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by

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A. Developments in Federal Remedies

1. Title VII of the Civil Rights Act of 1964

Smith v. City of Salem, 378 F.3d 566, 94 FEP Cases 273 (**6th Cir.** 2004), reversed the Rule 12(c) dismissal of plaintiff's Title VII claim, holding that discrimination against a transgender plaintiff because of failure to conform to gender stereotypes is actionable under Title VII.

2. 42 U.S.C. § 1981

See the discussion of *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 190–91, 94 FEP Cases 577 (**4th Cir.** 2004), in the section below on "What Plaintiff Experienced."

3. 42 U.S.C. § 1983

Warnock v. Archer, 380 F.3d 1076, 1082, 21 IER Cases 1203 (**8th Cir.** 2004), affirmed in part, and reversed in part, the remedial order below in this Establishment Clause religious harassment case. The court held that the plaintiff teacher could not complain of harassment arising from the personal religious effects in the Superintendent's office. "But people do not give up their free-exercise or free-speech rights when they become government employees. . . . When their speech and acts can reasonably be attributed to the government itself, of course, the restrictions of the establishment clause apply. But when such activity is clearly personal and does not convey the impression that the government is endorsing it, the mere fact that it occurs in a government setting does not render it unconstitutional." (Citations omitted.) The court held that the school district took prompt and effective remedial action with respect to each incident of religious harassment by students and a teacher, and was therefore not liable. Plaintiff had objected to compulsory-prayer requirements on work time, and a student placed a wooden cross outside his classroom. The court held that the removal of the cross before plaintiff had even seen it, and the suspension of the student for a few hours, was sufficient. "Certainly, their response was not so perfunctory as to constitute official endorsement of or indifference to the student's action." *Id.* at 1083. Plaintiff also complained that a mother had insisted that her children leave an art class he was teaching, and they did so The court held that defendants were not required to force the children to return, and pointed out that the parents of schoolchildren also have free-exercise rights.

4. The ADA

Shaver v. Independent Stave Co., 350 F.3d 716, 719, 14 AD Cases 1889 (**8th Cir.** 2003), held that the ADA prohibits harassment because of disability. "Today, for the reasons that follow, we join the other circuits that have decided the issue by holding that such claims are in fact actionable. *Cf. Flowers v. Southern Reg'l Physician Servs., Inc.*, 247 F.3d 229, 232–35 (**5th Cir.** 2001), *Fox v. General Motors Corp.*, 247 F.3d 169, 175–77 (**4th Cir.** 2001)."

Lanman v. Johnson County, 393 F.3d 1151, 1154–56, 16 AD Cases 449 (**10th Cir.** 2004), affirmed the grant of summary judgment to the ADA harassment defendant, but held that harassment claims under the ADA are actionable. The court stated: "We think it doubtful that

comments by non-supervisory co-workers about Ms. Lanman's mental health establish that the County mistakenly perceived her as mentally impaired. . . . Personality conflicts among coworkers (even those expressed through the use (or misuse) of mental health terminology) generally do not establish a perceived impairment on the part of the employer." *Id.* at 1157.

5. The Rehabilitation Act

Mannie v. Potter, __ F.3d __, 2005 WL 107187 (**7th Cir.** Jan. 20, 2005), affirmed the grant of summary judgment to the Rehabilitation Act harassment defendant, the U.S. Postal Service. The court stated: "Although we have not yet decided whether a claim for hostile work environment is cognizable under the ADA or the Rehabilitation Act, we have assumed the existence of such claims where resolution of the issue has not been necessary. . . . We have further assumed that the standards for proving such a claim would mirror those we have established for claims of hostile work environment under Title VII." (Citations omitted.)

6. The ADEA

Kriescher v. Fox Hills Golf Resort and Conference Center, 384 F.3d 912, 94 FEP Cases 1007 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII sexual harassment and ADEA age harassment defendant but raised no question as to the availability of such a cause of action under the ADEA.

7. Retaliation

Smith v. Northeastern Illinois University, 388 F.3d 559, 567 n.5, 94 FEP Cases 1295 (**7th Cir.** 2004), affirmed the grant of summary judgment and the judgment on a jury verdict for the Title VII racial harassment defendants. The court stated: "The creation of a hostile work environment can be a form of retaliation."

Baker v. John Morrell & Co., 382 F.3d 816, 830 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Iowa Human Rights Act sexual harassment and retaliation plaintiff, including the awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys' fees and costs, a total of $1,386,632. The court upheld the jury's finding that plaintiff's female supervisor, Kathi Brown, retaliated against her for having filed her complaint with the Iowa Civil Rights Commission by creating a retaliatory hostile environment severe enough to qualify as an adverse employment action: "Here, Baker presented evidence showing Brown became antagonistic towards her because the ICRA complaint reflected badly on Brown's job performance. In response, Brown limited Baker's bathroom and other breaks, added to her job duties, refused to provide her necessary job assistance, repeatedly yelled at her for making mistakes, withheld privileges allowed to other employees, and attempted to dissuade her from making further complaints. We are satisfied these retaliatory changes in working conditions constituted significant and material disadvantages sufficient to support the retaliation claim."

B. Exhaustion

Hottenroth v. Village of Slinger, 388 F.3d 1015, 1035–36 (**7th Cir.** 2004), affirmed the grant of summary judgment to defendant on plaintiff's Title VII sexual harassment claim,

holding that plaintiff failed to exhaust the claim before the EEOC. One of her filings asserted facts that did not rise to the level of cognizable harassment—being yelled at, feeling upset at her co-workers, and feeling threatened—and the other contained only "vague and unsupported" statements. "In her complaints, Hottenroth alleges no specific evidence of anything which could reasonably be considered either objectively or subjectively hostile. . . . If this court were to hold otherwise, any complainant, who at any time filed any manner of claim with the EEOC, could collaterally attack an adverse ruling on hostile work environment grounds. *Id.* at 1035 (citation omitted).

C. Procedural Questions

See the discussion of *Baker v. John Morrell & Co.*, 382 F.3d 816, 830–32 (**8th Cir.** 2004), and the post-verdict amendment of the Complaint to limit the effect of the caps on damages, in the section below on "Compensatory Damages."

Jackson v. Flint Ink North American Corp., 382 F.3d 869, 94 FEP Cases 549 (**8th Cir.** 2004), on panel rehearing, reversed the grant of summary judgment to the Title VII racial harassment defendant. The court rejected plaintiff's argument that a jury must always decide whether an environment is objectively hostile. The court held that this was a legal question. "In other words, a showing of some minimal level of harassment is necessary before a case is submissible to a jury. A court of course may decide this issue of submissibility on summary judgment." *Id.*

EEOC v. Pemco Aeroplex, Inc., 383 F.3d 1280, 94 FEP Cases 848 (**11th Cir.** 2004), reversed the grant of summary judgment to the Title VII racial harassment defendant, holding that the EEOC was not in privity with private plaintiffs and was not bound by *res judicata* or by collateral estoppel by the judgment for defendant in that case. The EEOC had brought suit on behalf of persons not involved in the earlier case, and had twice unsuccessfully sought to consolidate its case with the earlier case.

D. Limitations and the Actionable Period

Singletary v. District of Columbia, 351 F.3d 519, 526–28, 92 FEP Cases 1799 (**D.C. Cir.** 2003), reversed in part and affirmed in part the lower court's judgment after a bench trial to the Title VII and Rehabilitation Act retaliation defendant. The court held that plaintiff had timely challenged a hostile environment that had lasted for six years as of the filing of his EEOC charge, and that harassing actions had continued to within 300 days of the filing of the charge. These included the failure to give plaintiff an official job description, meaningful assignments, or the tools needed to perform his job. The court held that these actions were part of the hostile environment although the lower court had considered them time-barred instances of failure to accommodate his disability.

Petrosino v. Bell Atlantic, 385 F.3d 210, 220, 94 FEP Cases 903 (**2d Cir.** 2004), reversed the grant of summary judgment to the Title VII defendant on plaintiff's sexual harassment claim. The court held that only one sexually harassing incident need occur within the 300-day charge-filing period for the entire period of harassment to be considered in determining liability.

Felton v. Polles, 315 F.3d 470, 486, 90 FEP Cases 812 (**5th Cir.** 2002), reversed the denial of qualified immunity and held in part that plaintiff had not shown a continuing violation because there had been a three-year break during the alleged harassment, and no actions of the same type had occurred during the charge-filing period.

Dandy v. United Parcel Service, Inc., 388 F.3d 263, 271, 94 FEP Cases 1156 (**7th Cir.** 2004), affirmed the grant of summary judgment to the § 1981 racial harassment defendant. The court held that, because plaintiff failed to show that a pattern of racially biased statements had continued into the four-year period prior to the filing of suit, she could not rely on conduct outside the four-year period.

Wilson v. Brinker Int'l, Inc., 382 F.3d 765, 94 FEP Cases 585 (**8th Cir.** 2004), affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant because the jury found that no "act of harassment" took place within the 300 days preceding the charge.

Rowe v. Hussmann Corp., 381 F.3d 775, 779–81, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Missouri law sexual harassment plaintiff, including the award of $500,000 in compensatory damages and $ 1 million in punitive damages. Plaintiff began complaining to her direct supervisor, Oscar Weston, in October, 1996, as soon as co-worker Roy Moore began touching her breast and buttocks and engaging in similarly foul verbal conduct, including threats of rape and murder if she did not engage in sexual activity with him. Plaintiff filed her EEOC charge on June 7, 2000, fixing the 300-day mark at August 12, 1999. *Id.* at 779. The court rejected defendant's contention that plaintiff's own testimony established a two-year hiatus in harassment prior to September 1999, and that the acts before and after that date could not be part of the same pattern, or was contradictory. The court referred to plaintiff's testimony that Moore had left her alone for a long time, but not as long as two years, and then to her testimony that he never left her alone and to her description of a February 1999 incident "in which Moore, in the crudest of terms, asked Rowe about her sexual relationship with her boyfriend and then in obscene terms accused Rowe of lying about not having engaged in a certain sex act." *Id.* at 780. The court held that there was at most a seven-month hiatus, and that it did not matter:

> In the present case, it was the same harasser, Moore, committing the same harassing acts both before and after August 12, 1999; there was evidence that Hussmann was made aware of this harassment through Weston; and there is no evidence of any "intervening action," *Morgan*, 536 U.S. at 118, 122 S. Ct. 2061, by Hussmann that can fairly be said to have caused the later acts of sexual harassment to be unrelated to those which occurred during the period when Rowe was first forced to run the gauntlet of Moore's repeated verbal and physical harassment and abuse. Accordingly, we conclude as a matter of law that the acts before and after the limitations period were so similar in nature, frequency, and severity that they must be considered to be part and parcel of the hostile work environment that constituted the unlawful employment practice that gave rise to this action.

Id. at 781. The court also rejected defendant's argument that the lower court erred in refusing to issue a proposed instruction that would have allowed it to escape liability if it took adequate

corrective action within the charge-filing period, regardless of what it had allowed to happen earlier. *Id.*

Porter v. California Dept. of Corrections, 383 F.3d 1018, 1027, 94 FEP Cases 928 (**9th Cir.** 2004), reversed the grant of summary judgment to the Title VII sexual harassment defendant. The court held that, while the earlier conduct of plaintiff's supervisors had settled down by the time of the charge-filing period, taken as a whole it was severe and pervasive and continued to within the charge-filing period. By contrast, the actions of co-workers were not part of the same pattern of harassment, had ended before the start of the charge-filing period, and were now time-barred.

Boyler v. Cordant Technologies, Inc., 316 F.3d 1137, 90 FEP Cases 1249 (**10th Cir.** 2003), reversed the grant of summary judgment to the defendant, holding in light of *Morgan* that the plaintiff's claims of a racially and sexually hostile environment going back to 1982 were timely raised in her 1997 charge.

E. Definitions of a *Prima Facie* case

Septimus v. University of Houston, __ F.3d __, 2005 WL 237351 (**5th Cir.** Feb. 2, 2005), stated at *7:

> The plaintiff in a hostile work environment claim must establish that 1) she belongs to a protected class; 2) she was subjected to unwelcome sexual harassment; 3) the harassment was based on sex; 4) the harassment affected a term, condition or privilege of employment; and 5) the employer knew or should have known of the harassment and failed to take remedial action. Conduct sufficient to create a hostile working environment must be severe or pervasive. To be actionable, the alleged harassment must have created an environment that a reasonable person would find hostile or abusive. Whether an environment is hostile or abusive depends on the totality of the circumstances, including factors such as the frequency of the conduct, its severity, the degree to which the conduct is physically threatening or humiliating, and the degree to which the conduct unreasonably interferes with an employee's work performance.

(Footnotes omitted.)

Luckie v. Ameritech Corp., 389 F.3d 708, 713, 94 FEP Cases 1351 (**7th Cir.** 2004), a Title VII racial harassment case, stated: "To state a claim for a hostile work environment, Luckie must demonstrate that: (1) she was subject to unwelcome harassment; (2) the harassment was based on her race; (3) the harassment was sufficiently severe or pervasive so as to alter the conditions of her employment and create a hostile or abusive atmosphere; and (4) there is a basis for employer liability." (Citation omitted.) *Accord*, *Smith v. Northeastern Illinois University*, 388 F.3d 559, 566, 94 FEP Cases 1295 (**7th Cir.** 2004).

Herron v. DaimlerChrysler Corp., 388 F.3d 293, 302, 94 FEP Cases 1219 (**7th Cir.** 2004), a Title VII and § 1981 racial harassment case, stated: "To succeed on his racial harassment claim, Herron has to show that: '(1) he was subject to unwelcome harassment; (2) the harassment was based on his race; (3) the harassment unreasonably interfered with his work performance by creating an intimidating, hostile, or offensive working environment that

seriously affected his psychological well-being; and (4) there is a basis for employer liability.'" (Citation omitted.) *Accord*, *McPherson v. City of Waukegan*, 379 F.3d 430, 437–38, 94 FEP Cases 247, 94 FEP Cases 257 (**7th Cir.** 2004) (sexual harassment).

Dandy v. United Parcel Service, Inc., 388 F.3d 263, 271, 94 FEP Cases 1156 (**7th Cir.** 2004), stated: "To be actionable under § 1981, harassment must be: (1) based on race; (2) subjectively and objectively hostile; and (3) sufficiently severe *or* pervasive to interfere with an employee's ability to perform his assigned duties. . . . Under the objective hostility analysis, courts may consider: (1) the frequency of the conduct; (2) the severity of the conduct; (3) 'whether it is physically threatening or humiliating, or a mere offensive utterance'; and (4) whether it unreasonably interferes with the employee's ability to complete his or her assigned duties." (Citations omitted.)

Okruhlik v. University of Arkansas, __ F.3d __, 2005 WL 124238 (**8th Cir.** Jan. 24, 2005), stated: "To establish a prima facie case for a hostile work environment based on sexual harassment, Okruhlik must show (1) that she belongs to a protected group; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment was based on sex; and (4) that the harassment affected a term, condition or privilege of her employment." (Citation omitted.) *Accord*, *LeGrand v. Area Resources for Community and Human Services*, __ F.3d __, 2005 WL 106621 (**8th Cir.** Jan. 20, 2005); *Baker v. John Morrell & Co.*, 382 F.3d 816, 828 (**8th Cir.** 2004).

Hesse v. Avis Rent A Car System, Inc., __ F.3d __, 2005 WL 36541 (**8th Cir.** Jan. 10, 2005), stated: "To establish a prima face case that she was subjected to a hostile work environment, Hesse must show that (1) she is a member of a protected group; (2) unwelcome harassment occurred; (3) a causal nexus existed between the harassment and her protected group status; and (4) the harassment affected a term, condition, or privilege of employment."

Williams v. ConAgra Poultry Co., 378 F.3d 790, 794, 94 FEP Cases 266 (**8th Cir.** 2004), stated: "In order to prevail on a harassment claim, a plaintiff must show that he or she is a member of a protected group, that there was "unwelcome harassment," that there was a causal nexus between the harassment and membership in the protected group, and that the harassment affected a term, condition, or privilege of employment. . . . If the harassment comes from non-supervisory employees, the plaintiff must also show that the employer knew or should have known about the harassment but failed to take proper action." (Citations omitted.)

Porter v. California Dept. of Corrections, 383 F.3d 1018, 1027, 94 FEP Cases 928 (**9th Cir.** 2004), stated: "In order for this claim to survive summary judgment, Porter must show that: (1) she was subjected to verbal or physical conduct of a sexual nature; (2) the conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment." (Citation omitted.)

F. Who is a Supervisor?

Joens v. John Morrell & Co., 354 F.3d 938, 940–41, 93 FEP Cases 72 (**8th Cir.** 2004), affirmed the grant of summary judgment to the Title VII hostile-environment defendant, holding

that the alleged harasser was not plaintiff's supervisor. The court canvassed the approaches of different Circuits, stating:

> The decisions of the few circuits to address the question are not entirely consistent. The majority hold that, to be a supervisor, the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties. See *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002); *Mikels v. City of Durham*, 183 F.3d 323, 333-34 (4th Cir.1999). By contrast, the Second Circuit recently adopted a somewhat broader standard, concluding that an alleged harasser is a supervisor for these purposes if he possessed "authority to direct the employee's daily work activities," even if he otherwise lacked the power to take tangible employment action against the victim. *Mack v. Otis Elevator Co.*, 326 F.3d 116, 127 (**2d Cir.**), *cert. denied*, __ **U.S.** __, 124 S. Ct. 562, __ L. Ed. 2d __ (2003).

The court did not resolve the question, but held that the alleged harasser was a co-worker because he was only the foreman of one of the production lines that depended on plaintiff to make their boxes. He was a customer without direct authority to control plaintiff's activities. He could demand that she allocate more of her production to him, but she had discretion and the allocation did not affect her total work effort. While he could "write her up," all foremen could do so, there was no evidence that he had ever done so, and the power to discipline plaintiff lay with the Human Resource Department. *Id.* at 941.

Porter v. California Dept. of Corrections, 383 F.3d 1018, 1025–26, 94 FEP Cases 928 (**9th Cir.** 2004), reversed the grant of summary judgment to the Title VII sexual harassment defendant and held that plaintiff established a *prima facie* case of *quid pro quo* sexual harassment when she showed that a transfer to a position with significantly different responsibilities was denied because plaintiff presented evidence that she had rejected the decisionmaker's demands for sexual favors prior to his becoming a supervisor, when he was a co-worker and union official assigned to investigate her claims of sexual harassment by another supervisor, and because she showed that he was influenced in his decisions by the other supervisor she had rejected. The court explained at 1026 n.3:

> Contrary to the dissent's suggestion, we do not hold that an employer may encounter vicarious liability "based on sexual advances made by coworkers without supervisory capacity." Rather, we hold that an employer may be vicariously liable for timely personnel decisions made by one of its supervisors on the basis of an unlawful criteria. Such liability may attach if the plaintiff can show that the challenged personnel decisions were motivated by her historical refusal to submit to the decision-maker's workplace demands for sexual favors, or by her having declined the workplace demands for sexual favors urged by other supervisors who held sway over the personnel decisions in question.

Judge Tallman dissented as to this part of the decision. *Id.* at 1031–35.

G. What is a Tangible Employment Action?

Pennsylvania State Police v. Suders, __ **U.S.** __, 124 S. Ct. 2342, 159 L.Ed.2d 204, 93 FEP Cases 1473 (2004), held that an employer does not have the benefit of the affirmative defense under *Faragher* and *Ellerth* when a constructive discharge is caused by a tangible employment action.

Lee-Crespo v. Schering-Plough Del Caribe Inc., 354 F.3d 34, 93 FEP Cases 47 (**1st Cir.** 2003), affirmed the grant of summary judgment to the Title VII same-sex sexual harassment defendant. The court assumed without deciding that denial of a transfer could be a tangible employment action, but held there was no proof that the alleged harassing supervisor had had any role in the denial of the transfer request. To the contrary, she had expressed her hope that plaintiff would transfer. *Id.* at 44. "A reassignment could constitute a tangible employment action, particularly if it caused a loss of income. But again, there must be a causal link between the tangible employment action and the alleged harassment and harasser." *Id.* No such link was shown, and the reassignment was in direct response to plaintiff's request for a new supervisor. The court held that plaintiff's claim of constructive discharge was undercut by defendant's swift action in transferring her once she complained. *Id.* at 45–46. "Among other things, the evaluation of a constructive discharge claim takes into account how the employer responded to the plaintiff's complaints and whether it was likely that the harassment would continue." *Id.* at 45.

McPherson v. City of Waukegan, 379 F.3d 430, 439–41, 94 FEP Cases 247, 94 FEP Cases 257 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII sexual harassment defendant. Plaintiff testified that she was sexually assaulted on three occasions by her second-level supervisor, who resigned immediately after defendant learned of the problem and ultimately pleaded guilty to attempted criminal sexual assault, which required him to be registered as a sex offender. The court held that there was no tangible employment action, and that defendant was entitled to assert the affirmative defense. It rejected plaintiff's argument that she had been constructively discharged, constituting a tangible action:

> Within hours of learning of McPherson's allegations against Copenharve on March 27, 2001, the City convened a meeting during which it demanded that he either submit his resignation or face suspension during the pendency of its investigation. Copenharve chose to resign. McPherson, on the other hand, chose to resign months after Copenharve's resignation, when the hostile working conditions created by Copenharve were long gone. McPherson has offered no facts to show that her resignation was "an appropriate response" to an intolerable work environment.

Id. at 440. The court rejected plaintiff's argument that the City's use of a temporary employee while she was on leave, the packing of her belongings, and the request for return of City property, showed that her return would be unwelcome. It pointed out that defendant had urged her to return.

H. What Makes an Environment Hostile?

1. What Plaintiff Experienced

Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 190–91, 94 FEP Cases 577 (**4th Cir.** 2004), affirmed the grant of summary judgment to the § 1981 racial harassment defendant. The court held that plaintiff could not establish a hostile environment because he failed to show any racially offensive conduct directed at him. Plaintiff's complaints involved the actions of one employee with whom he did not get along, but he showed no evidence of a racial motivation. "At most, the record contains a hearsay statement that Callahan once stated in reference to Honor that, 'she didn't know how to work with an African-American male.' Assuming this statement is accurate, and that Honor was aware of it prior to this litigation, it is not "sufficiently severe and pervasive" to create an objectively abusive atmosphere." *Id.* at 191.

Septimus v. University of Houston, __ F.3d __, 2005 WL 237351 (**5th Cir.** Feb. 2, 2005), affirmed the grant of summary judgment to held at *7 that a two-hour "harangue" in her office, which frightened her and made her feel useless and incompetent, questioning her about her presentation in a "mocking tone," and a comment by her supervisor that she "was like a needy old girlfriend," did not rise to the level of a hostile environment.

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

> First, we note that there were several overtly sexual comments made by Judge Sappington to Ms. Robinson including Judge Sappington's offer to purchase Ms. Robinson a sexual device . . .; Judge Sappington's comment that the attorneys were only speaking to her because she was wearing revealing clothing . . . and the twice-repeated comment that Judge Sappington would like Ms. Robinson to "sit on his face" . . . . In addition to these comments, there is strong evidence that Judge Sappington took an inappropriate interest in Ms. Robinson's relationships with men, first inquiring as to the status of her marriage and later, on two occasions, expressing outrage at the possibility of her romantic involvement with anyone else.
>
> Second, we believe that much of Judge Sappington's conduct reasonably could be construed as intimidating and threatening. Judge Sappington monitored Ms. Robinson's actions both within the courthouse and after hours, going so far as to fly an aircraft over the farm of Ms. Robinson's mother when he knew Ms. Robinson was visiting there. Judge Sappington exhibited anger when he believed other men showed interest in Ms. Robinson. He also subjected Ms. Robinson to hearing the details of a gruesome murder and suggested that she might face a similar fate. Finally, on one occasion, Judge Sappington grabbed Ms. Robinson's face and told her point-blank that, if she "shacked up" with anyone else, he would kill her.
>
> Finally, Ms. Robinson was the recipient of other gestures that, although innocuous in themselves, when put in the larger context, served as constant reminders of Judge Sappington's interest in her and in exercising control over her. Specifically, Judge

> Sappington called her beautiful, a "blonde Demi Moore" or a golden goddess on a daily basis. He took her to lunch and became angry if Ms. Robinson did not eat lunch with him. Additionally, for a period of several weeks, he shook Ms. Robinson's hand on a daily basis to experience physical contact with her.

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

Mannie v. Potter, __ F.3d __, 2005 WL 107187 (**7th Cir.** Jan. 20, 2005), affirmed the grant of summary judgment to the Rehabilitation Act harassment defendant, the U.S. Postal Service because plaintiff did not show actionable conduct: "She asserts that her supervisors made derogatory statements about her, discussed her mental condition with other employees, and paged her to return from cigarette breaks. In addition, she contends that her co-workers discussed rumors about her mental stability and engaged in behavior offensive to her such as wearing tight-fitting clothing." The court held that plaintiff "barely addressed" the crucial factors, "such as 'the frequency, severity, and threatening or humiliating nature of the discriminatory conduct and whether it unreasonably interferes with [her] work performance.'" (Citation omitted.)

Luckie v. Ameritech Corp., 389 F.3d 708, 713–14, 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. Plaintiff relied solely on three incidents: (1) Patterson's comment that she wanted to "change the complexion" of the Human Resources group; (2) Patterson calling an African-American employee a 'dunce'; and (3) an e-mail sent by James Boring which complained of the effect that Patterson's management style was having on several employees and the department as a whole.." *Id.* at 713 (footnote omitted). The court explained: "None of these incidents are sufficiently connected to race so as to satisfy the second element of the hostile environment analysis. The conduct at issue must have a racial character or purpose to support a hostile work environment claim." *Id.* (citation omitted). The court held that the remark as to the department's "complexion" "was made in the context of assessing the was made in the context of discussing the department's organization and ways to increase its efficiency," and noted that "Patterson did not overtly refer to race at all during this discussion, or at any other time." *Id.* at 713–14. The court held the conduct was not racial, not severe, and not pervasive.

Smith v. Northeastern Illinois University, 388 F.3d 559, 94 FEP Cases 1295 (**7th Cir.** 2004), affirmed the grant of summary judgment and the judgment on a jury verdict for the Title VII racial harassment defendants. The court held that plaintiff Weaver was not subjected to an objectively hostile environment because she had never heard the "n" word used in her presence, and she only heard two African-American officers referred to as "black m—f—s" once in her presence over several years of employment. *Id.* at 566. "One utterance alone does not create an objectively hostile work environment." *Id.* at 567. The court held that the retaliatory threat that plaintiff might lose her home was just an empty threat, and not sufficient to create a retaliatory hostile environment. The court held that plaintiff Guerrero also failed to show objective harassment despite unusual actions. "Leyva's visit to Guerrero's home is certainly suspect, as any parent would be concerned about a police officer coming to his or her home to make inquiries about child abuse. However, Guerrero fails to explain how this curious act affected her employment conditions or her ability to do her job." *Id.* at 568.

Herron v. DaimlerChrysler Corp., 388 F.3d 293, 303, 94 FEP Cases 1219 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII and § 1981 racial harassment defendant, holding that plaintiff's problems, apart from not being related to his race, did not rise to an actionable level: "Here he complains about transfers, a late overtime payment, his salary, and difficulties with managers. This is normal workplace friction."

Dandy v. United Parcel Service, Inc., 388 F.3d 263, 271, 94 FEP Cases 1156 (**7th Cir.** 2004), affirmed the grant of summary judgment to the § 1981 racial harassment defendant. The court held that the two name-calling incidents—in which plaintiff was called "tiger," and a black employee was called "lazy," could not support a harassment claim.

McPherson v. City of Waukegan, 379 F.3d 430, 439, 94 FEP Cases 247, 94 FEP Cases 257 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII sexual harassment defendant. The court distinguished between the physical assaults on plaintiff by her supervisor and the verbal comments prior to the assaults. "While Copenharve's inquiries about what color bra McPherson was wearing, his suggestive tone of voice when asking her whether he could "make a house call" when she called in sick and the one occasion when he pulled back her tank top with his fingers were lamentably inappropriate, we agree with the district court that, due to the limited nature and frequency of the objectionable conduct, a hostile work environment did not exist until the March 21, 2001 assault." (Footnote omitted.) The court also held that plaintiff had not shown she subjectively found these "questions and remarks" offensive. *Id.* at 430 n.6.

LeGrand v. Area Resources for Community and Human Services, __ F.3d __, 2005 WL 106621 (**8th Cir.** Jan. 20, 2005), affirmed the grant of summary judgment to the Title VII same-sex sexual harassment defendant. The court of appeals held that repeated sexual advances on the male plaintiff by a priest on defendant's board of directors were not actionable despite the priest's admission of his demands that plaintiff watch pornographic movies with him, hugging the plaintiff, kissing the plaintiff on the mouth, touching his crotch, and making explicit sexual suggestions, all of which occurred after plaintiff had followed defendant's procedures and complained following the priest's first sexual overtures. The court sought to explain its ruling: "'Sexual harassment standards are demanding—to be actionable, conduct must be extreme and not merely rude or unpleasant.'" (Citations and internal quotation marks omitted.) It added: "Compared to other cases in which the Supreme Court and our circuit have found the harassing conduct did not constitute sexual harassment, we believe the harassment alleged in this case did not create an actionable hostile work environment." Finally, the court stated:

> None of the incidents was physically violent or overtly threatening. There can be no doubt Father Nutt's actions, admitted and alleged, ranged from crass to churlish and were manifestly inappropriate; however, the three isolated incidents, which occurred over a nine-month period, were not so severe or pervasive as to poison LeGrand's work environment. Therefore, we hold LeGrand failed to establish the existence of a trial-worthy question of fact on his hostile work environment claim.

Hesse v. Avis Rent A Car System, Inc., __ F.3d __, 2005 WL 36541 (**8th Cir.** Jan. 10, 2005), affirmed the grant of summary judgment to the Title VII sexual harassment defendant, holding that the loud noises and bumptious conduct of the alleged harasser were directed equally to male and female employees under his supervision, and there was no basis to say it was

because of sex. The court stated: "In determining whether a hostile work environment existed, evidence concerning all circumstances of the complainant's employment must be considered, including the frequency of the offending conduct, its severity, whether it was physically threatening or humiliating, and whether it unreasonably interfered with work performance."

Griffith v. City of Des Moines, 387 F.3d 733, 739, 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 hostile environment claim, holding that three scattered incidents of derogatory comments did not rise to the level of actionable harassment. Judge Magnuson concurred specially.

Baker v. John Morrell & Co., 382 F.3d 816 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Iowa Human Rights Act sexual harassment plaintiff, including the awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys' fees and costs, a total of $1,386,632. Plaintiff and other women had unsuccessfully complained for years about severe and pervasive harassment and degradation interfering with their work and their ability to work. The harassment included a daily barrage of degrading remarks, interference with plaintiff's work, physical assaults in the form of throwing 40-pound meat boxes at plaintiff and hitting her, male employees' grinding their groins into plaintiff's rear as they passed her, threatening her by driving at her in the parking lot, preventing or delaying plaintiff in going to the bathroom even where it was medically necessary, and driving plaintiff to emotional breakdowns and suicide attempts. The court rejected defendant's argument that plaintiff had not shown an actionable environment. The court stated, "we reject out of hand Morrell's attempts to minimize the harassment and its accompanying claim it was unaware of the sexual nature of the harassment." *Id.* at 829. The court also upheld plaintiff's constructive-discharge claim, stating: "The constant barrage of harassment endured by Baker over a period of many years was objectively intolerable. Moreover, Baker's numerous attempts to resolve the problems went largely ignored by supervisors and management personnel to whom she repeatedly turned for help. In the end, Baker had little choice but to leave the position she had held for over fifteen years and seek employment elsewhere." *Id.*

Jackson v. Flint Ink North American Corp., 382 F.3d 869, 870, 94 FEP Cases 549 (**8th Cir.** 2004), on panel rehearing, reversed the grant of summary judgment to the Title VII racial harassment defendant. The court held that plaintiff's working environment was objectively hostile where "his name was written in a shower at his workplace and that there was an arrow connecting his name with a burning cross and a KKK sign." The panel stated that "an objective observer would regard this combination of figures as a threat of serious bodily harm if not death to Mr. Jackson." It had previously held that plaintiff had not shown an objectively hostile environment, but changed its mind in light of this factor. It described the case as on he ":cusp of submissibility," and continued: "But our best judgment is that an objective observer in Mr. Jackson's shoes would be justified in reacting to his situation in a way that would affect a term or condition of his employment."

Williams v. ConAgra Poultry Co., 378 F.3d 790, 795–96, 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 rejected defendant's contention that plaintiff had not shown an actionable hostile environment because he was aware of only one racial slur, an incident in which his supervisor threatened to fire his "black ass." The court held that a jury could reasonably find an actionable environment:

> Although ConAgra stresses the fact that Mr. Williams testified to only a single racial slur directed at him by the supervisor, the plaintiff and others testified that the supervisor's non-racial profanity and abuse was nevertheless more severe when directed toward black employees. The degree of the severity of the conduct of the supervisor and other employees is a closer question, but Mr. Williams testified to racially-motivated harassment that had a direct effect on the terms and conditions of his employment, such as work assignments. In addition, he testified that workplace harassment negatively affected his relationship with his wife and children, leading to uncharacteristic exhaustion, hostility, and impatience with family members. Furthermore, Mr. Williams testified that the verbal abuse that he suffered from his supervisor was continuous and extended over several years.

Bainbridge v. Loffredo Gardens, Inc., 378 F.3d 756, 760, 94 FEP Cases 283 (**8th Cir.** 2004), affirmed the grant of summary judgment to the Title VII, § 1981, and Iowa Civil Rights Act defendant. The court held that plaintiff, whose wife was Japanese, had not shown severe or pervasive harassment arising from the repeated use of anti-Asian racial slurs. "Here, the remarks were also sporadic, no more than one per month, and were not even about Bainbridge, his wife, or their marriage. Instead, the alleged remarks were used in reference to customers, competitors, or other employees. Some of the remarks were merely overheard by Bainbridge."

Porter v. California Dept. of Corrections, 383 F.3d 1018, 1027, 94 FEP Cases 928 (**9th Cir.** 2004), reversed the grant of summary judgment to the Title VII sexual harassment defendant. The court stated that a single instance of sexual harassment may create an actionable hostile environment "if the harassing conduct is sufficiently severe." (Citation omitted.) The court added: "With the exception of sexual assault, few types of harassing conduct are more extreme than thrusting explicit sexual propositions toward an employee and then executing reprisals against her for resisting the advances." *Id.*

Chavez v. State of New Mexico, __ F.3d __, 2005 WL 237654 (**10th Cir.** Feb. 2, 2005), affirmed the grant of summary judgment to defendant on plaintiffs' Title VII racial harassment claim, but reversed the grant of summary judgment on the sexual harassment claim. The court stated: "A plaintiff cannot meet this burden by demonstrating 'a few isolated incidents of racial enmity' or 'sporadic racial slurs.' . . . Instead, 'there must be a steady barrage of opprobrious racial comments.'" (Citations omitted.) Plaintiff Contreras alleged that her supervisor called her a "clica." "Plaintiffs do not clarify whether 'clica' is a derogatory term for a clique of Hispanic individuals or simply the Spanish translation of 'clique.' Second, Mr. Bochenek called one of Ms. Lucero's Caucasian friends and coworkers a 'spic lover' in Ms. Lucero's presence." As to the claims of sexual harassment, the court held that plaintiffs' showings of persistent demands for sexual favors, and persistent gender-based abuse, coupled with threatening and physically

hostile behavior and interference with plaintiffs' work, were enough to raise a material question of fact.

Lanman v. Johnson County, 393 F.3d 1151, 1157, 16 AD Cases 449 (**10th Cir.** 2004), affirmed the grant of summary judgment to the ADA defendant on plaintiff's harassment claim. The court stated: "We think it doubtful that comments by non-supervisory co-workers about Ms. Lanman's mental health establish that the County mistakenly perceived her as mentally impaired. . . . Personality conflicts among coworkers (even those expressed through the use (or misuse) of mental health terminology) generally do not establish a perceived impairment on the part of the employer." The court held that, in light of the plaintiff's extensive good work experience and recent altercations with co-workers, no inference could be drawn from defendant's order that she submit to an examination of her fitness for duty. "Nor does the County's order that Ms. Lanman take a fitness for duty exam show that Ms. Lanman was perceived as mentally impaired." *Id.* (citation omitted).

Sandoval v. City of Boulder, 388 F.3d 1312, 94 FEP Cases 1226 (**10th Cir.** 2004), affirmed the grant of summary judgment to the Title VII sexual harassment defendant, holding that two sexist comments did not constitute actionable harassment.

2. <u>What Others Experienced and Plaintiff Only Heard About</u>

Septimus v. University of Houston, __ F.3d __, 2005 WL 237351 (**5th Cir.** Feb. 2, 2005), held at *7 that "evidence of a hostile environment pertaining to other women in the OGC, not Septimus . . . therefore is not relevant."

Mannie v. Potter, __ F.3d __, 2005 WL 107187 (**7th Cir.** Jan. 20, 2005), affirmed the grant of summary judgment to the Rehabilitation Act harassment defendant, the U.S. Postal Service. The court rejected plaintiff's contentions involving statements made to others: "Most of the conduct that forms the basis of her claim consists of derogatory statements made by supervisors or co-workers out of her hearing."

Smith v. Northeastern Illinois University, 388 F.3d 559, 567, 94 FEP Cases 1295 (**7th Cir.** 2004), affirmed the grant of summary judgment and the judgment on a jury verdict for the Title VII racial harassment defendants. The court held that plaintiff Weaver was not subjected to an objectively hostile environment because she only heard second-hand about an official's repeated use of the "n" word. The court stated:

> While certainly relevant to the determination of a hostile work environment claim, when harassment is "directed at someone other than the plaintiff, the 'impact of [such] 'second-hand harassment' is obviously not as great as the impact of harassment directed at the plaintiff.'" . . .
>
> We do not mean to hold that a plaintiff can never demonstrate a hostile work environment through second-hand comments or in situations where a plaintiff is not the intended target of the statements. However, what Weaver personally experienced does not amount to an objectively hostile work environment. She heard an offensive term directed at a third person once and only learned from others about other offensive

comments directed at third persons. The district court did not err when it dismissed her hostile work environment claim on summary judgment.

(Citations omitted.)

Dandy v. United Parcel Service, Inc., 388 F.3d 263, 271–72, 94 FEP Cases 1156 (**7th Cir.** 2004), affirmed the grant of summary judgment to the § 1981 racial harassment defendant. The court held that racial epithets are of less significance if plaintiff hears about them secondhand, but may still be part of a hostile environment. The court explained: "Repeated use of such highly offensive terms in the work environment (especially considering the fact that racial epithets are meant to denigrate a group of people) may create an objectively hostile work environment, even if they are heard secondhand."

Kriescher v. Fox Hills Golf Resort and Conference Center, 384 F.3d 912, 94 FEP Cases 1007 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII sexual harassment and ADEA age harassment defendant. The court held that plaintiff had shown an occasional sexually charged atmosphere—with naked strippers in the hot tub and pool at 3:00 A.M. on one occasion, and with a manager and a bartender being found in the dark together—but she was not exposed to ether event and had not shown that such an atmosphere had led to any difference in the working conditions or treatment of female or older employees.

McKenzie v. Milwaukee County, 381 F.3d 619, 624, 94 FEP Cases 532 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII racial harassment defendant. The court held that plaintiff had not shown an objectively hostile working environment, and stated: "Several of the incidents involved other female employees of the sheriff's office, and the impact of such 'second-hand' harassment is not as great as harassment directed at McKenzie herself." (Citations omitted.)

Williams v. ConAgra Poultry Co., 378 F.3d 790, 795, 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. See the discussion of the relevance of this evidence in the section below on "Evidence." The court rejected the lower court's discussion of incidents that

3. Conduct Neutral in Form

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

Nor can we accept the defendants' further suggestion that no reasonable factfinder could

find a hostile work environment here. In addition to the alleged 1993 discriminatory failure to promote and 1993-94 failure to provide him with the tools necessary to accomplish his assignments—the merits of which claims the district court must address on remand—Singletary made a host of allegations that the court ruled did have merit but that it erroneously thought were untimely for a hostile work environment claim. Most significantly, the district court determined that, notwithstanding the availability of appropriate office space, the defendants intentionally assigned Singletary to work in an unheated storage room for over a year and a half as "retaliatory discrimination" for the filing of a discrimination complaint. . . . As the court found:

> The room to which plaintiff was assigned was not previously used as an office space, but rather was used as a general storage room. The storage room was without heat or ventilation. It was poorly lit, which posed problems for plaintiff, who is visually challenged. The only entrance to plaintiff's office was through a clinic to which plaintiff did not have keys. The phone in the room often did not work. The office space contained ... brooms [and] boxes of debris.... Defendants clearly intended to relegate plaintiff to this sub- standard office.... [T]he record shows that there were other, more suitable, places in which plaintiff's office could have been located.

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

Herron v. DaimlerChrysler Corp., 388 F.3d 293, 303, 94 FEP Cases 1219 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII and § 1981 racial harassment defendant, holding that plaintiff's problems were self-created and not the result of racial motivation or harassment: "Herron does not show any connection between these occurrences and his race. His problems were not related to his race—they were related to him. The fact that he is a member of a protected class does not transform them."

McKenzie v. Milwaukee County, 381 F.3d 619, 624–25, 94 FEP Cases 532 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII racial harassment defendant. The court held that plaintiff had not shown an objectively hostile working environment, but almost exclusively consisted of perceived slights by her second-level supervisor in personal interactions—failing to greet her, being "standoffish," "unapproachable," or "unfriendly," and disagreements with her supervisor's supervision of her conduct of a narcotics investigation. There was no evidence of a gender-based motive for any of these matters. Plaintiff testified that her first-level supervisor had told her of a sexually offensive remark by the second-level supervisor, but the court held that a single remark could not make the working environment objectively hostile.

Hesse v. Avis Rent A Car System, Inc., __ F.3d __, 2005 WL 36541 (**8th Cir.** Jan. 10, 2005), affirmed the grant of summary judgment to the Title VII sexual harassment defendant, holding that the loud noises and bumptious conduct of the alleged harasser were directed equally to male and female employees under his supervision, and there was no basis to say it was because of sex. "Hesse argues that even though Rod Johnson's conduct towards her was not

sexual in nature, it was related to sex because his harassing actions were directed at women in the office and particularly at her. The record shows, however, that Johnson's loud behavior was directed at both male and female employees. Hesse has acknowledged that everyone in the office was subjected to Johnson's deliberate shoe squeaking and that he clapped his hands loudly to get the attention of male garage technicians. Hesse relies on the incident in which Johnson banged on a window to get Sheila Sexauer's attention, but that incident does not establish that Johnson's conduct was based on sex since he engaged in similar behavior to get the attention of male employees."

Griffith v. City of Des Moines, 387 F.3d 733, 739, 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 hostile environment claim. Much of plaintiff's complaint involved comments about his being a child molester, stemming from his well-publicized arrest and guilty plea to a lesser offense. The court held that discrimination on such a ground is not covered by Title VII. Judge Magnuson concurred specially.

Chavez v. State of New Mexico, __ F.3d __, 2005 WL 237654 (**10th Cir.** Feb. 2, 2005), reversed the grant of summary judgment on the sexual harassment claim. The court held that conduct neutral in form can still be part of a sexually hostile environment. "This is because what is important in a hostile environment claim is the *environment*, and gender-neutral harassment makes up an important part of the relevant work environment. Conduct that appears gender-neutral in isolation may in fact be gender-based, but may appear so only when viewed in the context of other gender-based behavior." (Emphasis in original; citation omitted.)

4. Sexual Harassers of Both Men and Women

Chavez v. State of New Mexico, __ F.3d __, 2005 WL 237654 (**10th Cir.** Feb. 2, 2005), reversed the grant of summary judgment on the sexual harassment claim. The lower court held that "'Bochenek's and Cruz's behavior cannot be deemed actionable sexual harassment, for a male co-worker took Family and Medical Leave due to his 'anxiety and depression over the constant belittling that Bochenek and Cruz did to him.' These Defendants, thus, seem not to discriminate between who they wish to intimidate.'"

5. Other Motivations

Chavez v. State of New Mexico, __ F.3d __, 2005 WL 237654 (**10th Cir.** Feb. 2, 2005), reversed the grant of summary judgment on the sexual harassment claim. The court of appeals held that the unlawful motivations of an alleged sexual harasser could not be reasonably attributed to other employees who harassed a plaintiff, because their actions occurred shortly after the plaintiff in question had reported that the employees had been taking extra food from the cafeteria and retaliation for whistleblowing motive seemed a more obvious motive.

6. Same-Sex Harassment

LeGrand v. Area Resources for Community and Human Services, __ F.3d __, 2005 WL 106621 (**8th Cir.** Jan. 20, 2005), affirmed the grant of summary judgment to the Title VII same-sex sexual harassment defendant. The court set an extreme standard for actionable harassment,

but did not suggest that the standard should be higher for homosexual than for heterosexual harassment.

7. Same-Race Harassment

Kang v. U. Lim America, Inc., 296 F.3d 810, 817, 89 FEP Cases 566 (**9th Cir.** 2002), reversed the grant of summary judgment to the defendant. The court stated: "Generally, a plaintiff alleging racial or national origin harassment would present facts showing that he was subjected to racial epithets in the workplace. Here, however, Kang alleged that he and other Korean workers were subjected to physical and verbal abuse because their supervisor viewed their national origin as superior. The form is unusual, but such stereotyping is an evil at which the statute is aimed." (Citation omitted.) The court continued:

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

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

8. District Courts That Just Did Not Get It

Petrosino v. Bell Atlantic, 385 F.3d 210, 221–22, 94 FEP Cases 903 (**2d Cir.** 2004), reversed the grant of summary judgment to the Title VII defendant on plaintiff's sexual harassment claim. The court described the lower court's incorrect approach:

> The district court concluded that no jury could reasonably find Petrosino's work environment objectively hostile to women. In so ruling, it decided, first, that evidence of incessant sexually offensive exchanges at the daily assignment meeting and omnipresent sexual graffiti in the terminal boxes could not support Petrosino's claim, because this conduct, while "undeniably boorish and offensive," was not "motivated by hostility toward Petrosino because of her sex." . . . Rather, it applied equally to all employees, male and female."

Id. at 221. The court of appeals disagreed: "The mere fact that men and women are both exposed to the same offensive circumstances on the job site, however, does not mean that, as a matter of law, their work conditions are necessarily equally harsh. The objective hostility of a work environment depends on the totality of the circumstances. . . . Further, the perspective from which the evidence must be assessed is that of a 'reasonable person in the plaintiff's position, considering all the circumstances [including] the social context in which particular behavior occurs and is experienced by its target.'" *Id.* The court held that there was no need to determine whether the "reasonable person" was a woman "or a person drawn from the public at large," *id.* at 222, because the evidence, seen in the light that most favors plaintiff, "would permit a jury to conclude that a reasonable person, regardless of gender, would consider the sexually offensive

comments and graffiti here at issue more offensive to women than to men and, therefore, discriminatory based on sex." *Id.* The court explained:

> The comments and graphics that permeated Petrosino's work environment may have sexually ridiculed both men and women, but there is an important, though not surprising, distinction. The conduct at issue sexually ridiculed some men, but it also frequently touted the sexual exploits of others. In short, the insults were directed at certain men, not men as a group. By contrast, the depiction of women in the offensive jokes and graphics was uniformly sexually demeaning and communicated the message that women as a group were available for sexual exploitation by men. Such workplace disparagement of women, repeated day after day over the course of several years without supervisory intervention, stands as a serious impediment to any woman's efforts to deal professionally with her male colleagues.

Id. The court held that the fact that much of the offensive material was not directed at plaintiff did not preclude a finding of a hostile work environment. It cited *Ocheltree v. Scollon Products, Inc.*, 335 F.3d 325, 332 (**4th Cir.** 2003) (*en banc*), *cert. denied*, __ U.S. __, 124 S .Ct. 1406, 158 L. Ed. 2d 77 and __ U.S. __, 124 S. Ct. 1411, 158 L. Ed. 2d 77 (2004), as having held the same. It relied in part on the fact that plaintiff was sexually assaulted by a co-worker and that managers and co-workers made a joke out of the incident.

See the discussion of *Robinson v. Sappington*, 351 F.3d 317, 93 FEP Cases 75 (**7th Cir.** 2003), above.

Chavez v. State of New Mexico, __ F.3d __, 2005 WL 237654 (**10th Cir.** Feb. 2, 2005), reversed the grant of summary judgment on the sexual harassment claim. The court of appeals described the lower court's view of the case:

> Despite this laundry list of gender-based and threatening, gender-neutral harassment, most of which occurred within one year of the June 1999 EQUIP training meeting, the district court found that "Plaintiffs fail[ed] to demonstrate that Defendant Bochenek's actions were sufficiently severe and pervasive 'to alter the conditions of [Plaintiffs'] employment, and create an abusive working environment.'" . . . According to the court, the instances of gender-based harassment, "though unpleasant, would not interfere with a reasonable person's work performance, for they do not reek of a sexually hostile working environment, as they were not physically threatening, severe or pervasive." . . . Of the many instances of arguably gender-neutral harassment, the district court considered only one: it found that Mr. Bochenek's pursuit of Ms. Chavez on the highway was not gender-based and therefore not actionable.

The court of appeals then stated its own view:

> Plaintiffs in this case have presented considerably stronger evidence of a hostile work environment than the plaintiff in *O'Shea.* In *O'Shea,* the gender-based conduct consisted almost exclusively of derogatory comments about women, many of which were not even directed at the plaintiff. Here, Mr. Bochenek sexually propositioned Ms. Contreras in exchange for not issuing a reprimand letter. He stood close behind Ms.

Lucero in the mail room, staring at her lewdly and massaging his genitals as she tried to exit; on another occasion he purposefully rubbed the front side of his body against her backside while she was collecting her mail. Finally, he called Ms. Contreras a "fucking bitch" and made a lewd, seductive invitation to Ms. Chavez for a "real experience." All of this conduct is substantially more severe than that in *O'Shea.*

From this conduct, a jury could infer that the arguably gender-neutral harassment—which was also more severe in this case than in *O'Shea*—was in fact based on gender. In *O'Shea,* coworkers failed to invite the plaintiff to lunch; here, Mr. Cruz left a death threat on Ms. Chavez's answering machine. In *O'Shea,* coworkers avoided discussing technical matters and became generally uncommunicative with the plaintiff; here, coworkers incited a plaintiff's clients against her and issued unwarranted letters of reprimand. In *O'Shea,* a coworker loudly informed the plaintiff that she was doing her work incorrectly; here, Mr. Bochenek engaged in a dangerous, high-speed chase of Ms. Chavez on the highway. Of course, it is difficult to compare scenarios on the basis of descriptions on paper. Every workplace is different. But the point is that in light of our precedents, there is a material issue of fact as to whether Plaintiffs faced gender-based harassment severe and pervasive enough to alter the conditions of their employment. The district court's sweeping grant of summary judgment was therefore inappropriate.

I. Employer's Duty to Prevent Harassment

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

Petrosino v. Bell Atlantic, 385 F.3d 210, 225–26, 94 FEP Cases 903 (**2d Cir.** 2004), reversed the grant of summary judgment to the Title VII defendant on plaintiff's sexual harassment claim. The court held that plaintiff showed a material issue of disputed fact as to the "'reasonable care' element of the affirmative defense. "In this case, Petrosino does not dispute the existence of Bell Atlantic's complaint hotline, but she does challenge its effectiveness in promptly correcting reported sexual harassment. She asserts that when she telephoned the hotline in May 1997 to complain of gender discrimination by her supervisor Mangiero, her request to discuss her concerns with a female counselor was refused. Thereafter, no one investigated her complaint or took any remedial action." *Id.* at 226.

Robinson v. Sappington, 351 F.3d 317, 337 n.13, 93 FEP Cases 75 (**7th Cir.** 2003), reversed the grant of summary judgment to the Title VII defendants, and stated in *dicta* that a reasonable jury might find the defendants' adoption without promulgation of an anti-harassment policy inadequate to meet the requirements of the *Faragher* / *Ellerth* affirmative defense: "A jury certainly could conclude that the meager action of adopting, but not promulgating, a sexual harassment policy failed to inform employees of their right to be free from such behavior as well

as of the steps the employees could take to remedy any offending behavior. The fact that Ms. Robinson understood that, if she had general workplace complaints, she should report those to Janice Shonkwiler does not absolve her employer of the responsibility to take reasonable steps to protect her from sexual harassment."

McPherson v. City of Waukegan, 379 F.3d 430, 441, 94 FEP Cases 247, 94 FEP Cases 257 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII sexual harassment defendant. Plaintiff testified that she was sexually assaulted on three occasions by her second-level supervisor, who resigned immediately after defendant learned of the problem and ultimately pleaded guilty to attempted criminal sexual assault, which required him to be registered as a sex offender. The court rejected plaintiff's argument that defendant failed to take adequate preventive steps. No complaint of sexual misconduct had ever been made against the harasser, although he was a long-time employee. The only conduct of which the City was aware was that the harasser had on at least one occasion asked women in the workplace about the color of their underwear, and there was nothing to put the City on notice that this employee would ultimately assault plaintiff sexually. The assaults took place behind closed doors, and absent a complaint by plaintiff—which was not forthcoming—the City could not have known about the assaults and taken action to prevent further assaults..

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

McCombs v. Meijer, Inc., __ F.3d __, 2005 WL 94639 (**6th Cir.** Jan. 19, 2005), affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff. The jury awarded $25,000 in compensatory damages, $100,000 in punitive damages, and the lower court awarded $460,450 in attorneys' fees, $4,532.50 in expert witness fees, $10,103.34 in costs, and supplemental attorneys' fees of $14,192.50. The court stated:

> This court has found that when the allegations of sexual harassment involve a coworker and the employer has fashioned a response, the employer will only be liable "if its response manifests indifference or unreasonableness in light of the facts the employer knew or should have known." . . . "The act of discrimination by the employer in such a case is not the harassment, but rather the inappropriate response to the charges of harassment." . . . Thus, an employer who implements a remedy "can be liable for sex discrimination in violation of Title VII only if that remedy exhibits such indifference as to indicate an attitude of permissiveness that amounts to discrimination."

(Citations and footnote omitted.) The court found that the jury could reasonably have found such indifference. Plaintiff complained orally several times, both to her supervisor and to "Department 10," defendant's internal department responsible for acting on harassment complaints. Defendant's officials dissuaded her from filing a written complaint so that the harasser's job would not be jeopardized. She made her first written complaint on November 25, 1997, after co-worker Pound touched her buttocks. In the investigation:

> . . . Pound admitted that he touched McCombs but viewed it "as a pat on the back," and also admitted that he told McCombs that he liked "the way that her legs went up to her butt," that he wanted to kiss her on her breast, and that she aroused him. After Pound had been interviewed regarding the sexual harassment allegations and admitted much of his

behavior, Meijer allowed him to return to work in the meat department with McCombs.

Pound then began stalking plaintiff internally in the Meat Department where they both worked. She complained orally, and ultimately made two more written complaints. Her second written complaint stated "that Pound told her that he wanted to kiss her all over and that he could hardly control himself." The court described her third written complaint: "In the December 4 complaint, McCombs described an incident from the prior evening where Pound walked over to the counter near McCombs, holding a bloody knife in his hand. He held the knife at face level, and stared at her while he wiped the knife (the 'knife incident')." Defendant finally fired Pound, and Pound was convicted on state criminal charges filed by plaintiff. The court rejected defendant's argument that no reasonable jury could have found it proceeded indifferently because it did investigate, suspend, and ultimately fire Pound, because the argument was based on the assumption that the relevant time period was after plaintiff filed her first written complaint, and the jury was entitled to infer that plaintiff had made numerous oral complaints and that defendant had delayed her filing of a written complaint. It continued:

> In this case, viewing the evidence in the light most favorable to McCombs, a jury could have found that Meijer's inaction amounted to indifference or unreasonableness. Pound was transferred to McCombs's department *after* she informed her supervisor that Pound was spreading rumors of having an extramarital affair with her. Prior to filing her first written complaint, McCombs orally informed her supervisor and Department 10 on several occasions of Pound's inappropriate conduct. Neither addressed her concerns. This evidence is legally sufficient to establish that Meijer acted both indifferently and unreasonably.

(Emphasis in original). Judge Gilman dissented.

Loughman v. Malnati Organization Inc., __ F.3d __, 2005 WL 89496 (**7th Cir.** Jan. 18, 2005), reversed the grant of summary judgment to the Title VII sexual harassment defendant. The court stated: "An employer is liable for a co-employee's harassment only when it is negligent either in discovering or remedying the harassment. And when it comes to remedying a bad situation, greater vigor is necessary when the harassment is physically assaultive." The court disagreed with the lower court on whether a reasonable jury would have to find defendant's actions adequate: "Loughman was not complaining merely of inappropriate jokes or comments, though she put up with those as well, but of serious physical violations. Considering the severity of the incidents, a reasonable jury could determine that simply talking to the people involved in the first two aggressive incidents was not a sufficient response." The court continued:

> In addition, the consistent stream of harassment at the restaurant suggests that Malnati's policy was actually not very effective at all. Gros testified that she talked to the kitchen workers between 10 and 20 times about how to treat female employees, often in response to complaints from the female employees about inappropriate comments made to them. While a reasonable jury could view such diligence as evidence of Malnati's commitment to preventing harassment, it might also think the frequency of the discussions suggests that a different approach was needed. A jury could determine that, at some point, the management at Malnati's needed to stop merely issuing warnings and start taking disciplinary action against the offending employees. Gros's comments to

> Loughman suggesting that harassment was inevitable because it is in the "culture" of Hispanic workers do not help the restaurant's case, either. A jury could take Gros's comments to suggest that Malnati's thought any efforts to prevent harassment would be fruitless.

The court also relied on the fact that two other employees had previously complained of being assaulted by some of the employees who harassed plaintiff. "Put together with the recurring nature of the harassment against Loughman, a reasonable jury could find that Malnati's was negligent in addressing its clear sexual harassment problems."

Hesse v. Avis Rent A Car System, Inc., __ F.3d __, 2005 WL 36541 (**8th Cir.** Jan. 10, 2005), affirmed the grant of summary judgment to the Title VII sexual harassment defendant, holding that the loud noises and bumptious conduct of the alleged harasser were directed equally to male and female employees under his supervision, and there was no basis to say it was because of sex. Independently, the court held that defendant met its affirmative defense. "Wallner met with Hesse and Johnson immediately after the chair incident and again the next day. She encouraged Hesse to discuss her concerns with human resources, and she met with Johnson and instructed him to stop his noisemaking. Within a week, Wallner and the human resources manager Jacobson met with Hesse and assured her that Johnson's conduct would improve. Avis sent Johnson to a management class, and Jacobson followed up with Hesse to make sure that she was not having any more problems with him. Hesse acknowledged in her deposition that Johnson's noisemaking diminished after she complained about it and admits that she did not raise it with management again." The class was an anger management class.

Rowe v. Hussmann Corp., 381 F.3d 775, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Missouri law sexual harassment plaintiff, including the award of $500,000 in compensatory damages and $ 1 million in punitive damages. Plaintiff began complaining to her direct supervisor, Oscar Weston, as soon as co-worker Roy Moore began touching her breast and buttocks and engaging in similarly foul verbal conduct, including threats of rape and murder if she did not engage in sexual activity with him. While Moore desisted for a short time after plaintiff's first complaint, he soon returned to the conduct, which worsened over time. Plaintiff testified that she complained "'at least two or three times a month,'" but little positive happened. Weston once told her that she should be understanding because Moore only had an eighth-grade education and did not know any better. In late March 2000, three and a half years after the harassment began, plaintiff went to Weston's office "very much upset and crying," and in the presence of Weston's supervisor told him that something had to be done because Moore's conduct was getting worse. *Id.* at 778. On April 3, 2000, Moore was warned not to speak with plaintiff or touch her again. Later that month, plaintiff found that a large rock had been thrown through the windshield of her car, with some evidence that Moore may have done it. Plaintiff complained to the police and demanded to see the Human Resources generalist, Lou Straika. "Rowe testified that Weston responded: 'Do you really want to do this? You know what's going to happen.'" *Id.* Plaintiff insisted. Straika transferred the plaintiff away from Moore but warned her to be careful because Moore had a lot of friends. "In June 2000, Rowe took to eating her lunch and taking her coffee breaks in the women's restroom to avoid encountering Moore in the plant." *Id.* at 779. Although she worked at some distance from Moore, he drove past her new work area in a forklift, sometimes when he was not carrying a load, staring at her as he did so. The last such occurrence was in October 2002, two weeks prior

to trial. The court also rejected defendant's argument that the lower court erred in refusing to issue a proposed instruction that would have allowed it to escape liability if it took adequate corrective action within the charge-filing period, regardless of what it had allowed to happen earlier. *Id.* at 781.

K. Truly Stupid Employer Responses to Complaints

Baker v. John Morrell & Co., 382 F.3d 816, 822 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Iowa Human Rights Act sexual harassment plaintiff, including the awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys' fees and costs, a total of $1,386,632. After plaintiff and other women had unsuccessfully complained for years about severe and pervasive harassment and degradation interfering with their work and their ability to work, Steve Joyce, Director of Human Resources, told plaintiff on the occasion of yet another complaint, in the presence of her harasser, that she and her primary harasser "had a 'hard-on for each other' and told them to get along." Subsequently, a company foreman told plaintiff she could no longer meet with the HR Director because he was tired of her complaints. The company refused to let plaintiff go to Personnel to make a complaint after a harasser threw a box of meat at her, hitting her foot. *Id.* at 823. Some boxes at the plant weighed 40 pounds. Despite being informed that some of the harassment against plaintiff occurred because she refused to go out with a co-worker and refused to give him her phone number, and despite his knowledge that the harassment included male employees' grinding their groins into plaintiff's rear as they passed her, the HR Director testified that he never saw any red flags suggesting sexual harassment and so never did a sexual harassment investigation.

Rowe v. Hussmann Corp., 381 F.3d 775, 778, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Missouri law sexual harassment plaintiff, including the award of $500,000 in compensatory damages and $ 1 million in punitive damages. Plaintiff repeatedly complained to her direct supervisor, Oscar Weston, that co-worker Roy Moore began touching her breast and buttocks and engaging in similarly foul verbal conduct, including threats of rape and murder if she did not engage in sexual activity with him. While Moore desisted for a short time after plaintiff's first complaint, he soon returned to the conduct, which worsened over time. Weston once told her that she should be understanding because Moore only had an eighth-grade education and did not know any better.

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 against the white plaintiff complaining of racial harassment by her African-American supervisor, Francine Lee. The court held that plaintiff's three complaints of harassment by Lee, one of them made within hours of the occurrence and all made promptly, and her complaint that Lee has intimidated her supervisor, coupled with the defendant's statement that it could not guarantee plaintiff's personal safety from Lee, were enough to create a jury issue.

L. Plaintiff's Duty to Complain

1. Claims Rejected Because of Failures to Complain

McPherson v. City of Waukegan, 379 F.3d 430, 441–42, 94 FEP Cases 247, 94 FEP Cases 257 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII sexual harassment defendant. Plaintiff testified that she was sexually assaulted on three occasions by her second-level supervisor, who resigned immediately after defendant learned of the problem and ultimately pleaded guilty to attempted criminal sexual assault, which required him to be registered as a sex offender. The court held that there was no adverse employment action, so the affirmative defense was available. Plaintiff knew of the procedures for making an internal complaint, having used them previously with respect to another employee, but did not complain. She was covered by a collective bargaining agreement that also allowed her a means to complain, and did not use that procedure, either. The City learned of these events when plaintiff had lunch with her sister-in-law, who happened to be the Mayor's daughter and who alerted the City. The court held that plaintiff failed to mitigate her damages by complaining and thus ensuring the end of the harassment.

Okruhlik v. University of Arkansas, __ F.3d __, 2005 WL 124238 (**8th Cir.** Jan. 24, 2005), affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant because plaintiff failed to make any complaint until a month after the end of the conversations to which she objected. Defendant had a track record of taking her concerns seriously, and it responded appropriately to her belated complaint.

2. To Whom Must a Complainant Complain?

Loughman v. Malnati Organization Inc., __ F.3d __, 2005 WL 89496 (**7th Cir.** Jan. 18, 2005), reversed the grant of summary judgment to the Title VII sexual harassment defendant. The court rejected defendant's argument that plaintiff should be faulted for failure to complain to senior managers for almost a year, because she did complain immediately to her supervisors and others. "And while Malnati's sexual harassment policy allowed employees to report incidents to upper management, a reasonable jury could find that Loughman took adequate steps by reporting the incidents to Solis, one of her supervisors."

3. How Many Times Should a Complainant Complain?

McCombs v. Meijer, Inc., __ F.3d __, 2005 WL 94639 (**6th Cir.** Jan. 19, 2005), affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff. The jury awarded $25,000 in compensatory damages, $100,000 in punitive damages, and the lower court awarded $460,450 in attorneys' fees, $4,532.50 in expert witness fees, $10,103.34 in costs, and supplemental attorneys' fees of $14,192.50. Plaintiff complained orally several times, both to her supervisor and to "Department 10," defendant's internal department responsible for acting on harassment complaints. Defendant's officials dissuaded her from filing a written complaint so that the harasser's job would not be jeopardized. She ultimately filed three written complaints, and the harasser was ultimately fired and convicted criminally. The court rejected defendant's arguments that only the written complaints required it to take action. Judge Gilman dissented.

Baker v. John Morrell & Co., 382 F.3d 816, 824 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Iowa Human Rights Act sexual harassment plaintiff, including the awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys' fees and costs, a total of $1,386,632. Plaintiff and other women had unsuccessfully complained for years about severe and pervasive harassment and degradation interfering with their work and their ability to work. At one point, plaintiff had made 15 complaints over a two-month period.

Rowe v. Hussmann Corp., 381 F.3d 775, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Missouri law sexual harassment plaintiff, including the award of $500,000 in compensatory damages and $ 1 million in punitive damages. Plaintiff began complaining to her direct supervisor, Oscar Weston, as soon as co-worker Roy Moore began touching her breast and buttocks and engaging in similarly foul verbal conduct. While Moore desisted for a short time after plaintiff's first complaint, he soon returned to the conduct, which worsened over time. Plaintiff testified that she complained "'at least two or three times a month,'" but little positive happened. Weston once told her that she should be understanding because Moore only had an eighth-grade education and did not know any better. In late March 2000, three and a half years after the harassment began, plaintiff went to Weston's office "very much upset and crying," and in the presence of Weston's supervisor told him that something had to be done because Moore's conduct was getting worse. *Id.* at 778. On April 3, 2000, Moore was warned not to speak with plaintiff or touch her again. Later that month, plaintiff found that a large rock had been thrown through the windshield of her car, with some evidence that Moore may have done it. Plaintiff complained to the police and demanded to see the Human Resources generalist, Lou Straika. "Rowe testified that Weston responded: 'Do you really want to do this? You know what's going to happen.'" *Id.* Plaintiff insisted. Straika transferred the plaintiff away from Moore but warned her to be careful because Moore had a lot of friends.

Williams v. ConAgra Poultry Co., 378 F.3d 790, 796, 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. In upholding punitive damages on the harassment claim, the court relied on the fact that plaintiff complained repeatedly to upper management, over a period of several years, without any meaningful action being taken.

4. What if Another Complained First?

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.

Rowe v. Hussmann Corp., 381 F.3d 775, 778, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Missouri law sexual harassment plaintiff, including the award of $500,000 in compensatory damages and $ 1 million in punitive damages. Plaintiff began complaining to her direct supervisor, Oscar Weston, as soon as co-worker Roy Moore began touching her breast and buttocks and engaging in similarly foul verbal conduct. "Weston responded by saying that Moore should know better because he had had two earlier incidents of similar behavior, and that he (Weston) would talk to Moore about the matter."

5. Judicial Acceptance of Failures to Complain

Loughman v. Malnati Organization Inc., __ F.3d __, 2005 WL 89496 (**7th Cir.** Jan. 18, 2005), reversed the grant of summary judgment to the Title VII sexual harassment defendant. The court held that a reasonable jury could infer that plaintiff's complaints to her supervisors were adequate to discharge her burden although she did not complain to senior management for almost a year. The court stated: "Moreover, the environment at Malnati's might have weakened its policy. One employee, Hannah Bulak, said she told D'Angelo that she felt she could not complain about improper conduct at work because the managers had spoken to her and reprimanded her about flirting in the past, making her worry that she would be blamed if she reported any problems."

Rowe v. Hussmann Corp., 381 F.3d 775, 781, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Missouri law sexual harassment plaintiff, including the award of $500,000 in compensatory damages and $ 1 million in punitive damages. Plaintiff began complaining to her direct supervisor, Oscar Weston, in October, 1996, as soon as co-worker Roy Moore began touching her breast and buttocks and engaging in similarly foul verbal conduct, including threats of rape and murder if she did not engage in sexual activity with him. Plaintiff complained repeatedly to her supervisor, to little effect. She filed her EEOC charge on June 7, 2000. The court held that against this background it did not matter if defendant lacked knowledge of the harassing activity within the 300-day charge-filing period—necessarily implying a failure to complain of that incident—because the only relevant factor was whether the incident occurred. The court stated: "The second alternative in Hussmann's proposed instruction thus states an incorrect proposition of law, for it allows the employer to avoid liability if it lacked knowledge of particular harassing acts that occurred during the charge period, irrespective of its knowledge of prior harassment."

M. Evidence

1. Criminal Conviction of the Harasser

McCombs v. Meijer, Inc., __ F.3d __, 2005 WL 94639 (**6th Cir.** Jan. 19, 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.'" (Footnote omitted.) Judge Gilman dissented.

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.

3. Experts

McCombs v. Meijer, Inc., __ F.3d __, 2005 WL 94639 (**6th Cir.** Jan. 19, 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."

4. What Happened to Others

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.)

5. 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.

6. 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.

7. Rule 412, Fed. R. Evid.

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 affirmed the award of

$5,000 in attorney's fee sanctions against both the defendant and its counsel under 28 U.S.C. § 1927 and the court's inherent power for knowing and reckless violation of Rule 412 and having misled the court about the testimony after plaintiff's counsel had made an anticipatory objection. The court also affirmed the sanction of $5,000 in emotional-distress damages for the plaintiff because of the emotional stress caused by the humiliation of hearing this evidence come in. *Id.* at 1106–09.

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.

N. Jury Instructions

McCombs v. Meijer, Inc., __ F.3d __, 2005 WL 94639 (**6th Cir.** Jan. 19, 2005), affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff. The court rejected defendant's argument that the instructions misstated the law on *respondeat superior*, because "the jury instructions explained that, to find liability, the jury must determine that 'Meijer knew or should have known of the conduct but failed to implement prompt and appropriate corrective action.'" The court also rejected defendant's argument that the instructions prejudicially failed to inform the jury it should not use hindsight in evaluating defendant's actions, because three instructions addressed that issue. "In its instructions, the court explained to the jury that McCombs alleged that 'Meijer's remedy and response to her complaint of gender harassment was reckless and indifferent *in light of the facts known to it at the time.*'" (Emphasis in original.) The court also gave the following instructions:

> When determining whether a reasonable person would find the alleged harassment sufficiently severe or pervasive to constitute a hostile work environment, you must consider the *totality of the circumstances instead of looking at each single event.* That is, you must determine whether, taken together, the accumulated effect of all the reported incidents of harassment amounted to a hostile work environment.
>
> You must determine whether Meijer took prompt and appropriate corrective action in responding to the harassment or whether its remedy exhibits such an indifference as to indicate an attitude of permissiveness that amounts to discrimination. You must determine whether Meijer acted in good faith; that is, whether Meijer took remedial action that was *reasonably calculated to end the harassment once it became aware of the harassment.*

(Emphasis in original.) Judge Gilman dissented.

Wilson v. Brinker Int'l, Inc., 382 F.3d 765, 771–72, 94 FEP Cases 585 (**8th Cir.** 2004), affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant because the jury found that no "act of harassment" took place within the 300 days preceding the charge. The court rejected plaintiff's argument that the instructions should have stated that defendant had the burden of proof to show what she termed the affirmative defense of untimeliness, instead of stating that plaintiff had the burden of proving all issues, necessarily including timeliness. Because plaintiff did not make this argument at the charging conference, the court held that the instruction could be reviewed only for plain error. The court stated that pre-*Morgan* precedent in the Circuit assigned the burden of proof to plaintiff, and did not decide whether *Morgan* changed the allocation of the burden because the jury verdict could be upheld regardless of who had the burden.

Wilbur v. Correctional Services Corp., 393 F.3d 1192, 1200–01 (**11th Cir.** 2004), affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant because the jury's answers to the special interrogatories removed any basis for the award of damages. The court rejected plaintiff's argument that the "no" verdict to the question whether plaintiff was discharged because she refused demands for sexual favors, and the "no" verdict to the question whether plaintiff was discharged because of sexual discrimination, were still consistent with the damages verdict because the jury may have thought that each factor contributed to the termination but that neither may have been sufficient by itself. The court held that the instructions—which the jury was presumed to follow—precluded such a result, because the jury was instructed that it should find whether these motives were a substantial contributing factor in the termination. The court held that the jury's answers to fact questions were not general verdicts. *Id.* at 1201. The court stated that "additional instructions and further deliberation may have been the preferred method of resolving" the inconsistency, but the lower court was not required to adopt the most preferable alternative. *Id.* at 1203–04.

O. Verdicts and Verdict Forms

Wilson v. Brinker Int'l, Inc., 382 F.3d 765, 772–73, 94 FEP Cases 585 (**8th Cir.** 2004), affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant because the jury found that no "act of harassment" took place within the 300 days preceding the

charge. The court rejected plaintiff's argument that the verdict form should have referred instead to acts contributing to a hostile environment. Because plaintiff did not make this argument at the charging conference, the court held that the verdict form could be reviewed only for plain error. The court stated that *Morgan* used the term "act of harassment" interchangeably with "act contributing to a hostile environment," and that there was no plain error.

Wilbur v. Correctional Services Corp., 393 F.3d 1192, 1200 n.4 (**11th Cir.** 2004), affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant because the jury's answers to the special interrogatories removed any basis for the award of damages. The court held that defendant did not waive its Rule 49(b) challenge to the inconsistency of the verdict despite its failure to raise the issue before the jury was discharged. The court held it would have been futile, because plaintiff's counsel had raised the issue of inconsistency prior to discharge of the jury, and the trial court had refused to resubmit the question. "To find otherwise means that CSC was required, solely for the sake of formality, to challenge the same matter that the district court had expressly ruled on an instant before."

P. Compensatory Damages

McCombs v. Meijer, Inc., __ F.3d __, 2005 WL 94639 (**6th Cir.** Jan. 19, 2005), affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff. Plaintiff recovered $25,000 in compensatory damages and spent $9,482.00 in expert witness fees, of which she recovered $4,532.50. She thus received $2.64 in damages for every dollar she spent in expert witness fees.

Baker v. John Morrell & Co., 382 F.3d 816, 830–32 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Iowa Human Rights Act sexual harassment and retaliation plaintiff, including the awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys' fees and costs, a total of $1,386,632. Plaintiff filed suit only under Title VII, and after the verdict moved to amend her complaint to add a claim under the Iowa Civil Rights Act, which provides for uncapped compensatory damages but no punitive damages. That would allow her to keep all of her compensatory-damage award, and $300,000 of her punitive-damage award. District Judge Mark Bennett ultimately granted the motion under Rules 15(b) and 54(c), FED. R. CIV. PRO., and the court of appeals affirmed. The court noted the agreement of the parties that the proof and legal standards under Title VII and the ICRA were identical, stated that the amendment was not inconsistent with defendant's position through the litigation, held that an issue can be tried by consent even if the evidence is also relevant to an issue withinb the pleadings, and held that Judge Bennett did not abuse his discretion in holding that the amendment reflected the issues tried by consent, *i.e.*, without objection,. *Id.* at 831. The court held in the alternative that the amendment was also permitted under Rule 54(c), as relief to which the plaintiff was entitled even if she did not demand it in her pleadings. It stated that there are limits on such a use of Rule 54(c), and that the rule cannot be applied so as to prejudice the other side. "For example, if the pleading failure denies the opposing party the 'opportunity to make a 'realistic appraisal of the case, so that [their] settlement and litigation strategy [could be] based on knowledge and not speculation,' the amendment may properly be denied." *Id.* at 831–32 (citations and some internal quotation marks omitted). The court rejected Morrell's claim that it would have settled the case if it had known of its larger exposure:

> Morrell contends it was prejudiced by Baker's failure to plead an ICRA claim because had it known damages would not be capped under Title VII it may have settled the claim instead of risking a verdict in excess of the cap. Morrell, however, has failed to present any evidence to show its settlement strategy was affected by the Title VII cap. Indeed, aside from Morrell's bare assertion, we have no reason to believe it would have been any more inclined to settle this claim irrespective of whether an ICRA claim was pleaded. Furthermore, Morrell was well aware throughout the course of the litigation Baker was demanding an amount to settle the claim well in excess of the Title VII caps. Surely, this fact alone put Morrell on notice Baker was seeking a verdict in excess of $300,000. In light of the liberal policy in favor of Rule 54(c) amendments, and because it is undisputed Baker proved an ICRA claim, we will not permit Morrell's bare assertion of prejudice to thwart the amendment.

Id. at 832. The obduracy of defendant's litigation position—denying a hostile en vironment even after years of degrading comments, actions, and physical assaults drove plaintiff to a suicide attempt and mental hospitalization—may have contributed to this holding.

Rowe v. Hussmann Corp., 381 F.3d 775, 782 n.6, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Missouri law sexual harassment plaintiff, including the award of $500,000 in compensatory damages and $ 1 million in punitive damages. The court rejected defendant's argument, relying on earlier Eighth Circuit case law construing Missouri law, that damages under Missouri law had to be limited to the 180-day period prior to plaintiff's charge. "Missouri courts imposed this limitation by relying on federal precedent that *Morgan* clearly overrules." (Citations omitted.) The court held that the compensatory-damage award was not excessive in light of the years-long harassment by co-worker Moore, including forced touchings, demands for sexual favors, foul verbal conduct, and threats of rape and murder. The court described the effect this had on plaintiff:

> Rowe testified to a constant fear of Moore and to experiencing panic attacks variously characterized by nausea, headaches, sweating, and hyperventilation. She was so afraid of Moore that she moved to a different home, obtained a gun card, purchased mace, and since June of 2000 has been eating lunch and taking coffee breaks in the women's restroom to avoid any contact with Moore. Rowe indicated that her fear has adversely affected her relationship with her four children. Her treating psychologist testified that Rowe suffers from an anxiety disorder and that her prognosis is poor.

Id. at 783. The court continued: "Because it is difficult to quantify the extent of the psychic injury that months and years of unwanted touching and verbal abuse, combined with threats of murder and rape, might cause, it was for the jury, equipped as it was with the collective wisdom that life's experiences confer, to determine the amount that would adequately compensate Rowe for that injury, and thus we decline to reduce the compensatory award." (Citations omitted.)

Wilbur v. Correctional Services Corp., 393 F.3d 1192 (**11th Cir.** 2004), affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant because the jury's answers to the special interrogatories removed any basis for the award of damages. Although the jury accepted plaintiff's quid-pro-quo claim, the only tangible employment action

giving rise to damages was her termination, and it found that her termination was not related to discrimination.

Q. Punitive Damages

Hatley v. Hilton Hotels Corp., 308 F.3d 473, 477, 89 FEP Cases 1861 **(5th Cir.** 2002), reversed the grant of judgment as a matter of law on plaintiffs' Title VII sexual harassment claims but affirmed the denial of punitive damages. The court held that, notwithstanding the inadequacy of the defendant's handling of plaintiffs' internal harassment complaints and earlier complaints filed by others, the defendant made out its affirmative defense:

> Davidson was arguably an agent in a managerial capacity, and she may have acted with malice or reckless indifference to the rights of the plaintiffs within the scope of her employment. However, these actions were contrary to Bally's good faith effort to prevent sexual harassment in the workplace, as is evidenced by the fact that Bally's had a well-publicized policy forbidding sexual harassment, gave training on sexual harassment to new employees, established a grievance procedure for sexual harassment complaints, and initiated an investigation of the plaintiffs' complaints. These actions evidence a good faith effort on the part of Bally's to prevent and punish sexual harassment.

McCombs v. Meijer, Inc., __ F.3d __, 2005 WL 94639 (**6th Cir.** Jan. 19, 2005), affirmed the judgment on a jury verdict for the Title VII sexual harassment plaintiff. Plaintiff recovered $100,000 in punitive damages. The court rejected defendant's argument that the lower court erroneously admitted evidence of its gross annual sales, because high volume does not mean high profit. The court held that defendant had not shown it was prejudiced, or that it was unable to pay the award. Judge Gilman dissented.

Lust v. Sealy, Inc., 383 F.3d 580, 590, 94 FEP Cases 645 (**7th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII sex discrimination plaintiff, but held that the award of $273,000 in punitive damages was excessive in light of defendant's remedial efforts, and that $150,000 is the most that could be sustained. The court affirmed the award of $27,000 in compensatory damages, and held that the caps made it unnecessary to address the ratio between the punitive and compensatory damage awards. "When Congress sets a limit, and a low one, on the total amount of damages that may be awarded, the ratio of punitive to compensatory damages in a particular award ceases to be an issue of constitutional dignity . . . ." (Citations omitted.) The court also stated:

> As we emphasized in *Mathias*, moreover, capping the ratio of compensatory and punitive damages makes sense only when the compensatory damages are large, which the statutory cap on total damages in employment discrimination cases precludes. Suppose Lust had been emotionally sturdier and incurred only $10 in emotional injury from the delay in her promotion to Key Account Manager. Would Sealy argue that in that case the maximum award of punitive damages would be $100? So meager an award would accomplish none of the purposes, discussed in *Mathias*, for which punitive damages are validly awarded.

Id/ at 591. The case cited is *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 675–78 (7th Cir.2003). The court went on to state that imposing the maximum penalty in a case involving "slight, because quickly rectified, discrimination" would "impair marginal deterrence." *Id.* Its argument is that employers in such a situation would have no incentive to avoid further discrimination "It's as if the punishment for robbery were death; then a robber would be more inclined to kill his victim in order to eliminate a witness and thus reduce the probability of being caught and punished, because if the murdering robber were caught he wouldn't be punished any more severely than if he had spared his victim." *Id.*

Baker v. John Morrell & Co., 382 F.3d 816, 832 n.4 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Iowa Human Rights Act sexual harassment and retaliation plaintiff, including the awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys' fees and costs, a total of $1,386,632. Plaintiff filed suit only under Title VII, and after the verdict moved to amend her complaint to add a claim under the Iowa Civil Rights Act, which provides for uncapped compensatory damages but no punitive damages. That would allow her to keep all of her compensatory-damage award, and $300,000 of her punitive-damage award. District Judge Mark Bennett ultimately granted the motion under Rules 15(b) and 54(c), FED. R. CIV. PRO., and the court of appeals affirmed. The court held that it would not consider the permissibility of allocating all $300,000 in Title VII damages to punitive damages, without a compensatory award under Title VII, because defendant did not raise the issue.

See the discussion of *Rowe v. Hussmann Corp.*, 381 F.3d 775, 782 n.6, 94 FEP Cases 520 (**8th Cir.** 2004), in the section above on "Compensatory Damages." The court held that the million-dollar punitive-damage award was not excessive in light of the years-long harassment by co-worker Moore, including forced touchings, demands for sexual favors, foul verbal conduct, and threats of rape and murder. The court rejected defendant's argument that it should not have been liable for punitive damages. "Recklessness and outrageousness may be inferred from evidence of "management's participation in the discriminatory conduct," . . . or where an employee's repeated complaints to supervisors fall on deaf ears. . . . In light of Weston's knowledge of Moore's abusive conduct, his repeated failure to take effective action to put a stop to such conduct, and his defense of and excuses for that conduct, all chargeable to Hussmann, the evidence is sufficient to support the award of punitive damages." *Id.* at 784 (citations omitted). The court held that the award was within the jury's discretion.

Williams v. ConAgra Poultry Co., 378 F.3d 790, 796–97, 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 rejected defendant's argument that it should not be liable for punitive damages, relying on incidents affecting the plaintiff, incidents affecting others of which the plaintiff was not aware, and relying on the egregiousness of the harassment. The court held that a reasonable jury could find malice from these facts and from the fact that ConAgra managers were inconsistent in their reasons for firing plaintiff:

> As we noted above, there was substantial evidence of egregious racial harassment at the El Dorado plant, and although Mr. Williams did not testify to being aware of this activity, it could be probative of the state of mind of ConAgra's managers in firing him. Furthermore, at trial there were contradictions in the testimony of ConAgra managers with respect to the basis for Mr. Williams's firing. Thus, in this case the same evidence that the jury used to support its finding of racial motivation in Mr. Williams's discharge also supports an inference of intentional and malicious conduct by ConAgra.

Id. at 796. The court also held that there was sufficient evidence to support a jury determination of reckless indifference on plaintiff's harassment claim, because plaintiff made many complaints to upper management about his supervisor's harassment, over several years, and no meaningful action was taken. The court held that the $6,063,750 punitive-damage award on the harassment claim was unconstitutionally excessive "for three interrelated reasons." "First, in upholding the award the district court improperly relied on evidence of misconduct by ConAgra unrelated to Mr. Williams's claim. Second, the punitive damages award is far in excess of what analogous statutes would allow. Finally, the ratio of punitive damages to compensatory damages far exceeds the levels that the Supreme Court has suggested are consistent with due process." *Id.* at 796. As to the first, the court stated:

> Tying punitive damages to the harm actually suffered by the plaintiff prevents punishing defendants repeatedly for the same conduct: If a jury fails to confine its deliberations with respect to punitive damages to the specific harm suffered by the plaintiff and instead focuses on the conduct of the defendant in general, it may award exemplary damages for conduct that could be the subject of an independent lawsuit, resulting in a duplicative punitive damages award. Where there has been a pattern of illegal conduct resulting in harm to a large group of people, our system has mechanisms such as class action suits for punishing defendants. Punishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff, however, deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure.
>
> That does not mean that conduct in other cases is always irrelevant when assessing the defendant's reprehensibility. An incident that is recidivistic can be punished more harshly than an isolated incident. . . . In determining what constitutes a previous example of the same conduct, however, we must be careful not to let the exception swallow the rule. By defining his or her harm at a sufficiently high level of abstraction, a plaintiff can make virtually any prior bad acts of the defendant into evidence of recidivism. . . .
>
> The Supreme Court has therefore emphasized that the relevant behavior must be defined at a low level of generality. "[E]vidence of other acts need not be identical to have relevance in the calculation of punitive damages," *id.*, but the conduct must be closely related.

Id. at 797 (emphasis in original). The question whether particular incidents are sufficiently factually and legally similar is not always simply, as the court's application of the standard shows:

> In upholding the punitive damages award on the harassment claim, we find that the district court improperly relied on evidence of harassment not suffered by Mr. Williams that was insufficiently similar to his experiences to be evidence of recidivism under the narrow exception set forth in *State Farm.* In particular, the district court relied extensively on the testimony of Mr. Johnican who stated that he saw black dolls hung from nooses around the plant. He also reported invitations to KKK barbecues and seeing a long racist joke about keeping black individuals out of heaven posted in the factory. Another black employee, James Atkins, testified that he was invited on KKK hunting trips, where he was to serve as the hunted. He also testified to seeing nooses left about the factory. Tasha Moore testified that female black employees who responded favorably to sexually suggestive banter were extended the privileges of white employees, while black women who did not respond favorably were, along with other black employees, given less favorable treatment. Mr. Williams never testified to being aware of these events, let alone being the target of similar behavior. We hold that this misconduct is insufficiently similar to that of which Mr. Williams was the object to count as evidence of its recidivist character.
>
> The district court did, however, identify evidence that would fall within the *State Farm* recidivism exception. Mr. Atkins testified that white managers were extended privileges, like travel at company expense, unavailable to black employees. Ms. Moore testified that black employees were given shorter breaks than white employees. These instances are factually similar to the disparate work assignments that Mr. Williams testified about. Mr. Johnican testified to the widespread use of racist language of the kind that Mr. Williams complained of. Once the evidence has been subject to the winnowing required by *State Farm,* ConAgra's conduct in Mr. Williams's case remains reprehensible, but it is less appalling than the general picture of ConAgra's misconduct that the district court drew.

Id. at 797–98. The court stated that "it would be inappropriate for the courts simply to extend the Title VII limitations to § 1981 cases under the guise of interpreting the Constitution," and continued: "In this case, the award of punitive damages alone on the harassment claim was $6,063,750, more than twenty times the Title VII limit. We do not hold that there is any constitutionally required ratio between § 1981 damages awards and the Title VII cap, but so huge a discrepancy when coupled with the other infirmities that we discern in this award is telling and hard to ignore." *Id.* at 798. The court then addressed the ratio between compensatory and punitive damages, and held that there was no simple test. "Rather, the mathematics alerts the courts to the need for special justification. In the absence of extremely reprehensible conduct against the plaintiff or some special circumstance such as an extraordinarily small compensatory award, awards in excess of ten-to-one cannot stand." *Id.* It held that this case did not present such an extreme, and continued:

> Mr. Williams's large compensatory award also militates against departing from the heartland of permissible exemplary damages. The Supreme Court has stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm,* 538 **U.S.** at 425, 123 S. Ct. 1513. Mr. Williams received $600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money.

> Accordingly, we find that due process requires that the punitive damages award on Mr. Williams's harassment claim be remitted to $600,000.

Id. at 799.

Wilbur v. Correctional Services Corp., 393 F.3d 1192, 1205 (**11th Cir.** 2004), affirmed the grant of judgment as a matter of law to the Title VII sexual harassment defendant because the jury's answers to the special interrogatories removed any basis for the award of damages. The court held that, even assuming the claim for punitive damages was not moot, the lower court did not err in dismissing it. It reasoned that, although plaintiff's supervisors may have acted with malice or reckless indifference towards her, "she failed to establish a sufficient basis for imputing their conduct to CSC." (Citation omitted.) The court added:

> And, in this Circuit, "punitive damages will ordinarily not be assessed against employers with only constructive knowledge of harassment." . . . In order to ground liability in an employer, the plaintiff must establish that "the discriminating employee was high[] up the corporate hierarchy" or that "higher management countenanced or approved his behavior." . . . Even if, as Wilbur asserts, CSC's corporate office had notice of the alleged sex discrimination as of February 2002, when she complained to CSC's human resources department, Wilbur has offered nothing to establish that CSC's higher management "countenanced or approved" the offending behavior of Wilbur's supervisors. Moreover, to hold otherwise seems irreconcilable with the jury's finding that CSC had "exercised reasonable care to prevent and correct promptly any sexually harassing behavior in the work place." . . . Therefore, even if the issue is not moot, we conclude that the district court did not err in dismissing Wilbur's punitive damages claim.

(Citation omitted.)

R. Appellate Tips for Effective Advocacy

Smith v. Northeastern Illinois University, 388 F.3d 559, 94 FEP Cases 1295 (**7th Cir.** 2004), affirmed the grant of summary judgment and the judgment on a jury verdict for the Title VII racial harassment and First Amendment harassment defendants. The court stated: "Plaintiffs' appellate brief provides a 'laundry list' of factual allegations followed by an 'argument' section in which the litany of unorganized factual allegations are prefaced or followed by conclusory statements. Plaintiffs' counsel should be well aware that courts are not to do counsel's work of organizing its arguments nor are they 'in the business of formulating arguments for the parties.'" *Id.* at 562 n.3. Later in its opinion, the court stated, in connection with two plaintiffs' appeal from the denial of their motion for a new trial:

> Smith and Reeves make two arguments to support their motion, both of which are cursory. Apparently addressing the weight of the evidence, their argument consists of a single sentence: "To fail to correct the present verdict will leave Defendants with the mistaken impression that it is legal and protected activity to create a vile, loathsome[,] intimidating environment against persons based on race. . ." This undeveloped argument constitutes waiver.

Id. at 569 (citations omitted).

Lust v. Sealy, Inc., 383 F.3d 580, 590, 94 FEP Cases 645 (**7th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII sex discrimination plaintiff, but held that the award of $273,000 in punitive damages was excessive in light of defendant's remedial efforts, and that $150,000 is the most that could be sustained. The court commented adversely on defendant's attack on the punitive-damages award after failing to request a jury instruction on the good-faith defense. "In its reply brief it argues mysteriously that '*Kolstad* does not require that jury instructions be structured around its analytical frame-work.' Whatever that means, it doesn't excuse a party's failure to seek an instruction if it wants to present a defense to the jury."