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Employment Discrimination Law Update
by
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I. The Statistics

A. 20,062 new EEO Cases were filed in Federal courts in calendar 2001. This is one out of every 12.3 civil cases, and one out of every 8.1 Federal-question civil cases.

B. 2,892 EEO cases were decided in the courts of appeals. 1,246 were decided on procedural grounds, and 842 were decided on the merits, without oral argument.

C. 804 Federal-question employment appeals were decided after oral argument. As always, EEO cases were much likelier than other Federal-question cases to get to oral argument.

II. The Government

A. The Justice Department has announced it is not bringing any new disparate-impact cases. It is cutting sharply back on enforcement, and re-assigning key enforcement personnel to the task of writing manuals on the defense of Title VII cases.

B. The Labor Department has announced a goal of a 25% cutback in enforcement. The Secretary of Labor has announced that she wants a "tea party" approach to enforcement, based on the concept that employers are anxious to comply and only need to be sat down with so that they can understand how to comply.

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

C. The EEOC is the brightest spot, because its record is mixed. Its *Waffle House* litigation was superbly done, and it is doing more systemic work than ever. In some offices it is still, however, treating charging parties shabbily, miswriting charges, refusing to take some charges, refusing to allow evidence that would contradict the respondent's position statement, settling claims involving rights it does not enforce, and failing to defend key regulations in the Supreme Court, such as the disparate-impact ADEA regulation. Like the Clinton Administration, it is considering a definition of "applicant" that would damage the Uniform Guidelines. Like every Administration for the past quarter century, it has some very good people and some indifferent or incompetent people. It badly needs to train its workforce and eliminate non-performers.

III. The Constitution, Statutes, and Rules

A. 42 U.S.C. § 1981

1. **A Black Plaintiff Proving Intentional Discrimination Does Not Have to Prove that No White Employees Were Subject to the Same Conduct:** *Swinton v. Potomac Corp.*, 270 F.3d 794, 806, 87 FEP Cases 65 (**9th Cir.** 2001).

2. **Does the Four-Year Limitations Period of 28 U.S.C. § 1658 Apply to § 1981 Post-Contract Formation Claims?** To date, two courts of appeals have held that the four-year period of limitations in 28 U.S.C. § 1658 does not apply to the amendments to § 1981 in the Civil Rights Act of 1991 because § 1658 is limited to the enactment of new statutes, not the amendment of old statutes. *Madison v. IBP, Inc.*, 257 F.3d 780, 797–98, 86 FEP Cases 77, 80 E.P.D. ¶ 40,628 (**8th Cir.** 2001), *petition for cert. filed*, 70 USLW 3445 (**U.S.**, Dec. 19, 2001) (No. 01–985); *Zubi v. AT&T Corp.*, 219 F.3d 220, 225–26, 83 FEP Cases 417, 79 E.P.D. ¶ 40,260 (**3d Cir.** 2000). The issue is pending before the Seventh Circuit in the *R.R. Donnelley* case.

B. The Age Discrimination in Employment Act and Disparate-Impact Claims:

The ability of ADEA plaintiffs to bring disparate-impact claims was raised in *Adams v. Florida Power Corp.*, and plaintiffs' side was well-briefed and well-argued. The EEOC did not file a brief supporting its ADEA disparate-impact regulation. On April 1, 2002, the Supreme Court dismissed certiorari as having been improvidently granted.

C. The Americans with Disabilities Act

1. **Carpal Tunnel Syndrome and the Need to Show that a Disability Affects the Plaintiff's Life, Not Just Her Work :** *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 **U.S.** 184, 122 S. Ct. 681, 151 L. Ed. 2d 615, 12 AD Cases 993 (2002), unanimously held that the plaintiff's carpal tunnel syndrome and related impairments did not automatically make the plaintiff disabled within the meaning of the ADA, and that her inability to perform a range of manual tasks did not make her disabled. "We conclude that the Court of Appeals did not apply the proper standard in making this determination because it analyzed only a limited class of manual tasks and failed to ask whether respondent's impairments prevented or restricted her from performing tasks that are of central importance to most people's daily lives." 122 S. Ct. at 686. The Court held that the medical diagnosis is not enough; an individualized

assessment is normally needed. "An individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person. Carpal tunnel syndrome, one of respondent's impairments, is just such a condition. While cases of severe carpal tunnel syndrome are characterized by muscle atrophy and extreme sensory deficits, mild cases generally do not have either of these effects and create only intermittent symptoms of numbness and tingling" *Id.* at 692. The Court again refused to decide whether working is a major life activity.

2. **Need to Show a Causal Relationship Between the Protected Characteristic and the Injury:** *Parker v. Sony Pictures Entertainment, Inc.*, 260 F.3d 100, 106–08, 12 AD Cases 1 (**2nd Cir.** 2001), affirmed the grant of JMOL to the ADA defendant but reversed the award of attorneys' fees to the defendant. It stated that an employer is not immunized from ADA liability by a mistaken belief that the plaintiff could not perform the essential duties of the job even with a reasonable accommodation, but held that the plaintiff's failure to communicate clearly with the defendant was responsible for its mistake and for the breakdown of the interactive process. *Id.* at 106. The court held that the plaintiff is required to show a causal relationship between the protected characteristic and the injury of which the plaintiff complains.

3. **Direct-Threat Cases:** Even if the likelihood of an accident is small, the consequences of an accident could be so catastrophic that the direct-threat standard is satisfied. *Hutton v. Elf Atochem North America, Inc.*, 273 F.3d 884, 892–95, 12 AD Cases 909 (**9th Cir.** 2001) (diabetic seizures while at work afflicting employee in a chlorine plant). The plaintiff carries the burden of establishing that he is not a direct threat. *Waddell v. Valley Forge Dental Associates, Inc.*, 276 F.3d 1275, 12 AD Cases 1029 (**11th Cir.** 2001).

4. **Technical Violations of the ADA:** *Griffin v. Steeltek, Inc.*, 261 F.3d 1026, 12 AD Cases 248 (**10th Cir.** 2001), affirmed the judgment for the ADA defendant, holding that a plaintiff who proves only a technical violation of the ADA, such as the employer's asking questions prior to a conditional job offer, but does not show personal injury, is not entitled to an award of compensatory or punitive damages or an award of attorneys' fees. The opinion surveyed the decisions of other Circuits.

D. **The Family and Medical Leave Act:** *Ragsdale v. Wolverine World Wide, Inc.*, 535 **U.S. __**, 2002 WL 416011, 7 Wage & Hour Cas.2d (BNA) 1153 (2002), struck down, as inconsistent with the FMLA, 29 C.F.R. § 825.700(a). This Labor Department regulation required employers to notify employees in writing when employees' medical leave is counted against the statutorily required 12 weeks of leave, on pain of not being able to treat the medical leave as FMLA leave. The defendant granted plaintiff 30 weeks of leave in 1996 without notifying the plaintiff that it considered 12 weeks of this leave as FMLA leave, refused to grant additional leave, and fired the plaintiff when she did not return to work. The plaintiff sued, contending that the employer's failure to abide by the regulation entitled her to 12 additional weeks of leave. The Court held the regulation invalid because the penalty is not connected to any prejudice suffered by the person taking leave.

E. **Fair Credit Reporting Act:** Some courts have held that law firms performing outside investigations of employee misconduct are not outside agencies subject to the restrictions

on investigative consumer reports. *Hartman v. Lisle Park District*, 158 F. Supp. 2d 869, 876 (**N.D. Ill.** 2001); *Friend v. Ancillia Systems Inc.*, 68 F.Supp.2d 969, 974 (**N.D. Ill.** 1999). An investigator who relied on information provided by employees and on his own knowledge, but not on information provided by third parties, was held to be outside the coverage of the FCRA. *Johnson v. Federal Express Corp.*, 147 F. Supp. 2d 1268, 1274–75 (**M.D. Ala.** 2001).

F. **Massachusetts Supreme Judicial Court Strikes Down Extreme Interpretation of Ethics Rules Barring Plaintiffs' Counsel from Communicating with Any Employees Without Consent of the Employer's Counsel:** On March 20, 2002,the Supreme Judicial Court of Massachusetts rejected this extraordinary interpretation of Rule 4.2, and reversed a $94,418.14 sanction against plaintiff's counsel. *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College*, 436 Mass. 347, 2002 WL 415540 (**Mass.** 2002). Describing the new standard, the court stated: "This interpretation, when read in conjunction with the other two categories of the comment, would prohibit ex parte contact only with those employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation."

G. **ABA Amends Comment to Model Rule 4.2, to Delete the "Admission" Language:** In February 2002, the ABA House of Delegates substantially amended the comment to Model Rule 4.2 to strike the "admission" language that had led some courts to hold that plaintiffs' attorneys could not contact any current employees, and sometimes any former employees. The red-line, strike-out version of the new comment is as follows:

> ~~[4]~~ [7] In the case of ~~an~~ a represented organization, this Rule prohibits communications ~~by a lawyer for another person or entity concerning the matter in representation~~ with ~~persons having a managerial responsibility on behalf~~ a constituent of the organization~~, and with any other person~~ who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with ~~that~~ the matter may be imputed to the organization for purposes of civil or criminal liability ~~or whose statement may constitute an admission on the part of the organization~~. Consent of the organization's lawyer is not required for communication with a former constituent. If ~~an agent or employee~~ a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4, Comment [2].

IV. Theories and Proof

A. The Inferential Model

United States v. Arvizu, __ **U.S.** __, 122 S. Ct. 744 (2002), a Fourth Amendment case, follows *Reeves v. Sanderson Plumbing Products, Inc.*, 530 **U.S.** 133, 82 FEP Cases 1748, 78 E.P.D. ¶ 40,045 (2000). In both cases, the Court rejected the approach of some lower courts in segmenting evidence when a determination is supposed to be made in light of all the evidence.

In *Arvizu*, the Ninth Circuit considered in isolation each circumstance that led to the stop, and rejected it if the court could conceive of a possible innocent explanation. The same often occurs in appellate review of employment discrimination summary judgments. In *Arvizu*, the Court stated: "To the extent that a totality of the circumstances approach may render appellate review less circumscribed by precedent than otherwise, it is the nature of the totality rule." *Id.* at 752 (emphasis supplied). Bright-line tests of isolated factors, such as the "same actor" inference in some Circuits, the ten-year minimum age rule in the Seventh Circuit, the universal-and-exclusive approach to retaliation cases in the Seventh Circuit, and the like, have no place under *Arvizu*.

Zapata-Matos v. Reckitt & Colman, Inc., 277 F.3d 40, 47, 87 FEP Cases 1409 (**1st Cir.** 2002), affirmed the grant of summary judgment for the Title VII defendant. The court held that the "slight suggestion of pretext present here, absent other evidence from which discrimination can be inferred," cannot meet the plaintiff's burden. The court held—correctly, in my view—that the plaintiff's case was extremely weak and the defendant's evidence of nondiscrimination was very strong. It reasoned from this that summary judgment was appropriate under *Reeves*. *Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc.*, 273 F.3d 30, 34, 87 FEP Cases 673 (**1st Cir.** 2001), vacated the grant of summary judgment to the ADEA defendant. The court held that some undocumented criticisms of the demoted plaintiff's work performance were too general to be useful, such as "poor communications with the management."

Celestine v. Petroleos de Venezuella SA, 266 F.3d 343, 355–56, 86 FEP Cases 1462, 81 E.P.D. ¶ 40,799 (**5th Cir.** 2001), held that, although there were 206 individual plaintiffs, the court held that, in light of the earlier denial of class certification, the lower court did not abuse its discretion in barring the plaintiffs from proceeding with their claims on a pattern-and-practice basis and requiring them to proceed on an individual basis under the *McDonnell Douglas* model. This strikes me as deeply wrong, and inconsistent with *Swierkewicz*.

B. **Mixed Motives:** *Costa v. Desert Palace, Inc.*, 268 F.3d 882, 86 FEP Cases 1456, 81 E.P.D. ¶ 40,723 (**9th Cir.** 2001), reversed and vacated the judgment on a jury verdict for the plaintiff, holding that the lower court erred in giving a mixed-motives instruction. The court stated: "The use of terms such as 'direct' evidence should not be read as limiting the type of evidence a plaintiff such as Costa must present in order to receive a mixed-motive instruction. Rather, it is directed at the greater quantum of evidence required to establish a mixed-motive case." *Id.* at 888 n.3. The plaintiff relied on the fact that she received less overtime work than a man performing the same work, and was told that it was because he had a family to support, and she did not. The court held that this was not even actionable under Title VII.

C. **Actionable Discrimination**

1. **Denial of a Pay Increase Can Be Actionable:** *Fierros v. Texas Department of Health*, 274 F.3d 187, 192–94, 87 FEP Cases 503 (**5th Cir.** 2001), held that the denial of some pay increases is significant enough to be actionable, and rejected the defendant's argument that only cuts in pay are actionable: "As Fierros points out, in light of her annual salary of $20,924.97, the $57-per-month pay increase is not, as TDH claims, 'de minimis.' It is illogical to construe Title VII as prohibiting discriminatory decreases in pay, but permitting discriminatory denials of pay increases." *Id.* at 194.

2. **Proof of Harm is Important:** *Weeks v. New York State (Division of Parole)*, 273 F.3d 76, 85–87, 87 FEP Cases 161, 81 E.P.D. ¶ 40,822 (**2nd Cir.** 2001); *Patt v. Family Health Systems, Inc.*, 280 F.3d 749 (**7th Cir.** 2002); *Longstreet v. Illinois Department of Corrections*, 276 F.3d 379, 383–84, 87 FEP Cases 1375 (**7th Cir.** 2002).

3. **Combinations of Practices May Reach "Critical Mass" and Become Actionable:** *Markel v. Board of Regents of University of Wisconsin System*, 276 F.3d 906, 911–12, 87 FEP Cases 1131 (**7th Cir.** 2002), affirmed the grant of summary judgment to the Title VII defendant, holding that the plaintiff's complaints of denial of better equipment, the ability to travel and make presentations, and removal from some accounts that caused her to lose bonuses, were not independently actionable. "When combined with other actions, differences in office aesthetics between employees might aid the plaintiff in showing discriminatory treatment, however, standing alone they are not readily quantifiable losses Title VII was meant to redress." *Id.* at 912 (citations omitted).

D. **Retaliation:** *Stone v. Indianapolis Public Utilities Division*, 281 F.3d 640, 644, 88 FEP Cases 162 (7th Cir. 2002) (Posner, J.), announced a new rule governing retaliation plaintiffs' ability to survive summary judgment in situations in which the plaintiff does not have direct evidence of retaliation: the conduct complained of cannot have affected any employee who did not file a charge, and some evidence of causation, other than mere temporal proximity, is generally enough to get to the jury. The court's formulation is far too broad and vastly outstrips its citations. *Pipkins v. City of Temple Terrace*, 267 F.3d 1197, 1201, 86 FEP Cases 1413, 81 E.P.D. ¶ 40,820 (**11th Cir.** 2001), affirmed the grant of summary judgment to the Title VII retaliation defendant. The court held that the plaintiff could not show a causal link between her poor performance evaluations and her complaints of harassment because the earlier poor evaluations preceded any protected activity, and her later poor evaluations were accompanied by "well-documented job performance deficiencies." (Footnote omitted.)

E. **Disparate Impact Can Mask Intentional Discrimination:** *Sledge v. Goodyear Dunlop Tires North America, Ltd.*, 275 F.3d 1014, 87 FEP Cases 823, 81 E.P.D. ¶ 40,828 (**11th Cir.** 2001) (*per curiam*), reversed the grant of summary judgment to the Title VII and § 1981 racial discrimination defendant and held that a reasonable jury could find that the black plaintiff was qualified to be a maintenance mechanic and that the company's examinations for mechanic "were nothing more than a pretext for racial discrimination." *Id.* at 1019.

F. **Reductions in Force:** *Windham v. Time Warner, Inc.*, 275 F.3d 179, 190, 87 FEP Cases 843 (**2nd Cir.** 2001), vacated the grant of summary judgment to the Title VII racial-discrimination RIF defendant because the lower court failed analyze the evidence in light of plaintiffs' theory. Plaintiffs did not argue that the defendant made a bad decision by choosing to terminate three black employees in a RIF, but argued that the decisionmaker did not consider white employees for the RIF, by exercising discretion to assign white employees duties taking them out of the risk of the RIF.

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

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

H. Harassment

1. **Actionable Conduct:** A single episode of profane language is not actionable. *Stewart v. Evans*, 275 F.3d 1126, 87 FEP Cases 1298 (**D.C. Cir.** 2002). Mere rudeness is not actionable. *Patton v. Indianapolis Public School Board*, 276 F.3d 334, 339, 87 FEP Cases 1433 (**7th Cir.** 2002) (in addition, the plaintiff's contention that the treatment was "purely personal" doomed her claim); *Bennington v. Caterpillar Inc.*, 275 F.3d 654, 660, 87 FEP Cases 1050 (**7th Cir.** 2001). Conduct that is sexual in form, but motivated by a nonsexual grudge, is not actionable. *Davis v. Coastal International Security, Inc.*, 275 F.3d 1119, 87 FEP Cases 1263 (**D.C. Cir.** 2002). There is no actionable conduct if the plaintiff was not bothered by the incidents. *Newman v. Federal Express Corp.*, 266 F.3d 401, 86 FEP Cases 1375 (**6th Cir.** 2001).

2. **The Eleventh Circuit Exception for Upsetting Conduct in the Common Aftermath of Consensual Relationships:** *Pipkins v. City of Temple Terrace*, 267 F.3d 1197, 1199–1201, 86 FEP Cases 1413, 81 E.P.D. ¶ 40,820 (**11th Cir.** 2001) ("Applying *Oncale*, this court has distinguished between actions based on discriminatory animus and those based on personal animosity resulting from failed consensual relationships.") (*quid pro quo* situation in which actions were taken by a third party against the plaintiff in order to please the wife of the plaintiff's former lover); *Succar v. Dade County School Bd.*, 229 F.3d 1343, 1345 (**11th Cir.** 2000) (hostile environment). The court held that there are limits to the exception.

3. **Examples of Actionable Conduct:** There can be actionable conduct even if the conduct is neutral in form but motivated by a discriminatory reason. *Cardenas v. Massey*, 269 F.3d 251, 261–62, 87 FEP Cases 19 (**3rd Cir.** 2001) (performance evaluations with a practice of rounding up the evaluations of non-Hispanic employees and rounding down the evaluations of Hispanic employees, and the practice of assigning all minority employees to the one unit headed by a minority manager). Conduct can be actionable if one gender is the primary, but not exclusive, target. *Beard v. Flying J, Inc.*, 266 F.3d 792, 798, 87 FEP Cases 1836 (**8th Cir.** 2001). Hotel rooms can sometimes be part of a working environment. *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 135, 87 FEP Cases 899 (**2nd Cir.** 2001). Even one act of harassment can be actionable if it is sufficiently egregious. *Worth v. Tyer*, 276 F.3d 249, 268, 87 FEP Cases 994 (**7th Cir.** 2001).

4. **Racial or Ethnic Slurs:** Frequently repeated racial slurs are actionable even if the plaintiff for independent reasons has a social relationship with his chief harasser. *Swinton v. Potomac Corp.*, 270 F.3d 794, 87 FEP Cases 65 (**9th Cir.** 2001). Racial and ethinc slurs are actionable even if they occurred only a few minutes before and after the start of each shift over a period of only three weeks. *McCowan v. All Star Maintenance, Inc.*, 273 F.3d 917, 87 FEP Cases 596 (**10th Cir.** 2001). Ethnic slurs shouted angrily three or four times a day over a period of a month, often in the course of reprimanding the plaintiff, with lesser harassment over a period of three months, were sufficiently severe and pervasive to be actionable. *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 87 FEP Cases 1209 (**11th Cir.** 2002).

5. **Who is a Supervisor?** *Hall v. Bodine Electric Co.*, 276 F.3d 345, 355, 87 FEP Cases 1240 (**7th Cir.** 2002) (not enough merely to oversee aspects of plaintiff's work performance; one must have "the authority to *directly* affect the terms and conditions of a victim's employment." (Emphasis in original; citations omitted.); *Swinton v. Potomac Corp.*, 270 F.3d 794, 803, 87 FEP Cases 65 (**9th Cir.** 2001) (a company supervisor who was the chief racial harasser of the plaintiff, was not a supervisor within the meaning of *Faragher* and *Ellerth* because he was not the plaintiff's supervisor). For purposes of the negligence theory, *Swinton* held that "an employee is a member of management if a 'supervisor[ ] possessing substantial authority and discretion to make decisions concerning the terms of the harasser's or harassee's employment,' such as 'authority to counsel, investigate, suspend, or fire the accused harasser, or to change the conditions of the harassee's employment.' . . . Second, a supervisor who lacks such authority is nonetheless classified as 'management' if he 'has an official or strong de facto duty to act as a conduit to management for complaints about work conditions.'" (Citations omitted.)

6. **Tangible Employment Actions:** A constructive discharge might be a tangible employment action. *Cardenas v. Massey*, 269 F.3d 251, 266–67 & n.10, 87 FEP Cases 19 (**3rd Cir.** 2001) (assumed without deciding); *Jackson v. Arkansas Department of Education*, 272 F.3d 1020, 1026–27, 87 FEP Cases 888 (**8th Cir.** 2001) (*dictum*).

7. **Harassment by Persons Other than Supervisors:** *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 136–37, 87 FEP Cases 899 (**2nd Cir.** 2001). The employer's notice or knowledge of the harassment is an essential element of its liability. *Hall v. Bodine Electric Co.*, 276 F.3d 345, 356, 87 FEP Cases 1240 (**7th Cir.** 2002)("Title VII neither requires nor expects the management of a company to be aware of every impropriety committed by every low-level employee.") (citation omitted); *Swenson v. Potter*, 271 F.3d 1184, 1192, 87 FEP Cases 620, 81 E.P.D. ¶ 40,821 (**9th Cir.** 2001).

8. **Adequacy of a Complaint, and Reasons for Not Complaining Earlier:** "Magic words" are not required in a complaint if the meaning is reasonably clear. *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 359, 87 FEP Cases 456, 81 E.P.D. ¶ 40,800 (**2nd Cir.** 2001). A plaintiff may be excused for not complaining earlier where the delay was not caused by mere fear of retaliation, but by the harasser's threats of retaliation and assertions of ability to influence the outcome of any action the University might take. *Mota v. University of Texas Houston Health Science Center*, 261 F.3d 512, 525–26, 86 FEP Cases 1140, 81 E.P.D. ¶ 40,728 (**5th Cir.** 2001). If the employer designated a channel for making harassment complaints, complainants can normally be expected to use it. "If a point person has not been identified, or is not easily accessible, 'an employer can receive notice of harassment from a 'department head' or someone that 'the complainant *reasonably believed*" was authorized to receive and forward (or respond to a complaint of harassment.'" *Hall v. Bodine Electric Co.*, 276 F.3d 345, 356, 87 FEP Cases 1240 (**7th Cir.** 2002). A plaintiff will lose where she makes only ineffective personal efforts to stop the harassment, and does not use the procedures available for handling complaints. *Gawley v. Indiana University*, 276 F.3d 301, 311–12, 87 FEP Cases 1116 (**7th Cir.** 2001).

9. **How Many Times Must a Complainant Complain?** A plaintiff may lose if she does not make a supplemental complaint after the failure of reasonable corrective action, to report that the harasser has resumed the harassment. *Woods v. Delta Beverage Group, Inc.*, 274 F.3d 295, 87 FEP Cases 737, 81 E.P.D. ¶ 40,833 (**5th Cir.** 2001).

10. **Actual or Constructive Notice of the Harassment:** *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1278–79, 87 FEP Cases 1209 (**11th Cir.** 2002).

11. **Adequacy of the Policy:** *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1279–80, 87 FEP Cases 1209 (**11th Cir.** 2002), affirmed the jury verdict for the plaintiff, holding that the defendant's harassment policy did not provide it with a defense because it was simply a document new employees had to sign, managers were unfamiliar with it, and supervisors did not step in to stop harassment of which they were aware.

12. **Adequacy of Corrective Action:** *Mota v. University of Texas Houston Health Science Center*, 261 F.3d 512, 525, 86 FEP Cases 1140, 81 E.P.D. ¶ 40,728 (**5th Cir.** 2001), affirmed the judgment for the plaintiff on his same-sex sexual harassment claims, holding that a jury could reasonably find the defendant's corrective actions inadequate because the investigating body did not make a finding of harassment, did not discipline the harasser, took no step more affirmative than directing that the plaintiff and his harasser work out an accommodation, and did not even issue a reprimand or warning. "Finally, the University's retaliation against Mota undermines its claim that it was attempting to prevent future harassment." *EEOC v. Indiana Bell Telephone Co.*, 256 F.3d 516, 521–26, 86 FEP Cases 1, 80 E.P.D. ¶ 40,590 (**7th Cir.** 2001) (*en banc*), affirmed the judgment of liability for sexual harassment, holding that the employer's asserted reason for not taking effective action against the alleged harasser—that he would file a grievance under the collective bargaining agreement and be reinstated—was irrelevant on liability even though it was relevant to punitive damages. *Jackson v. Arkansas Department of Education*, 272 F.3d 1020, 1025–26, 87 FEP Cases 888 (**8th Cir.** 2001), affirmed the grant of summary judgment to the defendant, because the employer responded adequately even though its findings were initially inconclusive. *Beard v. Flying J, Inc.*, 266 F.3d 792, 799–800, 87 FEP Cases 1836 (**8th Cir.** 2001), rejected the company's argument that it was entitled to the affirmative defense because it conducted an incomplete investigation, and took no corrective action even when it believed the allegations of harassment. *Swenson v. Potter*, 271 F.3d 1184, 1192, 87 FEP Cases 620, 81 E.P.D. ¶ 40,821 (**9th Cir.** 2001), held that there are two types of corrective action. "The first consists of the temporary steps the employer takes to deal with the situation while it determines whether the complaint is justified. The second consists of the permanent remedial steps the employer takes once it has completed its investigation." (Citations omitted.) The court held that the defendant's moving the harasser to minimize his contact with the plaintiff was adequate.

13. **Failure to Mitigate:** *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 137, 87 FEP Cases 899 (**2nd Cir.** 2001) "We do not rule out, however, that Ferris may be chargeable with partial, or even full, responsibility for this later injury or its duration by reason of her failure to mitigate her damages when she delayed reporting the event to Delta and naming her assailant.").

V. Litigation

A. **Administrative Exhaustion:** *Edelman v. Lynchburg College*, __ **U.S.** __, 122 S. Ct. 1145, 88 FEP Cases 321 (2002), upheld the EEOC regulation, 29 CFR §1601.12(b) (1997), allowing an unverified charge to be filed if it is later verified while the charge is before the agency, even if the verification is after the expiration of the charge-filing period, and providing

that the verification relates back to the original filing of the charge. However, Part III of the opinion raised a new question. It stated that there was some factual support in the record for the proposition that Edelman's unverified letter might not be a charge because it was not treated by Edelman or the EEOC as a charge, and that this question was open on remand.

B. **Pleading:** *Swierkiewicz v. Sorema N.A.*, __ **U.S.** __ , 122 S. Ct. 992, 88 FEP Cases 1 (2002) (Thomas, J.), unanimously rejected the requirements of the Second and Sixth Circuits that employment-discrimination plaintiffs plead facts sufficient to constitute a *prima facie* case, on pain of dismissal. "The prima facie case under *McDonnell Douglas* . . . is an evidentiary standard, not a pleading requirement." The Court pointed out that discovery may produce direct evidence of discrimination, enabling a plaintiff to escape the *McDonnell Douglas* approach entirely, and added: "Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases."

C. **Supplemental Jurisdiction:** *Raygor v. Regents of the University of Minnesota*, __ **U.S.** __, 122 S. Ct. 999, 88 FEP Cases 6 (2002), held that the savings provision of 28 U.S.C. § 1367(d) does not apply to State-law claims brought against a State agency in Federal court under the court's supplemental jurisdiction where the State agency is entitled to Eleventh Amendment immunity.

D. **Arbitration:** *EEOC v. Waffle House, Inc.*, __ **U.S.** __, 122 S. Ct. 754, 12 AD Cases 1001 (2002), held that the EEOC is not bound by a charging party's agreement to arbitrate his claims against his employer. There are a myriad of potential complications in implementing the decision. *Circuit City Stores, Inc. v. Adams*, 532 **U.S.** 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234, 85 FEP Cases 266, 17 IER Cases 545, 79 E.P.D. ¶ 40,401 (2001), held that the exception for contracts of employment in § 1 of the Federal Arbitration Act, 9 U.S.C. § 1, is limited to persons who directly move goods in interstate or foreign commerce, *i.e.*, that it is a "schlepper" provision. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 87 FEP Cases 1509 (**9th Cir.** 2002), on remand from the Supreme Court, held that Circuit City's arbitration provisions were unenforceable because procedurally and substantively unconscionable.

E. **Continuing Violations:** In *National R.R. Passenger Corp. v. Morgan* (No. 00-1614), the Supreme Court will decide the existence and scope of the continuing violation doctrine under Title VII. The Solicitor General took an extreme pro-employer position.

VI. Remedies

A. **Undocumented Aliens:** *Hoffman Plastics Compounds, Inc. v. N.L.R.B.*, __ **U.S.** __, 2002 WL 459438, 169 L.R.R.M. (BNA) 2769 (U.S., March 27, 2002), reversed the Board's grant of back pay to Jose Castro, an undocumented alien who had never been authorized to work in the United States, because this ran contrary to the policies of IRCA.

B. **The "Lost Chance" Means of Calculating Back Pay:** *Bishop v. Gainer*, 272 F.3d 1009, 1016–17, 87 FEP Cases 920 (**7th Cir.** 2001), affirmed the calculation of back pay

based on the “lost chance” method described hypothetically in *Doll v. Brown*, 75 F.3d 1200, 5 AD Cases 369 (**7th Cir.** 1996).