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Employment Discrimination Law Update
by
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I. The Statistics: 20,955 new EEO Cases were filed in Federal district courts in the twelve months ending Sept. 30, 2002. This is one out of every 11.4 civil cases, and one out of every 9.0 Federal-question civil cases. There was almost a 10% increase in civil filings, but a slight decline in EEO filings, over 2001. 719 Federal-question employment appeals were decided after oral argument. As always, EEO cases were likelier than other Federal-question cases to get to oral argument. The Seventh and Eighth Circuits alone account for 33.6% of all published decisions in the courts of appeals.

II. The Government

A. The Civil Rights Tax Relief Act has been re-introduced as H.R. 1155 and S. 557. The Senate bill is retroactive to Jan. 1, 2001, and the House bill is retroactive to Jan. 1, 2003.

B. Federal courts continue to restrict confidentiality orders. *See, e.g., Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943 (**7th Cir.** 1999).

C. If all goes well, on December 1, 2003, amendments to Rules 23 (class actions) and 51 (instructions) will go into effect. They can be downloaded from the web site http://www.uscourts.gov/rules/jc0902.html maintained by the Administrative Office of the U.S. Courts.

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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.

D. With the posting of more and more court filings on the web, concerns over privacy are increasing. The U.S. Judicial Conference has recommended that personal identifiers such as the first five digits of Social Security Numbers, dates of birth, financial account numbers, and names of minor children be partially redacted for purposes of imaging documents to be made available over the Internet and in hard-copy court files. The recommendations can be downloaded from http://www.uscourts.gov/Press_Releases/jc901a.pdf.

E. The EEOC is closing offices and going to a national call center model for taking charges, pursuant to recommendations from a contractor. See its web site at www.eeoc.gov.

III. The Constitution, Statutes, and Rules

A. **Affirmative Action:** The Supreme Court will re-visit affirmative action in the University of Michigan college and law school affirmative-action cases, *Grutter v. Bollinger* (No. 02–241) and *Grantz v. Bollinger* (No. 02–516).

B. **The Tenth Amendment:** The Supreme Court will decide in *Jinks v. Richland County*, No. 02–0258, whether Congress can suspend a State statute of limitations in the supplemental jurisdiction savings statute.

C. **The Eleventh Amendment:**

1. **FMLA:** The Supreme Court will decide in *Hibbs v. Department of Human Resources* (No. 01–1368), whether the Eleventh Amendment bars private suits for monetary relief against State agencies under the FMLA.

2. **ADA Title II:** The Supreme Court may decide in *Hason v. Medical Board of California* (No. 02–479), whether the Eleventh Amendment bars a Title II ADA monetary claim against a State agency. Petitioner moved on March 3, 2003, to withdraw the petition. Respondent has objected, and the Court will decided whether to keep the case.

D. **Title VII**

1. **Coverage in a Partnership:** The Supreme Court will decide in *Clackamas Gastroenterology v. Wells*, 01–1435, whether a physician/shareholder performing services for defendant should be counted towards Title VII's 15-employee coverage requirement.

2. **Title VII Coverage Based on Adding Foreign Employees Working Abroad to U.S. Employees, to Meet the 15-Employee Requirement:** *Kang v. U. Lim America, Inc.*, 296 F.3d 810, 814–17, 89 FEP Cases 566 (**9th Cir.** 2002), held that defendant's Mexican employees at a Mexican plant must be counted for purposes of determining Title VII coverage even though they were not themselves covered by Title VII, because plaintiff showed (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control.

3. **Mixed Motives:** The Supreme Court will decide in *Desert Palace, Inc. v. Costa*, No. 02-0679, whether plaintiffs have to show "direct evidence" of discrimination in order to qualify for mixed-motives analysis.

4. **National Origin vs. Racial Discrimination:** *Vasquez v. County of Los Angeles*, 307 F.3d 884, 892 n.24, 89 FEP Cases 1705 (**9th Cir.** 2002), held that anti-Hispanic bias presents a claim of racial discrimination, not national origin discrimination.

5. **Religious Exemption and Ministerial Exception:** *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 91 FEP Cases 183, (**7th Cir.** 2003), held that the position of Hispanic Communications Manager was exempt from Title VII under the "ministerial exception" to coverage.

6. **Religious Discrimination:** *Mandell v. County of Suffolk*, 316 F.3d 368, 90 FEP Cases 1328 (**2d Cir.** 2003), held that Title VII covers bias against everyone not part of a favored religion, and that plaintiff did not need to show that his religion was a specific target.

E. **Use of 42 U.S.C. § 1981 Against State or Local Agency Officials:** *Felton v. Polles*, 315 F.3d 470, 481–83, 90 FEP Cases 812 (**5th Cir.** 2002), held in part that a supervisor in a State agency cannot be liable for damages in his or her individual capacity if sued for racial discrimination under § 1981, unless he or she has also been sued under § 1983.

F. **"Substantial" Age Differences Under the ADEA:** *EEOC v. Bd. of Regents of University of Wisconsin System*, 288 F.3d 296, 302, 88 FEP Cases 1133 (**7th Cir.** 2002), affirmed judgment for the EEOC, including relief for persons less than ten years older than the favored employees. The line was not inflexible, and other evidence showed age discrimination.

G. **Americans with Disabilities Act**

1. **Rehire of Recovered Substance Abusers:** *Raytheon Co. v. Hernandez* (No. 02–749), will decide whether an employer policy of not rehiring employees fired for misconduct violates the ADA when it is applied to bar the rehire of a worker fired for drug use, who before applying for rehire had successfully completed a treatment program.

2. **Damages for Failure to Accommodate:** *Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565, 569, 13 AD Cases 1345 (**3rd Cir.** 2002), affirmed the award of $2.3 million in compensatory and punitive damages to the plaintiff, who suffered from multiple sclerosis and was repeatedly denied a reasonable accommodation.

H. **Removal of FLSA Cases from State Court to Federal Court.** The Supreme Court will decide in *Breuer v. Jim's Concrete of Brevard*, No. 02–0337, whether the FLSA language stating that FLSA cases "may be maintained" in State or Federal courts of competent jurisdiction, expresses the intent of Congress that such cases not be removed.

I. **The Family and Medical Leave Act**

1. **Ability to Use Vacation Leave to Become FMLA-Qualified:** *Ruder v. Maine General Medical Center*, 204 F.Supp.2d 16, 18–20, 7 WH Cases 2d 1441 (**D. Me.** 2002).

2. **Consequences of Rejecting FMLA Leave:** *Sanders v. May Department Stores Co.*, 315 F.3d 940, 944, 8 WH Cases 2d 577 (**8th Cir.** 2003), affirmed judgment on a jury verdict for the defendant. Plaintiff told her employer she wanted to resign but take time off in advance for a medical condition. She did not request FMLA leave because she would have had to reveal she was undergoing sex-change surgery and wanted to keep it confidential. Defendant suggested the possibility of FMLA leave to her, but she rejected it.

IV. The Inferential Model

A. The Supreme Court

1. *United States v. Arvizu*, 534 **U.S.** 266, 122 S. Ct. 744 (2002), a Fourth Amendment case, follows *Reeves v. Sanderson Plumbing Products, Inc.*, 530 **U.S.** 133, 82 FEP Cases 1748 (2000). In both cases, the Court rejected segmenting evidence when a determination is supposed to be made in light of all the evidence.

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

> Of more importance, the defense presented evidence that the District Attorney's Office had adopted a formal policy to exclude minorities from jury service. A 1963 circular by the District Attorney's Office instructed its prosecutors to exercise peremptory strikes against minorities: "'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'" App. 710. A manual entitled "Jury Selection in a Criminal Case" was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller-El's trial. *Id.*, at 749, 774, 783.
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> The court also relied on other old evidence of biased statements and practices, including testimony about biased juror-selection practices going back to the late 1950s and an ongoing systematic policy of discrimination in juror selection from 1976 to 1978.

B. **Theories and Proof**

1. **Setting Up the Plaintiff for Failure:** *Herrnreiter v. Chicago Housing Authority*, 315 F.3d 742, 746–47, 90 FEP Cases 801 (**7th Cir.** 2002), affirmed summary judgment. The court held that plaintiff's theory—"that he was 'set up' by Odom to fail by being given tasks that he could not be expected to complete within the prescribed deadlines and then being fired when he failed to make them—"is a perfectly good theory of discrimination" except that the facts did not bear it out.

2. **The Right Focus in a RIF Case:** *Kinsella v. Rumsfeld*, 320 F.3d 309, 14 AD Cases 4 (**2nd Cir.** 2003), reversed summary judgment to the Rehabilitation Act termination defendant, holding that plaintiff had shown enough for a reasonable jury to find that, although the RIF was bona fide, it was used as an opportunity to remove plaintiff because of his disability.

3. **New RIF Prima Facie Case Standard:** *Corti v. Storage Technology Corp.*, 304 F.3d 336, 340 n.6, 89 FEP Cases 1477 (**4th Cir.** 2002), affirmed judgment on a jury verdict for plaintiff, in the amount of $410,974.63 in back pay and prejudgment interest, and $100,000 in punitive damages. The court stated: "To establish a prima facie case for gender discrimination in a reduction in force (RIF) context, a plaintiff must show that 1) she was protected under Title VII, 2) she was selected from a larger group of candidates, 3) she was performing at a level substantially equivalent to the lowest level of that in the group retained, and 4) the process of selection produced a residual work force that contained some unprotected persons who were performing at a level lower than that at which the plaintiff was performing."

C. **Approaches to Proving Pretext:** *Johnson v. The Kroger Co.*, 319 F.3d 858, 866, 91 FEP Cases 145 (**6th Cir.** 2003), reversed the grant of summary judgment to the defendant. The court described the options available to a plaintiff seeking to show pretext:

> A plaintiff can refute the legitimate, nondiscriminatory reason articulated by an employer to justify an adverse employment action "by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." . . . Regardless of which option is used, the plaintiff retains the ultimate burden of producing "sufficient evidence from which the jury could reasonably reject [the defendants'] explanation and infer that the defendants intentionally discriminated against him." . . .

D. **Evidence that Clinches Matters:** *Salitros v. Chrysler Corp.*, 306 F.3d 562, 569–70, 13 AD Cases 1057 (**8th Cir.** 2002), affirmed the judgment for the ADA retaliation plaintiff and found that plaintiff had shown adequate evidence of pretext in the defendant's explanation that it fired the plaintiff because he had provided effective notice, but not formally adequate notice, of a temporary absence from work, where the decisionmaker had told other employees: "I want to teach Gerry a lesson."

E. **Same-Actor Inference:** *Wexler v. White's Furniture*, 317 F.3d 564, 572–74, 90 FEP Cases 1551 (**6th Cir.** 2003) (*en banc*), reversed the grant of summary judgment to the ADEA defendant. The court distinguished its prior case, *Buhrmaster v. Overnite Transp.*, 61 F.3d 461 (**6th Cir.** 1995), *cert. denied*, 516 **U.S.** 1078 (1996), and held that the same-actor

inference is an item of evidence like any other and not entitled to dispositive weight. "We therefore reject the idea that a mandatory inference must be applied in favor of a summary-judgment movant whenever the claimant has been hired and fired by the same individual." *Id.* at 573. The court held that a defendant's invocation of the same-actor principle "is insufficient to warrant summary judgment for the defendant if the employee has otherwise raised a genuine issue of material fact." *Id.* at 573–74. Judges Krupansky and Boggs dissented. *Id.* at 578–97.

F. **"Business Judgment":** *Wexler v. White's Furniture*, 317 F.3d 564, 576–78, 90 FEP Cases 1551 (**6th Cir.** 2003) (*en banc*), reversed the grant of summary judgment to the ADEA defendant. The court held that the lower court paid unwarranted deference to the defendant's business judgment in blaming plaintiff for the store's low sales. The court held: "A plaintiff can refute the legitimate, nondiscriminatory reason that an employer offers to justify an adverse employment action 'by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct.'" *Id.* at 576. Judges Krupansky and Boggs dissented. *Id.* at 578–97.

G. **References to Stereotypes:** *Wexler v. White's Furniture*, 317 F.3d 564, 571–72, 90 FEP Cases 1551 (**6th Cir.** 2003) (*en banc*), reversed the grant of summary judgment to the ADEA defendant. The court held that mixed-motives analysis is proper: "Criticism of an employee's performance, even if true, which is linked to stereotypes associated with a plaintiff's membership in a protected class is therefore squarely within the rubric of a mixed-motive analysis. . . . The association of these stigmatizing beliefs with an adverse employment decision creates a genuine issue of material fact as to whether the employer was motivated, at least in part, by discriminatory intent based on those stereotypes." (Citation omitted.) Judges Krupansky and Boggs dissented. *Id.* at 578–97.

H. **Objective Standard for Determining Adverse Employment Action:** *Herrnreiter v. Chicago Housing Authority*, 315 F.3d 742, 744–45, 90 FEP Cases 801 (**7th Cir.** 2002); *Vasquez v. County of Los Angeles*, 307 F.3d 884, 891, 89 FEP Cases 1705 (**9th Cir.** 2002). *Coszalter v. City of Salem*, 320 F.3d 968, 19 IER Cases 1114 (**9th Cir.** 2003), reversed the grant of summary judgment to the First Amendment retaliation defendants, holding that "an adverse employment action is an act that is reasonably likely to deter employees from engaging in constitutionally protected speech."

I. **Internal Complaints Are Protected:** *Treglia v. Town of Manlius*, 313 F.3d 713, 719, 13 AD Cases 1537 (**2d Cir.** 2002).

J. **Plaintiff is Protected Even When Reasonable Internal Complaint Was Based on Hearsay from Co-Workers:** *Fine v. Ryan International Airlines*, 305 F.3d 746, 752, 89 FEP Cases 1543 (**7th Cir.** 2002), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff. The court rejected defendant's argument that, because the plaintiff's discrimination claim did not survive summary judgment, she could not have had a good-faith belief her internal complaint was protected conduct. The court also held that plaintiff justifiably relied on statements from her co-workers: "(In everyday life, it is quite reasonable for people to rely on what they learn from their co-workers; the Federal Rules of Evidence do not govern the workplace.)" *Id.*

K. **Retaliation Involving Actions Other than Adverse Employment Actions:**

1. *Herrnreiter v. Chicago Housing Authority*, 315 F.3d 742, 745–46, 90 FEP Cases 801 (**7th Cir.** 2002). The court gave examples, such as filing false criminal charges against, or shooting, a charging party. It stated: that §704(a) does not contain limiting language like §703(a), and stated: "The provision regarding retaliation may intentionally be broader, since it is obvious that effective retaliation against employment discrimination need not take the form of a job action."

2. *Hernandez v. Crawford Bldg. Material Co.*, 321 F.3d 528, 91 FEP Cases 97 (**5th Cir.** 2003) (defendant's filing of counterclaim for theft against plaintiff not actionable retaliation under Title VII or the ADEA because not like ultimate employment actions such as "'hiring, granting leave, discharging, promoting, and compensating.'" (Citation omitted.) Judge Dennis concurred, but urged *en banc* reconsideration of the "ultimate employment decision" test.

L. **Informal Decisionmakers:** *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 189 , 13 AD Cases 1716 (**3rd Cir.** 2003) (lower court erred in refusing to consider evidence that a manager, Fungard, knew of the plaintiff's EEOC charge although he was assertedly not the decisionmaker, where he was in the decisionmaker's office when plaintiff was fired; this "presents circumstantial evidence that Fungard was involved in the decision to terminate Shellenberger." *Id.* at 187 (footnote omitted).

M. **Proof of Causation in Retaliation Cases, Because of Temporal Proximity Between the Protected Activity and the Adverse Action:** *Treglia v. Town of Manlius*, 313 F.3d 713, 720–21, 13 AD Cases 1537 (**2d Cir.** 2002) (temporal proximity between submission of a witness list and the adverse action); *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 189, 13 AD Cases 1716 (**3rd Cir.** 2003) (ten days); *Coszalter v. City of Salem*, 320 F.3d 968, 19 IER Cases 1114 (**9th Cir.** 2003) (three to eight months supports causation); *Vasquez v. County of Los Angeles*, 307 F.3d 884, 896, 89 FEP Cases 1705 (**9th Cir.** 2002) (thirteen months too long).

N. **Comparisons of Qualifications:** Since *Reeves*, comparisons still need to be fair, but rough similarity has often been regarded as sufficient. *Byrnie v. Town of Cromwell Bd. of Ed.*, 243 F.3d 93, 102–04 (**2d Cir.** 2001) (plaintiff had better paper credentials); *Pratt v. City of Houston*, 247 F.3d 601, 607 (**5th Cir.** 2001) (plaintiffs had better resumes); *Rutherford v. Harris County*, 197 F.3d 173, 182 n.9 (**5th Cir.** 1999) (differences in qualifications probative where defendant did not rely on qualifications); *Corti v. Storage Technology Corp.*, 304 F.3d 336, 338–89 *Durley v. APAC, Inc.*, 236 F.3d 651, 656–57 (**11th Cir.** 2000) (plaintiffs had better qualifications).

O. **Discriminatory Statements by Decisionmakers:** *Treglia v. Town of Manlius*, 313 F.3d 713, 13 AD Cases 1537 (**2d Cir.** 2002) (discussion of playing hardball in relation to a non-EEO grievance relevant to retaliation because it shows animus that a jury might find stemmed from an EEO complaint); *Corti v. Storage Technology Corp.*, 304 F.3d 336, 338–89, 89 FEP Cases 1477 (**4th Cir.** 2002) (decisionmaker did not work well with women, did not tell plaintiff about important meetings, told her he was not used to having women as equals, and when part of the team went to play golf, told plaintiff and another female employee "that they should go shopping because golf was a 'guy thing.'"); *Wexler v. White's Furniture*, 317 F.3d

564, 570–71, 90 FEP Cases 1551 (**6th Cir.** 2003) (*en banc*) (statements that 60-year-old plaintiff did not need the stress of continued work at his age, and decisionmaker's statement that plaintiff had made a similar statement, are both evidence of age bias if jury concluded that plaintiff did not so state).

P. **Discriminatory Statements by Informal Decisionmakers Are Probative:** *Johnson v. The Kroger Co.*, 319 F.3d 858, 91 FEP Cases 145 (**6th Cir.** 2003); *Juarez v. ACS Government Solutions Group, Inc.*, 314 F.3d 1243, 90 FEP Cases 1104 (**10th Cir.** 2003).

Q. **Discriminatory Statement by a Non-Decisionmaker Empowered to Explain Reason for Adverse Action Was Direct Evidence:** *EEOC v. Liberal R-II School District*, 314 F.3d 920, 924, 90 FEP Cases 1032 (**8th Cir.** 2002), held there was direct evidence of bias. The age-biased statements of Superintendent Gretlein, describing the bases on which the Board had decided not to renew plaintiff's contract as a bus driver, were direct evidence because "this case involves a nondecisionmaker who was closely involved in the decisionmaking process and who was directed to express the decision of the decisionmakers to the employee and to the Missouri Division of Employment Security."

R. **Lapse of Time Between the Biased Statement and the Action in Question:** See the discussion above as to *Miller-El v. Cockrell*, __ **U.S.** __, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003). *See also Johnson v. The Kroger Co.*, 319 F.3d 858, 91 FEP Cases 145 (**6th Cir.** 2003) (old racially biased remarks probative where coupled with testimony that declarant interacted with the plaintiff differently than with white employees.

S. **What is Racially Biased?** *Bowen v. Missouri Department of Social Services*, 311 F.3d 878, 884, 90 FEP Cases 782 (**8th Cir.** 2002) ("white bitch" is racially biased).

T. **Constructive Discharge:** *Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7, 28–29, 89 FEP Cases 1361 (**1st Cir.** 2002), reversed the jury's finding of retaliation, holding that plaintiff had not shown an adverse employment action, but affirmed its finding of constructive discharge based upon the same facts. The facts on which the court placed strongest emphasis were the defendant's failure to take action on plaintiff's repeated complaints, and its transfer of her to a work condition where she remained subject to her harasser's jeers.

V. Summary Judgment Evidence to Be Considered: *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 898, 90 FEP Cases 248 (**5th Cir.** 2002), *petition for cert. filed*, 71 USLW 3522 (**U.S.**, Jan. 27, 2003) (No. 02–1121), affirmed SJ, and stated:

> Appellant contends that *Reeves* requires us to disregard as interested witness testimony all testimony by managers involved in the employment decision. We disagree with Appellant's interpretation of *Reeves*, which would in effect eliminate his burden to show that Appellee's explanation is pretextual. The burden on Appellee to produce a legitimate nondiscriminatory reason for terminating Appellant is "one of production, not persuasion; it can involve no credibility assessment." . . . The definition of an interested witness cannot be so broad as to require us to disregard testimony from a company's agents regarding the company's reasons for discharging an employee. As the Seventh Circuit noted in *Traylor v. Brown, et al.*, 295 F.3d 783 (**7th Cir.** 2002), to so hold would

> foreclose the possibility of summary judgment for employers, who almost invariably must rely on testimony of their agents to explain why the disputed action was taken.

(Citations and footnote omitted.)

VI. Harassment

1. **Failure to Conduct a Reasonable Investigation, Failure and Respond to Earlier Complaints:** *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 475–76, 89 FEP Cases 1861 **(5th Cir.** 2002) (testimony of other employees relevant to show defendants were on notice).

2. **Drop in Performance Evaluations from "Excellent" to "Regular" Shows Plaintiff's Ability to Work Was Affected:** *Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7, 19, 89 FEP Cases 1361 (**1st Cir.** 2002).

3. **Plaintiffs Must Show Harassment Was Severe or Pervasive, Not Both:** *Quantock v. Shared Marketing Services, Inc.*, 312 F.3d 899, 904 n.2, 90 FEP Cases 883 (**7th Cir.** 2002); *Bowen v. Missouri Department of Social Services*, 311 F.3d 878, 884, 90 FEP Cases 782 (**8th Cir.** 2002).

4. **Racially Hostile Environment Without Hostility to the Affected Race:** *Kang v. U. Lim America, Inc.*, 296 F.3d 810, 817, 89 FEP Cases 566 (**9th Cir.** 2002).

5. **Failure to Complain About Subsequent Incidents Excused:** *Bowen v. Missouri Department of Social Services*, 311 F.3d 878, 884, 90 FEP Cases 782 (**8th Cir.** 2002) (reversed summary judgment where prompt earlier complaints did not help, and defendant told plaintiff it could no longer guarantee her personal safety).

VII. Timeliness

A. **Continuing Violations:** *National R.R. Passenger Corp. v. Morgan*, 536 **U.S.** 101, 122 S. Ct. 2061, 88 FEP Cases 1601 (2002); *Elmenayer v. ABF Freight System, Inc.*, 318 F.3d 130, 134–35, 90 FEP Cases 1393 (**2d Cir.** 2003) (failure to provide religious accommodation not a continuing violation); *Felton v. Polles*, 315 F.3d 470, 486, 90 FEP Cases 812 (**5th Cir.** 2002) (three-year break bars continuing violation theory); *McFarland v. Henderson*, 307 F.3d 402, 408–09, 90 FEP Cases 23 (**6th Cir.** 2002) (where plaintiff claimed harasser spread lies about her, her learning of another alleged lie during charge-filing period was enough for a continuing violation); *Jensen v. Henderson*, 315 F.3d 854, 90 FEP Cases 898 (**8th Cir.** 2002) (the required action within the charge-filing period need not be actionable in itself, and may only be something "*contributing to the claim.*" The court added that sexual harassment is a function of the nonresponse of the employer, not the underlying conduct of co-workers, and that a hostile environment can therefore continue after the last day of employment. *Id.* at 861.); *Boyler v. Cordant Technologies, Inc.*, 316 F.3d 1137, 90 FEP Cases 1249 (**10th Cir.** 2003) (plaintiff's claims of a racially and sexually hostile environment going back to 1982 were timely raised in her 1997 charge).

B. **Discovery Rule:** *Allen v. Chicago Transit Authority*, 317 F.3d 696, 698–99, 90 FEP Cases 1229 (**7th Cir.** 2003) (plaintiffs' time to file a charge with respect to the promotion of

two white employees in 1995 and 1997 did not begin until the selection of the second white employee in 1997, because it was not until then that plaintiffs had reason to suspect that racial discrimination may have been involved); *Wright v. AmSouth Bancorporation*, 320 F.3d 1198, 1201–02, 91 FEP Cases 41 (**11th Cir.** 2003) (vacated SJ; time does not begin to run when plaintiff formed a belief he would be fired, but only when he received "unequivocal notice"; "A 'final decision' that remains uncommunicated to the terminated employee has no impact on the statutory filing deadline." (citation omitted)).

C. **Oral Notice of Right to Sue:** *Ebbert v. DaimlerChrysler Corp.*, 319 F.3d 103, 13 AD Cases 1806 (**6th Cir.** 2003) (EEOC's oral notice to plaintiff of dismissal of EEOC charge can start the suit-filing period running when it conveys all necessary information; SJ reversed here because defendant did not show plaintiff was alerted that her 90-day period had begun).

VIII. Arbitration

A. **Agreements that Bound Employees:** *Tinder v. Pinkerton Security*, 305 F.3d 728, 735, 89 FEP Cases 1537 (**7th Cir.** 2002) (unsigned agreement binding where at-will plaintiff should reasonably have known of it, and kept working); *Riccard v. Prudential Insurance Co.*, 307 F.3d 1277, 1286 (**11th Cir.** 2002) (U–4 agreement binding where employer was member of NASD at time of dispute, even though no longer a member at time of suit); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 89 FEP Cases 1149 (**9th Cir.** 2002) (employee's right to opt out of arbitration agreement, even if not exercised, cures problems in the agreement).

B. **Agreements That Did Not or May Not Bind Employees:** *Murray v. United Food and Commercial Workers International Union*, 289 F.3d 297, 304, 88 FEP Cases 1185 (**2d Cir.** 2002) (agreement was unconscionable and unenforceable in part because it did not rely on external rules for the selection of arbitrators, defendant selected panel, and plaintiff had to chose from among defendant's picks; agreement also limited injunctive relief); *Brooks v. Travelers Insurance Co.*, 297 F.3d 167 (**2d Cir.** 2002) (limitations on length of hearing and limits on relief, shortening of limitations period, restrictions on fees, cost-splitting, etc.); *Nguyen v. City of Cleveland*, 312 F.3d 243, 19 IER Cases 618 (**6th Cir.** 2002) (signed agreement reciting receipt of the policy and rules not binding where employer failed to provide the policy and rules and there was a reasonable question whether the agreement covered terminations); *McCaskill v. SCI Management Corp.*, 298 F.3d 677, 680, 683–86, 89 FEP Cases 830 (**7th Cir.** 2002) (arbitration agreement barring fee awards in any situation is unenforceable); *EEOC v. Luce, Forward, Hamilton & Scripps*, 90 FEP Cases 1856, 2003 WL 282178 (**9th Cir.** Feb. 7, 2003) (granted rehearing *en banc* of panel decision that *Duffield* is no longer good law); *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778, 89 FEP Cases 706 (**9th Cir.** 2002) (limitations on discovery and other problems were part of an "insidious pattern"; in addition, agreement substantively unconscionable because it applied to claims that employees were likeliest to bring against employer, but not to claims employer likeliest to bring against employees).

C. **Stitches in Time? Employer Efforts to Dig Out of Holes:** *Murray v. United Food and Commercial Workers International Union*, 289 F.3d 297, 304–05, 88 FEP Cases 1185 (**2d Cir.** 2002) ("The arbitration agreement is unenforceable as written and Local 400 may not rewrite the arbitration clause and adhere to unwritten standards on a case-by-case basis in order

to claim that it is an acceptable one. *Cf. Perez v. Globe Airport Sec. Servs. Inc.*, 253 F.3d 1280, 1285-86 (**11th Cir.** 2001) (rejecting attempt to rewrite unenforceable arbitration clause in order to salvage it."); *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778, 89 FEP Cases 706 (**9th Cir.** 2002) (agreement not saved by defendant's unilateral announcement that it would pay arbitration-specific costs, because the company did not follow the procedure for making changes specified in its own agreement, and the announcement therefore could not be enforced).

D. **Conditions Precedent to Arbitration:** *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41 (**1st Cir.** 2003) (agreement stated that mediation was a condition precedent to arbitration, and defendant had not requested mediation); *Kemiron Atlantic, Inc. v. Aguakem International, Inc.*, 290 F.3d 1287 (**11th Cir.** 2002) (same).

E. **Use of Arbitration "Agreements" to Bar Class Actions:** By the convention, the Supreme Court will have decided *Green Tree Financial Corp. v. Bazzle* (No. 02–634).

F. **Retaliation / Discrimination Claims Arising from Imposed Arbitration:** *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1312, 88 FEP Cases 1482 (**11th Cir.** 2002) (employer's discharge of employees who refuse to sign lawful arbitration agreement not unlawful retaliation; "an unenforceable arbitration agreement does not amount to an unlawful employment practice under the federal employment discrimination laws." *Id.* at 1316.).

IX. Evidence

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

B. **Other Employees' Claims:** *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 475–76, 476 n.1, 89 FEP Cases 1861 **(5th Cir.** 2002) (reversed JMOL; held that 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); *Fine v. Ryan International Airlines*, 305 F.3d 746, 753–54, 89 FEP Cases 1543 (**7th Cir.** 2002) (proper to admit testimony of two other female employees on numerous instances of sexual harassment and discrimination because relevant to Ryan's good-faith belief that she was complaining of actionable sexual discrimination).

X. Back and Front Pay, and Reinstatement

A. **Ending Date:** *Salitros v. Chrysler Corp.*, 306 F.3d 562, 570, 13 AD Cases 1057 (**8th Cir.** 2002) (affirmed judgment for ADA retaliation plaintiff for $445,516 in front pay, "representing seven years worth of wages and benefits, up to September 8, 2007, Salitros's anticipated retirement date," because defendant responsible for plaintiff's inability to work); *Fine v. Ryan International Airlines*, 305 F.3d 746, 756, 89 FEP Cases 1543 (**7th Cir.** 2002) (stipulation that plaintiff's damages ended as of a specific pre-judgment date barred reinstatement).

B. **Application of *Hoffman Plastics* to Pay for Work Performed:** Some courts have held that *Hoffman Plastics* does not affect a plaintiff's right under FLSA or State wage and hour law to obtain back pay or overtime compensation for work actually performed, and/or have for this reason barred discovery into the plaintiff's immigration status. *Flores v. Amigon*, 233 F. Supp. 2d 462, 463–65 (**E.D. N.Y.** 2002); *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F.Supp.2d 191, 192–93 (**S.D. N.Y.** 2002); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056, 8 WH Cases 2d 165 (**N.D. Calif.** 2002).

XI. Compensatory and Punitive Damages

A. **Adequacy of Evidence to Support Large Compensatory Damage Award:** *Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565, 570–71, 13 AD Cases 1345 (**3rd Cir.** 2002), affirmed the judgment on a jury verdict for the ADA and Pennsylvania-law plaintiff in the amount of $450,000 in economic damages, and $1.55 million in compensatory damages for emotional distress. "Gagliardo produced evidence from her co-workers and family demonstrating the effects her problems with CLI had on her life. This testimony tied Gagliardo's pain and suffering to her early employment problems after she was diagnosed with MS and detailed their subsequent worsening effect on her life. The testimony demonstrated the effects of the mental trauma, transforming Gagliardo from a happy and confident person to one who was withdrawn and indecisive."

B. **Proof of Real Injury as Condition of Punitive Damages:** *Corti v. Storage Technology Corp.*, 304 F.3d 336, 341–43, 89 FEP Cases 1477 (**4th Cir.** 2002) (award of back pay adequately shows actual injury, supporting award); *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (**7th Cir.** 1998) (monetary award not essential for award of punitive damages under Civil Rights Act); *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 357 (**2d Cir.** 2001) (same); *Salitros v. Chrysler Corp.*, 306 F.3d 562, 569, 13 AD Cases 1057 (**8th Cir.** 2002) (front pay shows actual injury and supports punitive award).

C. **Conduct Justifying Punitive Award:** *Fine v. Ryan International Airlines*, 305 F.3d 746, 755, 89 FEP Cases 1543 (**7th Cir.** 2002) (cover-up by proffering pretextual explanation); *Juarez v. ACS Government Solutions Group, Inc.*, 314 F.3d 1243, 90 FEP Cases 1104 (**10th Cir.** 2003) (cover-up by knowingly proffering false explanation); *Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565, 570–71, 13 AD Cases 1345 (**3rd Cir.** 2002) (repeated refusal to provide reasonable ADA accommodation, with negative effects on plaintiff); *Salitros v. Chrysler Corp.*, 306 F.3d 562, 569, 13 AD Cases 1057 (**8th Cir.** 2002) (supervisor's announcement he was going to teach plaintiff a lesson while inventing a new work rule).

D. **Good-Faith Defense:** *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 477, 89 FEP Cases 1861 **(5th Cir.** 2002) (good-faith policy protected defendant from malicious or reckless actions of its agent).

E. **Amount:** *Fine v. Ryan International Airlines*, 305 F.3d 746, 755–56, 89 FEP Cases 1543 (**7th Cir.** 2002) (affirmed capped $300,000 judgment for compensatory and punitive damages, reduced from jury award of $6,000 in compensatory damages and $3.5 million in punitive damages, where "Ryan, having recently informed its female pilots to put complaints of sexual harassment and discrimination in writing, terminated Fine within 24 hours of its receipt of

her complaint on these subjects precisely because she had written the letter," and where "its general counsel and the president of the company both concurred in the decision."); *Juarez v. ACS Government Solutions Group, Inc.*, 314 F.3d 1243, 90 FEP Cases 1104 (**10th Cir.** 2003) (affirmed $22,500 in back pay and $250,000 in punitive damages for racial and national origin discrimination in a RIF); *Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565, 570–71, 13 AD Cases 1345 (**3rd Cir.** 2002) (affirmed allocation of all punitive damages to the ADA claim, its reduction to $300,000, and allocation of all $450,000 in economic damages, and all $1.55 million in compensatory damages for emotional distress, to the State-law claim).