employer's proffered legitimate, non-discriminatory rationale was pretextual.

(Citation omitted.)

Baylie v. Federal Reserve Bank of Chicago, 476 F.3d 522, 526, 99 FEP Cases 1310 (**7th Cir.** 2007), affirmed the grant of summary judgment to the racial discrimination defendant, stating that although "a district judge should not insist that the other employees to whom a plaintiff compares herself be identically situated, there must be a reasoned basis for thinking the comparator close enough in material ways so that a reasonable fact-finder could think that race (sex, or another covered attribute) was the difference that the employer perceived. When despite ample opportunity for discovery the plaintiff makes no serious effort to show that the favored worker was similarly situated except with respect to race (sex, and so on), the district judge properly concludes that a prima facie case of discrimination has not been established."

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

> There has been a tendency in our cases, and in those of some other circuits as well (a trend resisted, however, by the Eighth Circuit . . . to require closer and closer comparability between the plaintiff and the members of the comparison group (the group of 10 in this case). . . . The requirement is a natural response to cherry-picking by plaintiffs, the issue with which we began. If a plaintiff can make a prima facie case by finding just one or two male or nonminority workers who were treated worse than she, she should have to show that they really are comparable to her in every respect.
>
> But if as we believe cherry-picking is improper, the plaintiff should have to show only that the members of the comparison group are sufficiently comparable to her to suggest that she was singled out for worse treatment. . . . Otherwise plaintiffs will be in a box: if they pick just members of the comparison group who are comparable in every respect, they will be accused of cherry-picking; but if they look for a representative sample, they will unavoidably include some who were not comparable in every respect, but merely broadly comparable. The cases that say that the members of the comparison group must be comparable to the plaintiff in all material respects get this right. . . .

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

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

Id. at 847.

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."

F. <u>Judicial Representation as to Comparators at SJ is Binding at Trial</u>

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.

G. Statistics

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

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

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

(Citations omitted.)

Sun v. Board of Trustees of University of Illinois, 473 F.3d 799, 812–13, 99 FEP Cases 897 (**7th Cir.** 2007), affirmed the lower court's grant of summary judgment to the Title VII race and national origin discrimination defendants but held that plaintiff's simple statistical evidence had some probative value. "Sun emphasized that, between the years of 1993 and 2003, the four members of the PTC voted on 19 promotion candidates, two of whom were Asian and from

China and 17 of whom were Caucasian. According to Sun, the PTC voted unanimously against him and the other Chinese candidate and, in almost every case, voted unanimously in favor of the Caucasian candidates." (Footnote omitted.) The court stated: "Although the sample size is insufficient to provide statistically reliable evidence, the PTC's voting pattern has some probative value regarding discriminatory employment practices. . . . We do not hold, however, that a questionable pattern of promotion, standing alone, is sufficient evidence to withstand summary judgment." *Id.* at 813.

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

> When Allen filed her lawsuit, TSI had been in business for approximately ten years and operated eighty-two retail stores in states with large black populations—Arkansas, Tennessee, Mississippi, and Missouri—yet none of TSI's stores had a black store manager. In 2001 and 2002, TSI did not have a procedure for advancement. If an employee wanted to be considered for a management position, the employee simply asked the store manager or supervisor. Lovell, Hill, and Goggans were hired after Allen and had less managerial experience than Allen. Nonetheless, Lovell, Hill, and Goggans were hired directly into store manager positions. These hiring practices, together with TSI's word-of-mouth promotion process, support a finding of discriminatory practice.

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

Morgan v. United Parcel Service of America, Inc., 380 F.3d 459, 94 FEP Cases 591 (**8th Cir.** 2004), affirmed the grant of summary judgment to defendant on plaintiffs' Title VII pattern-and-practice claim. The court rejected plaintiffs' showing that black employees were disproportionately concentrated in defendant's lower-paid jobs, because the issue to be resolved in this part of the case was whether there was discrimination in promotions to the position of division manager.

> The upward-mobility classes consist of center managers who have not been promoted to division manager. Thus, the probative inquiry involves a comparison between the percentage of division managers who are black and the percentage of qualified employees who are black in the population from which division managers are chosen. As the district court held, "plaintiff's reliance on a bottom line racial imbalance in the workforce is insufficient to establish that blacks are less likely to be promoted."

Id. at 464–65. The court also held that plaintiffs' multiple regression analysis was admissible but, because of its omission of key explanatory variables involving prior pay and performance, was not strong enough by itself to withstand summary judgment. The court pointed to the fact that no anecdotal evidence had been offered. *Id.* at 466–71. Judge Melloy concurred in part and dissented in part.

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."

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

> Wal-Mart challenges Dr. Drogin's findings and faults his decision to conduct his research on the regional level, rather than analyze the data store-by-store. However, the proper test of whether workforce statistics should be viewed at the macro (regional) or micro (store or sub-store) level depends largely on the similarity of the employment practices and the interchange of employees at the various facilities. . . .
>
> Here, Dr. Drogin explained that a store-by-store analysis would not capture: (1) the effect of district, regional, and company-wide control over Wal-Mart's uniform compensation policies and procedures; (2) the dissemination of Wal-Mart's uniform compensation policies and procedures resulting from the frequent movement of store managers; or (3) Wal-Mart's strong corporate culture. Such evidence supports Plaintiffs' claim that the discrimination was closely related to Wal-Mart's corporate structure and policies. Because Dr. Drogin provided a reasonable explanation for conducting his research at the regional level, the district court did not abuse its discretion when it credited Dr. Drogin's analysis.
>
> Wal-Mart also contends that the district court erred by not finding Wal-Mart's statistical evidence more probative than Plaintiffs' evidence because, according to Wal-Mart, its analysis was conducted store-by-store. However, contrary to Wal-Mart's characterization of its analysis, its research was not conducted at the individual store level. Dr. Joan Haworth, Wal-Mart's expert, did not conduct a store-by-store analysis; instead she reviewed data at the sub-store level by comparing departments to analyze the pay differential between male and female hourly employees. 547 U.S. 268, 126 S.Ct. 1752 Further, our job on this appeal is to resolve whether the "evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence ultimately will be persuasive " to the trier of fact. . . .[7] Thus, it was appropriate for the court to avoid resolving "the battle of the experts" at this stage of the proceedings. . . .
>
> Finally, it is important to note that much of Dr. Haworth's evidence, which Wal-Mart argues was "unrebutted" by Wal-Mart, was in fact stricken by the district court for failing to satisfy the standards of Federal Rules of Evidence 702 and 703.[8] . . . The district court specifically stated that Dr. Haworth's stricken testimony could not be used to undermine or contradict Dr. Drogin's analysis . . . and, as noted above, Wal-Mart does not appeal this ruling. Thus, while Dr. Haworth's testimony may be relevant to an

analysis of the merits of Plaintiffs' claims, it does not rebut Dr. Drogin's evidence and does not support Wal-Mart's contention that its statistical evidence is more probative than Plaintiffs' at the certification stage.

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

---

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

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

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

Id. at 1228–30 (citations omitted). Judge Kleinfeld dissented. *Id.* at 1244–49.

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

Obrey's statistical evidence was not rendered irrelevant under Rule 402 simply because it failed to account for the relative qualifications of the applicant pool. See Fed. R. Evid. 402 ("All relevant evidence is admissible, except as otherwise provided [by law]. Evidence which is not relevant is not admissible.") A statistical study may fall short of proving the plaintiff's case, but still remain relevant to the issues in dispute. The Dannemiller study may be relevant, and therefore admissible, even if it is not sufficient to establish Obrey's prima facie case or a claim of pretext. Thus, objections to a study's

> completeness generally go to "the weight, not the admissibility of the statistical evidence" . . . and should be addressed by rebuttal, not exclusion . . . .
>
> In some cases, statistical evidence may suffer from serious methodological flaws and can be excluded, consistent with the trial court's "gatekeeping" power, under Rule 702. . . . Factors which may bear on admissibility include: (1) whether the "scientific knowledge . . . can be (and has been) tested"; (2) whether "the theory or technique has been subjected to peer review and publication"; (3) "the known or potential rate of error"; and (4) "general acceptance." . . . The Rule 702 inquiry is a "flexible one" whose "overarching subject is the scientific validity and thus the evidentiary relevance and reliability[ ] of the principles that underlie a proposed submission." . . .

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

H. Discriminatory Statements

1. Recent Noteworthy Decisions

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

> Burton Gifford, a male employee in AND, testified that Donohue "just doesn't give women, that I have observed, any credibility for what they're saying, or even acknowledge they said it, in some cases." Gifford Dep. at 80. He also testified that Donohue gave male employees "preference in program responsibilities, which included apparent forgiveness for slippag[es] in schedule and or costs," while treating female employees with similar difficulties dismissively. . . . Another male employee, Dr. Charles Overby, testified that Donohue treated women in a "sexist" and "demeaning" manner. . . .
>
> Both men pointed to specific events to substantiate their testimony. Gifford described an incident in which Donohue turned his back on a female subordinate who disagreed with him in a meeting. . . . ("[Donohue] turns away from it and refuses to deal with it when women are making these comments. He just turns to someone else and goes on with his agenda, as opposed to when a man ... makes that type of statement."). And Overby related an episode in which Donohue was "cavalier and rude" to a high-ranking female administrator in a belittling way—essentially telling her that "[y]ou don't have to worry your head about that." . . .

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

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

> In ruling that Stadmeyer's remarks lacked evidentiary significance because they were "stray," the court failed to apply the correct standard. Instead of disregarding some of the evidence because of such a classification, the court should have considered all the evidence in the light most favorable to the plaintiff to determine whether it could support a reasonable finding in the plaintiff's favor.
>
> We recognize that our precedents may have been somewhat confusing. In some instances we have found the evidence legally insufficient notwithstanding the incidence of discriminatory remarks. To explain why the evidence was nonetheless insufficient, we noted that the remarks were "stray." That locution represented an attempt—perhaps by oversimplified generalization—to explain that the more remote and oblique the remarks are in relation to the employer's adverse action, the less they prove that the action was motivated by discrimination. For example, remarks made by someone other than the person who made the decision adversely affecting the plaintiff may have little tendency to show that the decision-maker was motivated by the discriminatory sentiment expressed in the remark. *See, e.g.*, *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 182 (**2d Cir.** 1992) (describing remarks as "stray" when made "in the workplace by persons who are not involved in the pertinent decisionmaking process"); *cf. Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 162 (**2d Cir.** 2001) (contrasting "the stray remarks of a colleague" with "comments made directly to" the plaintiff by someone with "enormous influence in the decision-making process"). The more a remark evinces a discriminatory state of mind, and the closer the remark's relation to the allegedly discriminatory behavior, the more probative that remark will be. *See Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 56 (**2d Cir.** 1998) (explaining that the label "stray" is inappropriate where "other indicia of discrimination" tie the remarks to an adverse employment action); *compare Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 162–63 (**2d Cir.** 1998) (rejecting the label "stray" where decision-makers uttered age-related remarks near the time of plaintiff's discharge), *with Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 92 n. 2 (**2d Cir.** 2001) (characterizing remarks as "stray" where they were "unrelated to [the plaintiff's] discharge"). Where we described remarks as "stray," the purpose of doing so was to recognize that all comments pertaining to a protected class are not equally probative of discrimination and to explain in generalized terms why the evidence in the particular case was not sufficient. We did not mean to suggest that remarks should first be categorized either as stray or not stray and then disregarded if they fall into the stray category.
>
> The district court was also mistaken in the view that the probative value of Stadmeyer's remarks depended on how offensive they were. The relevance of discrimination-related remarks does not depend on their offensiveness, but rather on their tendency to show that the decision-maker was motivated by assumptions or attitudes

relating to the protected class. Inoffensive remarks may strongly suggest that discrimination motivated a particular employment action.[4] For example, Stadmeyer's assertion to the effect that Tomassi was well suited to work with seniors was not offensive. Nonetheless, it had a strong tendency in the circumstances to show that Stadmeyer believed that, because of Tomassi's age, she was not well suited to deal with the younger tenants Stadmeyer was hoping to attract.

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

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

---

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

[5] We take issue with the district court's argument that because Stadmeyer "gave [Tomassi] positive evaluations, promoted her, and granted her salary raises," he was unlikely to have fired her because of her age. *Tomassi*, 398 F. Supp. 2d at 272. First, Tomassi's promotion, pay raises, and positive evaluations cut directly against the legitimate, non-discriminatory justification that Stadmeyer has offered for her termination. Stadmeyer claimed in his deposition and post-deposition affidavit that his decision to fire her was based on her poor job performance--an argument strongly

> undermined by evidence that she was a well-regarded employee. Second, the notion that Tomassi's work was esteemed by Stadmeyer is not necessarily inconsistent with her account of his actions. Tomassi argues that Stadmeyer fired her, not because of her work performance, but because he decided that a younger face would attract a more-desirable demographic to PCV/ST. Evidence showing he thought highly of Tomassi's work does not contradict this claim. Thus, Tomassi's promotion, pay raises, and positive evaluations are more consistent with her contentions than with the defendant's.

(Footnote omitted.)

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

> The most significant evidence showing pretext is Santoro's conduct after Asmo announced she was pregnant with twins. In October 2001, Asmo, Santoro and the entire SG & A team were participating in a conference call, during which Asmo informed the team that she was pregnant with twins. The news was met with congratulations from all her colleagues except Santoro, who did not comment and then "simply moved on to the next business topic in the conference call." . . . Santoro's initial silence is suspect. Pregnancies are usually met with congratulatory words, even in professional settings. When people work together they develop relationships beyond the realm of employment, and Asmo's pregnancy was particularly noteworthy given that she was pregnant with twins, a fairly unusual (and overwhelming) occurrence.
>
> Additionally, though Santoro conducted weekly conference calls with the recruiters, he did not mention Asmo's pregnancy again until December 4, 2001, the day he terminated Asmo. Asmo's job involved considerable travel (forty to sixty percent of her time), something an employer might be concerned about given the announcement that Asmo was going to have *twins,* which most people know is a tremendous responsibility. Yet Santoro did not talk with Asmo about how she planned to deal with the impending arrival of her twins and/or what the company could do to help accommodate her. Instead, he did not mention her pregnancy at all. He also did not ask any of his colleagues to discuss Asmo's pregnancy with her, or to provide her with information about how the company accommodates parents. Given the combination of Asmo's job's being particularly demanding of time due to travel and her announcement of not just a pregnancy, but a pregnancy of twins, Santoro's silence could be interpreted as discriminatory animus.

The court recognized that there might be completely satisfactory reasons for Santoro's silence, but held that such reasons were inappropriate to explore on summary judgment. It continued: "Santoro's silence is evidence of pretext because it can be read as speculation regarding the impact of Asmo's pregnancy on her work, and an employer's speculation or assumption about how an employee's pregnancy will interfere with her job can constitute evidence of

discriminatory animus." *Id.* at 595 (citation omitted). Judge Griffin dissented. *Id.* at 598–601.

2. Courts Refusing to Rely on Biased Statements

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

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

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

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

3. Courts Relying on Biased Statements

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

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

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

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

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

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

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

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

(Citations omitted.)

4. Statements by Decisionmakers

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

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

Miller-El v. Dretke, 545 **U.S.** 231, 263–64 (2005), reversed the denial of *habeas corpus* and held that petitioner had shown racial discrimination in the prosecutor's peremptory

challenges by clear and convincing evidence. The Court cited *Reeves v. Sanderson Plumbing Products*, *id.* at 241, underscoring the relevance of this decision to employment law. The Court relied on evidence of discriminatory statements going back to the 1950's, evidencing a policy of racial discrimination that was not shown to have ended by the time of petitioner's trial. The Court also relied on the fact that prosecutors marked the race of each prospective juror on their jury cards. *Id.* It rejected the State's argument that this was to ensure there would be no violation of the rule of *Batson v. Kentucky*, 476 **U.S.** 79 (1986), because *Batson* was not decided until a month after Miller-El was tried. *Id.* at 2339 n.38. The Court sharply criticized the Fifth Circuit's unwillingness to see the discrimination so plainly laid before it. *Id.* at 265–66. Justice Breyer concurred. *Id.* at 266–73. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissented. *Id.* at 274–307.

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.'"

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

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

(Footnote omitted.) The court continued:

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

Id. (footnote omitted).

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

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

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.

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

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

(Citations omitted.)

Obrey v. Johnson, 400 F.3d 691, 697, 95 FEP Cases 531 (**9th Cir.** 2005), reversed the judgment on a jury verdict for the Title VII defendant. Plaintiff is an Asian-Pacific Islander who claimed that persons of his race were systematically excluded from senior management positions at the Pearl Harbor Naval Shipyard. The lower court excluded as irrelevant the testimony of an employee, Toyama, who "was expected to testify that Shipyard officials had informed him that off-yard employees were rotated to Pearl Harbor on a temporary basis because the 'local' workers 'were not good enough' and 'can't do a good job.'" The court held that this was an

abuse of discretion because the testimony tended to show defendant's discriminatory state of mind, and Toyama's further expected testimony on the source of the funds used to pay for off-yard employees tended to show that defendant's stated explanations were pretextual.

Plotke v. White, 405 F.3d 1092, 1106–07, 95 FEP Cases 1025 (**10th Cir.** 2005), reversed the grant of summary judgment to the Title VII defendant and held that remarks that the plaintiff historian was hired because of affirmative-action pressures and calling her by her first name while calling males with her academic credentials "Dr." was probative of gender discrimination:

> Dr. Plotke's final contention is that the district court erred by rejecting as irrelevant to the pretext issue her evidence of several incidents not directly related to the termination decision. These incidents include but are not limited to: referring to Dr. Plotke as "Jane" instead of "Dr."; calling her a "femi-Nazi" and "wire-head" . . . advising her that she "should be quiet and not make [her]self noticed" . . .; remarking that her presence would prevent the all-male group from "sitting around drinking beer, smoking cigars, and farting" on a professional staff ride . . .; comments that CAC was under pressure to hire a female historian; and disparaging Dr. Plotke's professional competence and yelling at her to "keep [her] mouth shut" in the presence of her peers and supervisor. . . . The district court held that these incidents "do not constitute direct evidence of gender discrimination" . . . and that under *McDonnell Douglas*, they would only be considered if offered as pretext evidence on the issue of the falsity of defendant's stated reasons for termination. We disagree.
>
> * * *
>
> The Supreme Court has emphasized that courts should not reject a plaintiff's evidence of additional circumstantial gender-based comments and treatment simply because they "were not made in the direct context of [the plaintiff's] termination." *Reeves*, 530 **U.S.** at 151–53, 120 S. Ct. 2097. Accordingly, we have held that gender-based comments by a plaintiff's supervisor can be relevant evidence of pretext demonstrating that the supervisor had "preconceived notions premised on [the plaintiff's] gender" and "ultimately terminated her based at least in part on his gender bias," even where such comments were not directly limited to the termination decision. . . . A plaintiff simply must show a nexus between the allegedly discriminatory statements and the employer's decision.

(Footnote and citations omitted.)

5. 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, 290–91, 93 FEP Cases 1 (**4th Cir.** 2004) (*en banc*), *cert. dismissed*, 543 U.S. 1132 (2005), affirmed the grant of summary judgment to the Title VII and ADEA defendant. The court held: "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). Judge Michael dissented, joined by Judges Motz, Judge King, and Judge Gregory. *Id.* at 299–305.

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

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

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

were not in this instance probative of discrimination. "Therefore, Greene's possibly improper motives cannot be imputed to the final decisionmaker." *Id.* at 814.

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

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

(Citations omitted.)

Lust v. Sealy, Inc., 383 F.3d 580, 584, 94 FEP Cases 645 (**7th Cir.** 2004), affirmed the judgment on liability for the Title VII plaintiff, rejecting the Fourth Circuit's holding on cat's paw testimony in *Hill v. Lockheed Martin*.

6. 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.

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.

7. 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."

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

8. 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.

9. Contentions that Biased Remarks Were Isolated

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.

10. 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 of Richard Seymour 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.

I. Independent Investigations

1. The Effect of Independent Investigations

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

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

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

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

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

> The summary judgment evidence establishes that Aguero, as President of Eastfield College, had the final authority to hire and fire employees. Clark and Kelley, as supervisors in their respective departments, had the authority to make recommendations concerning the employment status of their subordinate employees. In this case, Clark recommended that Long be terminated, and Kelley recommended that Reavis be terminated. Aguero then made the final decisions to terminate Long and Reavis. If Aguero based his decisions on his own independent investigation, the causal link between

> Clark and Kelley's allegedly retaliatory intent and Long and Reavis's terminations would be broken. . . . If, on the other hand, Aguero did not conduct his own independent investigation, and instead merely "rubber stamped" the recommendations of Clark and Kelley, the causal link between Long and Reavis's protected activities and their subsequent terminations would remain intact. . . . The degree to which Aguero's decisions were based on his own independent investigation is a question of fact which has yet to be resolved at the district court level. Viewing the evidence in the light most favorable to Long and Reavis, we must assume on appeal that Aguero merely "rubber stamped" the recommendations of Clark and Kelley. . . . Accordingly, for the purposes of this appeal, we find that Long and Reavis have presented sufficient evidence to establish a causal link between their protected activities and their terminations, and we hold that Long and Reavis have presented prima facie cases for unlawful retaliation.

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

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

> But it is not enough just to have some minimal amount of influence; did Thompson have the "singular influence" required by Rozskowiak? For a nominal non-decision-maker's influence to put an employer in violation of Title VII, the employee must possess so much influence as to basically be herself the true "functional[ ] ... decision-maker." . . . The nominal decision-maker must be nothing more than the functional decision-maker's "cat's paw." . . . A good example of such a degree of influence (and one which will offer a revealing comparison to the present case) is where the party nominally responsible for a decision is, by virtue of her role in the company, totally dependent on another employee to supply the information on which to base that decision. In such a case the employee that selects, colors and supplies the information has such power over the nominal decision maker that she is in fact the true, functional decision maker. Mere "paper review" of the informer's recommendation will not shield the employer from liability if her recommendation is racially motivated. . . .
>
> By contrast, where a decision maker is not wholly dependent on a single source of information, but instead conducts its own investigation into the facts relevant to the decision, the employer is not liable for an employee's submission of misinformation to the decision maker. . . . It does not matter that in a particular situation much of the

> information has come from a single, potentially biased source, so long as the decision maker does not artificially or by virtue of her role in the company limit her investigation to information from that source. For instance, we have frequently dealt with employees that claim they were framed for misconduct by a racist coworker or superior, which caused the employee in question to be fired. Even though the employer in such situations must often decide what to do based on nothing more than the conflicting stories of two different employees, the employer will not be liable for the racism of the alleged frame-up artist so long as it independently considers both stories.

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

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

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

> Even if we were to assume that a lesser degree of influence over an employment decision might trigger Title VII liability in other contexts, such as the context of a regularized, formal performance evaluation, we do not think that such an approach can affect the outcome in a case like this that concerns an employee's discipline for particular misconduct. The line of cases addressing this particular situation is univocal, and indicates that even where a biased employee may have leveled false charges of misconduct against the plaintiff, the employer does not face Title VII liability so long as the decision maker independently investigates the claims before acting.
>
> Requiring only an independent investigation of misconduct charges makes good sense in light of the practical realities that an employer often faces when addressing such charges. Title VII is informed by traditional principles of agency law, see 42 U.S.C. § 2000e–2(a)(1), *Burlington Indus., Inc. v. Ellerth*, 524 **U.S.** 742, 754–55, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998); *Faragher v. City of Boca Raton*, 524 **U.S.** 775, 791–92,

> 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998), but those principles should be applied in light of the practical reasons for imposing liability on employers. *Faragher*, 524 **U.S.** at 797, 118 S. Ct. 2275; *see also Burlington Indus.*, 524 **U.S.** at 755, 118 S. Ct. 2257 (holding that "common-law principles may not be transferable in all their particulars to Title VII"). Title VII's primary objective is "not to provide redress but [to] avoid harm" by giving employers an incentive to control their employees. *Erickson v. Wis. Dept. of Corr.*, 469 F.3d 600, 605–06 (**7th Cir.** 2006); *see also Burlington Indus.*, 524 **U.S.** at 764, 118 S. Ct. 2257 ("Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms."). Consequently, employers should be liable for their employees' racism only in "the general class of cases in which [an employer] has the practical ability to head off injury to [its] employee's . . . victim." *Shager*, 913 F.2d at 405. Imposing liability for employee wrongs that an employer could not practically prevent (that is, could prevent only with prohibitive expense or through unreasonable efforts) would not induce employers to impose additional controls on its employees and would therefore not be effective to avoid any harm.
>
> In cases like the present one, there is probably no practical step an employer can take beyond independently investigating the misconduct charges that will reduce the chances of an employee's racism influencing its behavior. When an employee is accused of wrongdoing by another, the key evidence for an employer (and the courts) to consider will often be the mere say-so of two employees, one of whom claims the other is a lying racist. Such a case is a model "swearing contest." The best way the courts can find to deal with such puzzles is to empanel a jury and hope for the best; it might be too demanding to expect an employer to do more than have an employee conduct a fair-minded, independent investigation into the available evidence and then make a decision in good faith.

Id. at 920–21.

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

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

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

[7] Godwin, 150 F.3d at 1221 (internal quotation marks omitted) (alteration in original).

[8] DeHorney v. Bank of Am. Nat'l Trust & Sav. Assoc., 879 F.2d 459, 468 (9th Cir.1989).

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

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

2. Rebuttals to Independent-Investigation Defenses

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

> Rather, the discriminatory animus of a manager can be imputed to the ultimate decisionmaker if the decisionmaker "acted as a rubber stamp, or the 'cat's paw,' for the subordinate employee's prejudice." . . . The relevant inquiry is whether Jones "had influence or leverage over" Carr and Dotto's decisionmaking. . . . Jones issued Laxton's Written Warning. Carr issued Laxton's Final Written Warning, but Carr testified that Jones served as her primary source of information. Gap makes the somewhat implausible assertion that Carr and Dotto did not rely on the two warnings when they decided to terminate Laxton, but instead relied solely on the "independent investigations" of Inglis and Licona. This position is inconsistent with Gap's proffered justification for Laxton's discharge, namely, the cumulative effect of violations of company policy including those

> cited in the Written Warning and Final Written Warning. The degree to which Carr and Dotto relied on the "independent investigations" is a question of fact for the jury. . . . Given that the Written Warning and the Final Written Warning represent Strikes One and Two in Gap's "three-strikes-you're-out policy," the jury could have reasonably concluded that these warnings influenced Carr and Dotto's decisionmaking.
>
> Gap's reliance on Wallace for the proposition that Jones did not influence the final decisionmakers is, again, off-the-mark. Like Jones, the declarant in Wallace was the terminated employee's direct supervisor. Also like Jones, the Wallace declarant participated in the factfinding leading to the plaintiff's termination. In both cases, the supervisors' discriminatory animus arguably colored their factfinding. The final decisionmakers in Wallace, however, did not rely on the Wallace declarant's factfinding to terminate the plaintiff because the plaintiff in that case freely admitted to the final decisionmakers that she committed the violation for which they fired her. . . . Here, by contrast, Laxton never admitted to Carr and Dotto that she committed the violations charged in the Final Written Warning. Indeed, Carr herself testified that she relied on Jones for the facts underlying these violations. The jury could have therefore reasonably inferred that Jones "had influence or leverage over" Carr and Dotto, such that it would have been proper for the jury to impute Jones's discriminatory animus to Carr and Dotto.

(Citations omitted.)

EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476, 487–88, 98 FEP Cases 571 (**10th Cir.** 2006), *cert. dismissed*, __ **U.S.** __, 127 S. Ct. 1931, 167 L.Ed.2d 583 (2007), stated: "To prevail on a subordinate bias claim, a plaintiff must establish more than mere 'influence' or 'input' in the decisionmaking process. Rather, the issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action. . . . This standard comports with the agency law principles that animate the statutory definition of an 'employer.' *See* RESTATEMENT § 219 (describing the scope of a master's liability 'for the torts of his servants' and thereby incorporating standard tort concepts like causation)." (Citation omitted.) The court held that the decisionmaker's investigation was too inadequate to break the causal chain.

J. <u>Evidence Considerations Relating to Disparate Impact</u>

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.

K. 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.)

L. 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.

M. Evidence Considerations Relating to Summary Judgment

1. 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.

2. <u>Harassment Cases</u>

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

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

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.

3. Summary Judgment in Pattern-and-Practice Cases

Thiessen v. General Electric Capital Corp., 267 F.3d 1095, 1108–09 (**10th Cir.** 2001), *cert. denied*, 536 U.S. 934 (2002), 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.)

N. Defense Mental Examinations, Often Misnamed "Independent"

Nuskey v. Lambright, 251 F.R.D. 3 (D.D.C. 2008), held that a sexual harassment plaintiff seeking $300,000 in emotional-distress damages had thereby placed her physical and mental state in issue, and compelled her to submit to a defense mental examination. The court stated at p. 8:

> Ms. Nuskey also argues that her case is distinguishable from the cases in which I have ordered an IME because "the recurrent theme in each of [those] decisions is the plaintiff's proffer of an expert opinion, a claim of permanent mental injury, and / or a concession that the mental condition of plaintiff was in controversy." Pl. Opp. at 9. The absence of these factors, which are elements of the *Turner* test, does not alter the critical fact that the Bank would be at a significant disadvantage if forced to defend itself against Nuskey's claims without the benefit of an IME. Whether she has explicitly "conceded" that her mental condition is in controversy is of no matter because her complaint and discovery responses make clear that she is seeking to recover damages relating to her mental condition-which is, as a result, at issue. That she is not claiming a permanent mental injury is also irrelevant; whether permanent or not, she is claiming compensatory damages of $300,000-hardly a nominal amount-that consist of, amongst other things, several years of past and future therapy. That the injury for which she seeks compensation is not "permanent" is a distinction without a difference. Finally, her decision not to call an expert witness should have no bearing on the Bank's ability to test her theory of damages, especially where she intends to call a doctor to testify about her mental condition. It is her claim of damages, not her presentation of evidence, that trigger's the Bank's interest in an IME.

Roberson v. Bair, 242 F.R.D. 130 (D.D.C. 2007), held that a discrimination and retaliation plaintiff claiming $300,000 in emotional-distress damages and relying on assertions of two mental-distress disorders, and who would likely rely on expert testimony at trial, must undergo a defense mental examination by a psychiatrist and a psychotherapist. The court rejected her claim that defendant could get the information it sought by deposing her treating physician.

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. Hearsay

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

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.

3. 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.

4. 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), *cert. denied*, __ **U.S.** __, 124 S. Ct. 1602 (2004), 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.

5. 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.

6. Admissions

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.

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.

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

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

7. <u>Ineffective Denials</u>

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.

8. 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.

Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 328 F.Supp.2d 865 (**N.D. Ill.** 2004), held that the arbitrators resolving claims under a settlement agreement's claims resolution process may consider a prior arbitral finding that defendant had engaged in a pattern and practice of sex discrimination.

9. 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.

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

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

(Citations omitted.)

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

> We recognize, however, that the district court retains broad discretion to determine whether the probative value of the evidence at issue is substantially

outweighed by considerations of "undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403 . . . . Nevertheless, none of the testimony that the appellant attempted to offer into evidence so clearly involved delay that was "undue" or a "waste of time" or was cumulative of other evidence that it was excludable. Rather, the testimony was offered to show that the defendant had a discriminatory motive when it denied his promotion because it had unlawfully rejected other applicants in circumstances similar to his, and tended to support his pattern or practice theory. While the jury naturally has to determine the credibility of witness testimony in order to assess the weight it should be accorded, this is not the sort of undue delay and waste of time that the Rules contemplate.

> We acknowledge that the trial court was properly concerned with the prospect of mini-trials on the witnesses' own claims of discrimination. The trial court should have first addressed these concerns with the parties through other, less restrictive means. On balance, we believe that this proposed testimony was likely to be relevant, and Rule 403 considerations do not warrant exclusion in this case. Consequently, we find that the district court abused its discretion when it excluded this testimony. On remand, the district court, of course, will retain discretion to decide that the witnesses' claims so overwhelm the issues in the trial that their testimony must be excluded under Rule 403.

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

10. <u>Disaggregating the Evidence</u>

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).

11. Prior Deposition Testimony As Limiting Trial Testimony

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.)

12. 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.

13. 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.)

14. 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.

15. Determinations of the EEOC and State and Local Agencies

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

16. The EEOC "Reasonable Cause" Determination

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.)

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

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).

17. <u>Hearsay and its Exceptions</u>

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."

18. 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.

19. 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.

20. The Time Period for Which Evidence Was Permitted

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

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

Id. at 167.

21. Judge's Questions

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.

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.

22. <u>Counsel's Failure to Follow Through</u>

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.

23. Criminal Conviction of the Harasser

McCombs v. Meijer, Inc., 395 F.3d 346, 95 FEP Cases 1 (**6th Cir.** 2005), affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff, and held that the lower court did not abuse its discretion by admitting evidence that the harasser—a co-worker in the Meat Department where plaintiff worked—had pleaded guilty to a criminal charge after he waved a bloody knife at her in response to her complaints. "Meijer was not prejudiced by the jury knowing that Pound had been convicted of a misdemeanor that resulted from the knife incident. Meijer does not argue that the knife incident did not occur; in fact, evidence of the knife incident was admitted through McCombs's written complaint on December 4. Moreover, if Pound himself had been the defendant or if the occurrence of the knife incident was at issue, the situation may have been different. But, as the district court properly concluded, it does not 'hurt [ ] Meijer[ ] at all to know the man was convicted.'" *Id.* at 354–55. (Footnote omitted.) Judge Gilman dissented.

24. Criminal Conviction Followed by Pardon

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

25. 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.

26. <u>The Courtroom Deputy's Testimony</u>

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

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

(Citation omitted.)

P. <u>Rule 412, Fed. R. Evid.</u>

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

Evid. 402 & 403." *Id.* at 857 (emphasis in original). The court's discussion of the $500 fine imposed on a defense attorney for violating the court's Rule 412 rulings at trial is described in Chapter 56 (Sanctions).

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

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

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

Q. Privilege

1. Attorney-Client Privilege

Arnold v. Cargill Inc., 2004 WL 2203410 (**D. Minn.** Sept. 24, 2004), held that counsel for plaintiffs breached defendant's attorney-client privilege by seeking out and obtaining information from a former manager who had been involved in the defense against a prior class action, working directly with defense counsel, obtaining from him documents labeled privileged,

and failing to return the documents promptly. The court disqualified plaintiffs' counsel from representation of the named plaintiffs and of the class they sought to represent.

2. 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.

3. 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.

4. 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.

R. Experts

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

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.

T. Electronic Evidence

1. Authentication of E-Mails

United States v. Siddiqui, 235 F.3d 1318, 1322–23 (**11th Cir.** 2000), *cert. denied*, 533 **U.S.** 940 (2001), a criminal case, held that defendant's e-mails were properly authenticated by a series of steps:

> In this case, a number of factors support the authenticity of the e-mail. The e-mail sent to Yamada and von Gunten each bore Siddiqui's e-mail address "msiddiquo@jajuar1.usouthal.edu" at the University of South Alabama. This address was the same as the e-mail sent to Siddiqui from Yamada as introduced by Siddiqui's counsel in his deposition cross-examination of Yamada. Von Gunten testified that when he replied to the e-mail apparently sent by Siddiqui, the "reply-function" on von Gunten's e-mail system automatically dialed Siddiqui's e-mail address as the sender.
>
> The context of the e-mail sent to Yamada and von Gunten shows the author of the e-mail to have been someone who would have known the very details of Siddiqui's conduct with respect to the Waterman Award and the NSF's subsequent investigation. In addition, in one e-mail sent to von Gunten, the author makes apologies for cutting short his visit to EAWAG, the Swiss Federal Institute for Environmental Science and Technology. In his deposition, von Gunten testified that in 1994 Siddiqui had gone to Switzerland to begin a collaboration with EAWAG for three or four months, but had left after only three weeks to take a teaching job.
>
> Moreover, the e-mail sent to Yamada and von Gunten referred to the author as "Mo." Both Yamada and von Gunten recognized this as Siddiqui's nickname. Finally, both Yamada and von Gunten testified that they spoke by phone with Siddiqui soon after the receipt of the e-mail, and that Siddiqui made the same requests that had been made in the e-mail. Considering these circumstances, the district court did not abuse its discretion in ruling that the documents were adequately authenticated.

Lorraine v. Markel American Ins. Co., __ F.R.D. __, 2007 WL 1300739 (**D. Md.** May 4, 2007) (No. CIV.A.PWG 06 1893), denied summary judgment because both parties relied on unauthenticated e-mails. Judge Grimm engaged in an extensive analysis of authentication. A copy of his decision is attached.

Whatley v. South Carolina Dept. of Public Safety, 2007 WL 120848 (**D. S.C.** Jan. 10, 2007) (No. 3:05-0042-JFA-JRM), followed *Siddiqui*, and stated

> Electronic mail communications can normally be authenticated by affidavit of a recipient, comparison of the communications content with other evidence, or statements or other statements from the purported author acknowledging the email communication. . . .

> After reviewing the documents in question, the court agrees with defendants that these alleged communications have not been properly authenticated. Plaintiff has failed to provide the court with any foundation, authentication, or certification that the documents are legitimate despite defendants' raising concern about their authenticity. Furthermore, none of the alleged communicants in these emails have authenticated them by affidavit. Finally, plaintiff did not attach an affidavit to the documents demonstrating their authenticity. . . . Without this requisite showing, we are unable to substantiate the validity of these electronic communications.

(Citations omitted.)

Authentication by affidavit, declaration, or deposition testimony is sufficient. *Avery v. Idleaire Technologies Corp.*, 2007 WL 1574269 (**E.D. Tenn.** May 29, 2007) (No. 304-CV-312) at p. *5 n.1; *Illustro Systems Intern., LLC v. International Business Machines Corp.*, 2007 WL 1321825 (N.D. Tex. May 4, 2007) (No. CIV.A. 3:06-CV-1969-L) at p. *4.

Trial testimony can authenticate electronic files even where notes and source files have been destroyed, where the memory of witnesses is very specific. *Loussier v. Universal Music Group, Inc.*, 2007 WL 1098687 (**S.D. N.Y.** April 11, 2007) (No. 02 CIV. 2447 KMW), at p. *9.

2. <u>Presumption of Authenticity?</u>

Sundance Image Technology, Inc. v. Cone Editions Press, Ltd., 2007 WL 935703 (**S.D. Calif.** March 7, 2007) (No. 02 CV 2258 JM (AJB)), rejected defendants' challenge to the authenticity of an e-mail used in support of the court's grant of partial summary judgment on libel, remarking at p. *8 n.8:

> Defendants object that the email lacks foundation and that it is immaterial to the present motion. However, the email appears to be written by defendant Cone and he is free to dispute its authenticity, which he has not. Moreover, the email is not immaterial because it contains one of the statements alleged to be libelous.

Paris Foods Corp. v. Foresite Foods, Inc., 2007 WL 568841 (**N.D. Ga.** Feb. 20, 2007) (No. 105-CV-610-WSD), stated:

> Plaintiffs do not deny that the parties made these oral agreements, nor do they deny the existence of the emails and letters relied upon by Defendants. Instead, they argue that the record displays "Collins' erstwhile attempts to manufacture ... an agreement with Paris through fallacious letter confirmations and surreptitious notations of check stubs during the Fall of 2004, but each one of those machinations was caught by Paris' vigilant staff and rejected." (Opp. to Def. MSJ [100], at 9.) Plaintiffs, however, do not point to any evidence indicating that Paris Foods did not enter into the agreements or that the conversations, emails and letters relied upon by Defendants are not authentic. Plaintiffs fail to demonstrate these agreements were not reached, or that Defendants' evidence of them is unreliable.

3. Counsel's Say-So

Dobbins v. Postmaster General and CEO, U.S. Postal Service, 2007 WL 295215 (**D. Me.** Jan. 29, 2007) (No. CIV. 05-CV-140-B-W), *aff'd*, 2007 WL 906595 (D. Me. March 22, 2007) (No. CIV. 05-140-B-W), stated at p. *10 n.6:

> Considering the many, many presentations given by the bench and the bar on summary judgment practice, it occurs to me that altogether too few practitioners observe the basic practice of citing authenticating testimony (which could be counsel's own summary judgment affidavit, attached to the electronic document as "exhibit 1") in support of exhibits that are critical to the matter at hand.

4. Inauthentic E-Mails

Jimenez v. Madison Area Technical College, 321 F.3d 652, 91 FEP Cases 193 (**7th Cir.** 2003), affirmed the sanction of dismissal of plaintiff's claim for having presented fabricated e-mails and other documents in support of her claims after notice of defendants' investigation of the authenticity of the e-mails and other documents and after the purported authors all denied any knowledge of them, noted the failure of plaintiff's counsel to appeal the $16,473 Rule 11 sanction entered against him, and sanctioned plaintiff and her counsel for filing a frivolous appeal—they challenged only the severity of the sanction of dismissal, and did not deny the fraudulent character of the e-mails and other documents—by awarding defendants their attorneys' fees on appeal.

Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 91 FEP Cases 1574 (**S.D. N.Y.** 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. It stated that the production of electronic discovery can be cheaper than the production of paper discovery. 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.
> 2. The Seven Factors Should Not Be Weighted Equally

> 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.

Wiginton v. CB Richard Ellis, Inc., 2004 WL 1895122, 94 FEP Cases 627 (N.D. Ill. Aug. 10, 2004), modified the *Zubulake* factors by adding a "marginal utility" factor and granted in part plaintiffs' motion to require defendant to pay the costs of restoring data defendant had rendered inaccessible, by requiring that defendant pay 25% of the costs pendente lite.

U. Curative Actions

Lust v. Sealey, Inc., 383 F.3d 580, 585, 94 FEP Cases 645 (**7th Cir.** 2004), affirmed the judgment for the Title VII plaintiff except for punitive damages, stating in *dictum* that the general tort rule barring evidence of curative actions as showing the steps that could have been taken earlier to avoid injury, is not limited to tort cases and could reasonably be applied in employment discrimination cases as well.

V. Employer's Access to Employee Communications Over the Employer's Electronic Systems

Quon v. Arch Wireless Operating Co., Inc., __ F.3d __, 2008 WL 2440559, (**9th Cir.** June 18, 2008, No. 07-55282), reversed the grant of summary judgment to the defendant text messaging contractor on plaintiffs' claims that it improperly turned over to the City of Ontario, their employer, the archived text of text messages sent over City pagers. The court stated at p. *2:

> The City had no official policy directed to text-messaging by use of the pagers. However, the City did have a general "Computer Usage, Internet and E-mail Policy" (the "Policy") applicable to all employees. The Policy stated that "[t]he use of City-owned computers and all associated equipment, software, programs, networks, Internet, e-mail and other systems operating on these computers is limited to City of Ontario related business. The use of these tools for personal benefit is a significant violation of City of Ontario Policy." The Policy also provided:
>
> > C. Access to all sites on the Internet is recorded and will be periodically reviewed by the City. The City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources.

D. Access to the Internet and the e-mail system is not confidential; and information produced either in hard copy or in electronic form is considered City property. As such, these systems should not be used for personal or confidential communications. Deletion of e-mail or other electronic information may not fully delete the information from the system.

E. The use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language in the e-mail system will not be tolerated.

In 2000, before the City acquired the pagers, both Quon and Trujillo had signed an "Employee Acknowledgment," which borrowed language from the general Policy, indicating that they had "read and fully understand the City of Ontario's Computer Usage, Internet and E-mail policy." The Employee Acknowledgment, among other things, states that "[t]he City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice," and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." Two years later, on April 18, 2002, Quon attended a meeting during which Lieutenant Steve Duke, a Commander with the Ontario Police Department's Administration Bureau, informed all present that the pager messages "were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing." Quon "vaguely recalled attending" this meeting, but did not recall Lieutenant Duke stating at the meeting that use of the pagers was governed by the City's Policy.

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

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

II. PRACTICAL CONSIDERATIONS

A. Case Selection Information

In deciding whether to take a class action or FLSA collective action, the potential cost of litigation is an important factor. If the defendant and its vendors have much of the critical information in computer-readable form, it will enormously decrease transaction costs for both sides.

Analysis of the electronic data may also enable each side to form relatively quick estimates of the value of the case, enabling the parties to engage in early settlement discussions.

No matter how many employees potential plaintiffs' counsel may interview in the pre-filing or even pre-retainer investigation, it often occurs that their perceptions of the causes of their problems differ markedly from the real policies or practices causing their problems. Many employers see no need to explain themselves to their employees, or provide such partial information that they sow confusion. They pay a price in more frequent litigation, but are happy because they get summary judgments. It would be better to be clearer and not be sued in the first place, but until they absorb that lesson plaintiffs' counsel will have to continue to be very careful about relying on their clients' perceptions. Access to the electronic information leads with some frequency to an understanding of the real nature of the problem, requiring a fresh evaluation of the case.

Some companies or agencies with extensive computer-readable information can make use of it to persuade plaintiffs' counsel, even prior to the filing of litigation, that there is no good case to be made. This obviously requires attorneys of high integrity and professionalism on both sides of the case.

B. <u>Whose Electronic Evidence?</u>

Practitioners should never fall into the trap of assuming that only the company may have relevant electronic evidence.

State Employment Services and private employment agencies may have computer files showing referrals to the employer, with information on qualifications, race, gender, age, and disability.

Numerous employers contract out the initial screening to third-party companies, which may administer a test on-line or over the phone, and which may administer detailed questionnaires on education, prior experience, and minute details of qualifications. The third party may have records of applicants the defendant never obtained, or obtained but no longer has accessible.

For higher-level positions, a corporate parent may receive information and issue instructions. For lower-level positions, it may issue changes to local qualification standards. For example, there are still companies that insist on higher educational and other qualifications whenever nonwhites are a large proportion of the available pool, and lower qualifications elsewhere. It is good to know this.

Plaintiffs' counsel or their expert may generate the most important computer-readable files. In one case, we computerized the entire job and department initial assignment, promotion, and disciplinary information, with details of seniority, experience and education, for all employees in a textile mill over the 15 years since the mill opened.[1] We needed it.

Hybrid files are also common. These occur when employer or third-party files are supplemented with other information counsel deem relevant, either of their own creation or by merging data from multiple sources. For example, an employer's data file on hires may be

---

[1] *Lewis v. Bloomsburg Mills,* 773 F.2d 561 (4th Cir. 1985).

merged with a third-party screener's files to show information on the relative qualifications of hired male applicants and unhired female applicants.

C. <u>Privilege Considerations</u>

When counsel directly or through an expert or in-house personnel create or merge electronic files for the purpose of litigation, the work-product privilege and sometimes attorney-client privilege have to be considered.

If the new or merged files will eventually give rise to exhibits in connection with a motion or to trial exhibits, most courts will order the parent files to be turned over to the opposing side.[2] The timing of the turn-over may be important in the litigation and in settlement discussions. Counsel may legitimately not reach a decision to use trial exhibits stemming from such files until late in the day, and it is doubtful that any obligation to turn over the privileged parent files could arise before that decision is made.

If opposing counsel have high integrity and professionalism, it is possible to work out a free-flowing exchange of information on merged and created files where counsel believe the files may be used in the future. Both sides may cooperate in the creation of a data base that both sides may then use in the litigation. The creation and checking of such a database can require extensive calendar and professional time, but will still often save a multiple of that professional time in avoiding a myriad of challenges for which the trial court will have little time or patience.

One of the many steep costs defendants justly pay for retaining junkyard dogs as counsel is that these types of case-shortening and cost-cutting techniques are not available.

D. <u>Identifying Potential In-House Electronic Evidence</u>

Before commencing a proceeding, it is advisable to meet with as many employees and former employees as possible, to figure out the company's recordkeeping system. Paycheck stubs can be useful, as can all of the computer-generated personnel and payroll information employees receive.

For example, if employees receive company newsletters at their home, the employer will be hard-pressed to assert that it does not have a record of employee addresses.

If employees receive printouts of their job histories, qualifications on file, statements of interest in higher-paid positions on file, and hours worked in the current week, potential counsel for the employees knows that these kinds of information will not have to be created from scratch. The case may be litigable with significantly lower transaction costs for both sides, making more relief available to the clients.

---

[2] *But see Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 765 (4th Cir. 1998), *vacated and remanded on another point*, 527 U.S. 1031 (1999) (denying defendant's argument that it was deprived of effective defense at trial because lower court refused to order production of data base compiled by non-testifying expert consultants, which testifying expert used to produce trial exhibits).

It is critical to gather facts in advance of a problem, to support a potential claim for obstruction of justice or spoliation in the event that the company destroys currently available information as soon as it gets wind of a possible legal proceeding. Each current employee in contact with plaintiffs' counsel should check to see how far back his or her e-mails are currently retained on the company's system.

E. Ensuring the Preservation of Electronic Evidence

As soon as plaintiffs' counsel decides to accept the retainer and it is wise to reveal this fact to the prospective defendant, plaintiffs' counsel should notify the defendant, at a high level, of the need to guarantee the preservation of electronic as well as documentary evidence. If there are no outside counsel yet known to plaintiffs' counsel, a letter should be sent to the CEO, Chairman of the Board, and General Counsel. If outside counsel are known, the letter should go only to outside counsel.

The letter should refer specifically to electronic evidence; some defense counsel routinely caution their clients to preserve documentary evidence but do not think to include electronic evidence, back-up tapes, etc., in their caution.

Setting the electronic evidence aside does not necessarily preserve it. The files need to be copied onto fresh media every so often, or they will deteriorate.

It is also important to make sure that the employer either preserves the means to read the files, or converts the files into a generally readable format. For example, I was in a case in which intervenors wanted access to electronic files the defendant was under a legal duty to maintain. The files were in fact in the computer room. Unfortunately, their format could be read only by the computer they had sold to a South American company when they upgraded, and they had not bothered to migrate the files onto the new system. On deposition, the IT official said that the law required them to keep the files, but does not require that they be readable.

If there is no response, or if there is any resistance, to the letter, plaintiffs' counsel should consider filing an action to preserve the evidence or to obtain pre-suit copies of the evidence that can then be preserved properly.

On more than one occasion, it was only in producing the files that the defendant became aware of their deterioration. Sometimes, one expert's equipment was able to use the underlying data where another expert's equipment was not. Sometimes, plaintiffs' copy of the data survives and the defendant's own original does not.

There are enough problems that it is in the interests of both sides to have a constructive working relationship as to at least the technical factors.

F. Objects of Discovery

1. Data Bases

It is critical to know what is available. Much may be irrelevant, but it is hard to make that decision without knowing what is available.

For example, in one case defense counsel had assured me the company had no computerized record of the race of employees. He had checked personally. When we took a deposition and enquired of a data processor the meaning of each field in the employee database, including the obviously irrelevant ones, it transpired that the company did not use the "Christmas Bonus" field for information on Christmas bonuses, because it did not pay such bonuses. That was the field where race codes were stored.

Practitioners should never assume the honesty of the information in the files. Even defense counsel may be deceived by his or her client's misdirection in data-processing files. I once had a class case in which defense counsel was convinced his client faced no risk because the vast majority of African American applicants had taken themselves out of the selection process by failing to return required documents. His client submitted the printout as part of sworn discovery responses. When we did a spot-check and called the applicants, however, some of them still had the computer-generated postcards or letters stating that they had failed the hiring test. All they "failed to return" was a passing score.

In a proper case, it may be worthwhile to compare a file that may have been "doctored" with an earlier version available from the back-up tapes.

A file that looks relevant may in fact be unintelligible without other files that do not look relevant. For example, a "Job Assignment" file looks relevant but may contain only two dates and four codes. The dates would be the starting and ending dates of assignment to the job, the first code may relate to a second file containing the employee name and SSN, the second code may relate to a third file containing the facility with the job, the third code may relate to the job name, the fourth code may relate to shift, the facility and job files may in turn relate to a fourth file containing the pay rate, and the employee name and SSN file may relate to an fifth file containing demographic information about the employee, a sixth file containing information about the employee's qualifications, and a seventh file containing information about the employee's performance evaluations.

Plaintiffs' counsel should ask for copies of all manuals, memoranda, checklists, etc., used by any persons in any job categories or departments who enter personnel information into the computer files or get reports out. They will need samples of blank forms and of filled-in forms, and will need to compare all of these sources with what is in the computer files.

These should be studied in detail before a deposition. One cannot "wing" these matters.

Assuming that the files are of manageable size, it is often much cheaper to get the entire cluster of files than it would be to go into the files and redact information. Redaction can add enormously to the costs of production.

2. <u>Getting Documents in their Native Format</u>

The "properties" of a document can contain critical information. For example, an employer will tend to win if plaintiff cannot dent the decisionmaker's statement that he had decided to fire the plaintiff and started to prepare the paperwork a week before she filed an EEOC charge. If the plaintiff gets a copy of the termination memorandum from the computer network in "native format"—*i.e.*, with the "properties" information still attached—she will tend

to win if the memorandum shows that the termination paperwork was initiated the day after she filed her charge.

One should always keep in mind that the company's decision to defend a claim may have resulted from its having been deceived by the decisionmaker. Without the plaintiff's pointing out the "properties" information, the defendant may honestly believe it is in the right, and refuse to settle on reasonable terms. With that information, it can make a more realistic choice about the risks of litigation.

3. E-Mails

E-mails are an enormously powerful tool for getting to the heart of what happened, and why. A single e-mail may alter the result of the case.

The problem is finding that single e-mail. I get about 200 e-mails a business day, with 30 to 50 more each weekend day. That's 1,100 a week, or 57,200 e-mails a year. If I am a pack rat and save my e-mails to my hard drive, in the four years I've been with my firm I would have accumulated 228,800 e-mails. As with most firms and organizations, some would be in the active e-mail folder, some in an archive folder, some on back-up tapes as active or archived, some only on my hard drive, and all potentially available in senders' and recipients' e-mail folders.

To avoid looking at every e-mail—because life is short, resources are limited, and the case has other demands—one must come up with an algorithm to search sources of e-mail records. The needs of the case will produce different search imperatives. We all know how difficult it is to get the precise case we need to come up in a search of computerized data bases based on strings of key words, because there are so many ways courts can phrase things. The problem is compounded with e-mails, because at least courts use formal English.

For example, in the hypothetical we would all agree that the following kinds of e-mails between senior officials and Paula Plaintiff's supervisor would be of great interest to her:

- Someone's been pulling the stats on our picks. I suspect you-know-who. Can you give her enough work so she doesn't have time for this garbage?
- Get serious! How many female golf pros can you name?
- What have you got on our problem situation?
- Somebody's getting ideas above their station. A little discouragement is in order, but be careful. We want to keep the employee.

This illustrates why a multi-tiered strategy works best. Key-word searches are important, but it is also important to monitor all the e-mail traffic of key individuals. If substantial traffic consists only of routine reports of some kind—which will be readily apparent in an eyeball inspection—they can be excluded.

It is also useful to test algorithms in advance on small sets of e-mails, with problematic e-mails drafted for the purpose and inserted, to see how well the algorithm does in practice. Computerized legal searches are often fine-tuned when one sees what the search terms included that should have been excluded, and excluded that should have been included.

It is highly desirable that the full search be gotten right, the first time.

4. Document "Retention" Policies

E-mails present special preservation imperatives. The advice of some defense counsel is to ensure that e-mails are purged quickly. Some companies have document-destruction policies—uniformly called "document retention" policies in Orwellian doublespeak[3]—resulting in the automatic erasure of e-mails after three weeks.

Putting aside the legal requirements that records relevant to compliance with the fair employment laws be retained,[4] employers dancing on this sword should remember that it is two-edged, competent plaintiffs' counsel can often make them slip, and falling on sharp objects—even of your own devising—can be painful.

For example, if plaintiffs can put together a decent case despite the destruction of documents, there are a thousand ways in which capable counsel can bring to the jury's attention that the documents were not preserved. Juries do not like that. In an extreme case, if defense counsel suggested application of the "document retention" shedder after it became reasonably clear a claim would be filed, defense counsel may be disqualified because counsel and their firm may become co-defendants in an obstruction-of-justice or spoliation count.

Even if the destruction is inadvertent rather than purposeful, it may result in adverse inferences where the defendant violated a duty to preserve the documents, such as a duty imposed by a record preservation order.

Finally, even if a destruction is inadvertent and there was no violation of a court order, the destroyed documents are often the employer's only record of any nondiscriminatory explanation. In a class action, the absence of supporting documentation means that the employer literally has no idea why any facially-qualified candidate was not selected. Some claims will be defeated on obvious grounds, but there may be no remaining defense as to the vast majority of claimants.

---

[3] The destructive commands of so-called "retention" policies have been well documented in recent corporate scandals. Nor is this phenomenon limited to private companies or to the United States. In December 2004, the British government announced a new "retention" policy that would require the destruction of massive amounts of information just before a new Freedom of Information law was to go into effect.

[4] EEOC regulations require that records be preserved during the pendency of EEOC charges and any ensuing litigation, as well as to show the presence or absence of disparate impact. 29 C.F.R. §§ 1602.14 and 1607.4. Unjustified failure to comply should give rise to adverse inferences. *EEOC v. American National Bank*, 652 F.2d 1176, 1195 (4th Cir. 1981); *Lewis v. Bloomsburg Mills*, 773 F.2d 561 at 568. *Contra*: *Anderson v. Douglas & Lomason Co., Inc.*, 26 F.3d 1277, 1287 n.13 (5th Cir. 1994), *cert. denied*, 513 U.S. 1149 (1995).

G. Meeting of Counsel on Electronic Discovery

Once the necessary documents are in hand and have been studied, and sometimes after the basic computer information has already been produced, the most effective and cost-efficient step is often to schedule a meeting of counsel, with each side bringing their data-processing people. When data-processing people speak directly, they can often come to a quick understanding of the nature of the data files and of any problems in their structure or use, translate it into English in each others' hearing for the benefit of counsel, and enable counsel to get to the heart of the matter.

When each side communicates only between counsel, with the computer experts speaking only to counsel, the result is about as effective as trying to connect to the Internet without a modem, by imitating the sounds modems make.

Court reporters can take down the meeting, but it is often more useful to cover the necessary ground informally, and then, if needed, to have a deposition laying everything out in legally useable form.

If a relationship of trust can be developed, it can continue throughout the case. My experience is that informal consultations can take place much more frequently with respect to electronic information than with respect to the traditional subjects of discovery, eliminating evidentiary problems and objections.

H. Reducing Transaction Costs

Plaintiffs, with more limited resources, are sometimes the parties most interested in reducing transaction costs. The reduction of transaction costs also provides a saving to defendants, with the ability to pay more to resolve the case because less is being wasted in litigation.

In the course of litigation, a lot of opportunities for cost reduction arise. Plaintiffs' counsel should raise them repeatedly in writing with defense counsel, even if defendant seems completely uninterested. If nothing else, this will help defeat defendant's arguments at the end of the case that plaintiffs did more work than was necessary.[5]

Toshiba America Electronic Components, Inc. v. Superior Court, 124 Cal.App.4th 762, 21 Cal.Rptr.3d 532 (Cal. App. 6th Dist. 2004), granted mandamus and remanded a discovery order that would have required the producing party to pay all of the potentially $1.9 million to produce requested electronic discovery, without any examination of the reasonable costs of such discovery to be borne by the requesting party.

---

[5] *E.g.*, *Lipsett v. Blanco*, 975 F.2d 934, 939, 59 FEP Cases 1498 (1st Cir. 1992) (rejecting defendants' attack on plaintiffs' counsel's time in a fee award, and stating: "This case was bitterly contested. Appellants mounted a Stalingrad defense, resisting Lipsett at every turn and forcing her to win her hard-earned victory from rock to rock and from tree to tree. Since a litigant's staffing needs often vary in direct proportion to the ferocity of her adversaries' handling of the case, this factor weighs heavily in the balance.").

I. The Role of the Court in Managing Electronic Discovery

As with all other subjects of discovery, judges are essential when one side cannot be reasoned with. The problem occurs when the judge makes a mistake in identifying the unreasonable party.

For example, some hearings on electronic discovery involve defense contentions that the discovery in question will cost millions of dollars, which makes the plaintiff look unreasonable. If the discovery could be provided cheaply without redactions, and if the millions are necessary only to satisfy the defendant's desire to strike all fields that are not immediately clearly relevant, it's actually the defendant that is being unreasonable.

In these situations, the appointment of an independent expert to advise the court may be extremely beneficial.

Where both sides are reasonable, my experience is that judges will happily leave the technical aspects of electronic discovery for counsel to work out together, once the court is satisfied that the parties know what they are doing in this area. Conversely, a court that has to immerse itself in technical details to resolve a myriad of objections and counter-objections is not a happy court.

Sometimes, judges will not have had personal experience with the kinds of problems attendant on this evidence, and will inadvertently make rulings that will prejudice one side or the other. This is one more reason it is useful to work out problems with the other side in advance of the hearing, or to narrow the scope of what is to be decided.

J. The Use of Computer Files at Trial

Exhibits should be simple enough that their meaning should be readily apparent to an ordinary person without technical training.

The problem for both sides is that, even with experts who know how to make themselves understood to persons not technically trained, their exhibits can be hard to understand. When they are easy to understand, they may be misleading.

Ideally, each analytic exhibit should identify its source, any specific subset of employees on which the analysis was done, the time period covered, the geographic scope of the analysis, any exclusions of data, and anything else helping to make apparent exactly what was done. These are not the normal conventions in the expert's field, but are critical. In addition, the presence of this information on the exhibit alerts the counsel putting on the witness to potential problems not yet fully appreciated.

"Dictionary" exhibits—big bulky printouts that will never be read cover to cover but that are available to provide additional information on employees if desired—can be useful not just at trial, but in ensuing appeals and remedy proceedings. They can answer questions that first occur to someone long after the trial.