American Trial Lawyers Association
2004 Annual Convention, Boston, Massachusetts
July 6, 2004

Employment Discrimination Law Update
by
Richard T. Seymour*

I. The Statistics: 20,972 new EEO Cases were filed in Federal district courts in the twelve months ending Dec. 31, 2003. This is one out of every 12.3 civil cases, and one out of every 8.2 Federal-question cases. 590 Federal-question EEO appeals were decided after oral argument. As always, EEO cases were likelier than other Federal-question cases to get to oral argument.

II. The Courts

Trials in civil and criminal cases are vanishing. According to the Administrative Office of the U.S. Courts, the average U.S. District Judge conducted just 19 trials from Oct. 1, 2002, through Sept. 30, 2003, down from 25 trials in FY 1998. That is for civil and criminal trials combined. Nineteen trials represent 4% of the average 476 matters terminated. These data were downloaded on February 23, 2004, from http://www.uscourts.gov/cgi-bin/cmsd2003.pl.

The Advisory Committee on the Civil Rules is considering whether to adopt special rules for electronic discovery. One of the items on business's wish list is a "safe harbor," in which defendants cannot be accused of spoliation, and no adverse inferences can be drawn, if they make computer data inaccessible or expensive to obtain, pursuant to their internal record retention policy. ATLA is opposed.

III. 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.

---

* Current information as of September 30, 2005: Law Office of Richard T. Seymour, P.L.L.C., 1150 Connecticut Avenue N.W., Suite 900, Washington, D.C. 20036-4129. Voice: 202-862-4320, Cell: 202-549-1454, Facsimile: 800-805-1065, e-mail: rick@rickseymourlaw.net. Web site: http://www.rickseymourlaw.com. This paper and other Continuing Legal Education papers can be downloaded from this site.

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.

B. The Class Action "Fairness" Act is now known as S. 2062. This bill would allow removal of most state-court class actions and mass tort cases filed after the date of enactment, without regard to jurisdictional amount and based on any diversity. Its provisions are too complex to explain here, but I can provide materials to anyone who e-mails me. It has been described as the top legislative priority for business in 2003 and 2004, and is opposed by a collation of over 70 national civil rights and consumer groups. As this is written, the bill is stalled in the Senate, while the Chamber of Commerce and the tech industry fight about whether the House should accept whatever comes out of the Senate, adhere to its more extreme version, or make its version even more extreme.

C. New Department of Labor FLSA Regulations: As this is written, the Department of Labor is trying to issue a final rule as quickly as possible, and some Senators on both sides of the aisle are trying to find a means of blocking it legislatively.

IV. The Constitution, Statutes, and Rules

A. First Amendment: Need to Specify the Protected Speech: *Foley v. University of Houston System*, 355 F.3d 333, 342, 92 FEP Cases 1839 (**5th Cir.** 2003), rejected plaintiff Hutto's First Amendment claim because she failed to specify the speech she contended was protected, thus depriving the court of the ability to consider its "content, context, and form."

B. Eleventh Amendment Immunity: *Martin v. Alamo Community College District*, 353 F.3d 409, 413–14, 15 AD Cases 160 (**5th Cir.** 2003), vacated the dismissal of plaintiff's ADA lawsuit and held that defendant waived its right to argue Eleventh Amendment immunity by briefing the question inadequately on appeal.

C. 42 U.S.C. § 1981

Does the four-year period of limitations in 28 U.S.C. § 1658 apply to § 1981 claims restored by the 1991 Act? The Supreme Court will decide this in *Jones v. R.R. Donnelley & Sons Co., cert. granted*, __ **U.S.** __, 123 S. Ct. 2074, 155 L. Ed. 2d 1059 (May 19, 2003) (No. 02–1205)

Foley v. University of Houston System, 355 F.3d 333, 339, 92 FEP Cases 1839 (**5th Cir.** 2003), held that § 1981(b) forbids retaliation for complaining about racial discrimination, including filing an EEOC charge. It also held that § 1981 allows a personal damages suit against individuals who effectively control a plaintiff's opportunity for promotion. *Id.* at 337–38. Among other activities, these individual defendants had been members of defendant's Tenure and Promotion Committee and had voted against plaintiff.

Walker v. Abbott Laboratories, 340 F.3d 471, 92 FEP Cases 769 (**7th Cir.** 2003), reversed the dismissal of plaintiff's § 1981 claim, holding that at-will employees have a contractual relationship with their employers sufficient to support a § 1981 racial discrimination claim as to promotions and pay. The court repudiated earlier dicta to the contrary.

D. Title VII

Weight Discrimination: *Taylor v. Small*, 350 F.3d 1286, 92 FEP Cases 1785, 15 AD Cases 25 (**D.C. Cir.** 2003), held that Title VII does not bar weight discrimination.

Ticking "Time Bomb" of the Year: *Clackamas Gastroenterology Associates, P. C. v. Wells*, __ **U.S.** __, 123 S. Ct. 1673, 155 L. Ed. 2d 615, 14 AD Cases 289 (2003). This opens the door to discrimination cases by some partners.

Employment Relationship: *EEOC v. Pacific Maritime Ass'n*, 351 F.3d 1270, 92 FEP Cases 1672 (**9th Cir.** 2003), held that although the defendant association of stevedoring companies was an employer, it could not be liable for the sexual harassment of the intervenor charging party unless it was also at least the intervenor's joint or indirect employer.

Religious Discrimination: *Peterson v. Hewlett Packard Co.*, 358 F.3d 599, 92 FEP Cases 1761 (**9th Cir.** Jan. 6, 2004), held that Title VII did not grant plaintiff the right to respond to defendant's diversity campaign by posting anti-gay religious texts near his cubicle, large enough to be read from the corridor, where he admitted the messages were intended to be hurtful to gay and lesbian employees, to confront them so they could repent and be saved.

E. Equal Pay Act: *Tenkku v. Normandy Bank*, 348 F.3d 737, 741, 92 FEP Cases 1509 (**8th Cir.** 2003), held that work is not "equal" where plaintiff assumed only part of her comparator's duties, or simply believed all Vice-Presidents should have the same duties.

F. ADEA

General Dynamics Land Systems, Inc. v. Cline, __ **U.S.** __, 2004 WL 329956, 93 FEP Cases 257 (Feb. 24, 2004), held that the ADEA does not protect relatively young employees in the protected class from discrimination in favor of older employees.

Smith v. City of Jackson, 351 F.3d 183, 187–95, 92 FEP Cases 1824 (**5th Cir.** 2003), *petition for cert. filed* (Feb. 11, 2004) (NO. 03–1160), held that disparate impact claims are not actionable under the ADEA.

Flannery v. Recording Industry Ass'n of America, 354 F.3d 632, 642–43, 93 FEP Cases 65 (**7th Cir.** 2004), held that the ADEA and ADA allow plaintiff to complain of the post-termination denial of promised consulting work because it had a nexus to his employment.

G. ADA and Rehabilitation Act

Work as a Major Life Activity: *Sullivan v. The Neiman Marcus Group, Inc.*, 358 F.3d 110, 115 (**1st Cir.** 2004), affirmed summary judgment on plaintiff's claim that his alcoholism affected the major life activity of working. The court discussed the difficulties of the claim:

> In our view, one of these difficulties poses a significant Catch-22 dilemma for an ADA claimant such as Sullivan. To be eligible for ADA protection, he must demonstrate that he is a "qualified individual" for the position at issue. . . . By demonstrating that his ability to work is substantially impaired, he may demonstrate that he is unqualified for the job and, therefore, excluded from ADA protection. If he does not introduce such evidence, however, he may fail to show that he was substantially impaired.

(Citations and footnote omitted). The court also held that there was no evidence that defendant regarded him as disabled from a class of jobs, or that defendant had any particular attitude towards alcoholism, other than firing plaintiff for drinking on the job.

Disparate-Impact vs. Treatment: *Raytheon Co. v. Hernandez*, __ **U.S.** __, 124 S. Ct. 513, 157 L. Ed. 2d 357, 14 AD Cases 1825 (2003), vacated and remanded the Ninth Circuit's decision rejecting defendant's articulated nondiscriminatory explanation for refusing to re-employ respondent, who had been fired for use of cocaine, after he had assertedly gone through a rehabilitation program and ended his drug dependency. The Court held that the Ninth Circuit impermissibly relied on a disparate-impact rationale to reject the explanation, when the case had been pleaded and presented only as a disparate-treatment case. Once the explanation had been proffered, "the only relevant question before the Court of Appeals, after petitioner presented a neutral explanation for its decision not to rehire respondent, was whether there was sufficient evidence from which a jury could conclude that petitioner did make its employment decision based on respondent's status as disabled despite petitioner's proffered explanation." *Id.* at 520.

Reasonable Accommodation: *Hedrick v. Western Reserve Care System*, 355 F.3d 444, 458, 15 AD Cases 1 (**6th Cir.** 2004), held that defendant was not required to offer plaintiff a promotion to a salaried non-bargaining unit position as a reasonable accommodation, was not required to displace employees in a particular set of comparable positions, there was no evidence defendant knew that vacancies in those positions would later occur, and that plaintiff's rejection of another comparable position because of its low pay meant that she could not show she was a qualified person with a disability. The court also held that the ADA did not require that plaintiff be given a preference in hiring. *Id.* at 459.

Failure to Comply with Request for Documentation: *Peebles v. Potter*, 354 F.3d 761, 768–89, 15 AD Cases 146 (**8th Cir.** 2004), affirmed summary judgment, holding that the Rehab Act defendant had reasonably requested medical certification that employee's disability had persisted for entire two years plaintiff had been away from work, and that plaintiff's failure to comply could not be excused as a reasonable accommodation where it was unrelated to the disability. "We do not read the Act as requiring the employer to level the playing field beyond those undulations that are related to the person's disability." *Id.* at 769 (citation omitted).

Failure to Cooperate: *Allen v. Pacific Bell*, 348 F.3d 1113, 14 AD Cases 1833 (**9th Cir.** 2003), affirmed summary judgment, holding that defendant was not required to participate in the interactive process prior to receiving requested documentation. *Id.* at 1114–15. The court also rejected plaintiff's claim that he was entitled to an alternative accommodation, because it had negotiated an agreement with the CWA, his collective bargaining agent, to create "a transfer system that provided disabled employees with super-seniority and multiple options to select an alternative job, and that guaranteed their right to transfer back to their former jobs if their medical condition so permitted," and he refused to participate in this system. *Id.* at 1115–16.

H. Retaliation

1. Statutory Remedies

No Common-Law Damages for ADA Retaliation Claims: *Kramer v. Banc of America Securities, LLC*, 355 F.3d 961, 964–66 (**7th Cir.** 2004), affirmed judgment for the ADA defendant, and held that the Civil Rights Act of 1991 authorized compensatory and punitive damages only for ADA discrimination claims, and not for ADA retaliation claims. The court distinguished appellate affirmances of common-law damage awards in ADA retaliation cases, because those decisions had simply assumed without discussion that such damages were available.

Common-Law Damages for FLSA, ADEA, and Equal Pay Act § 216(b) Retaliation Claims: 29 U.S.C. § 215(a)(3) is an anti-retaliation provision applicable to the FLSA, the EPA, and the ADEA. Sec. 216(b) of the Act was amended in 1977 to state that employers that violate § 215(a)(3) "shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatements, promotion, and the payment of wages lost and an additional equal amount as liquidated damages." Pub. L. No. 95-151, § 10(a), 91 Stat. 1245, 1252 (1977). 29 U.S.C. § 626(b) provides in part: "Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title." Thus, both provisions can apply to retaliation in violation of the ADEA.

_ The Seventh Circuit has held that compensatory damages for non-economic injuries and punitive damages are available for retaliation in violation of the Equal Pay Act, *Soto v. Adams Elevator Equipment Co.*, 941 F.2d 543, 551, 56 FEP Cases 1270 (**7th Cir.** 1991), the ADEA, *Moskowitz v. Trustees of Purdue University,* 5 F.3d 279, 283, 64 FEP Cases 1013 (**7th Cir.**, 1993), and the FLSA, *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1226, 2 WH Cases 2d 993 (**7th Cir.** 1995).

Moore v. Freeman, 355 F.3d 558, 563–64, 9 WH Cases 2d 321 (**6th Cir.** 2004), held that § 216(b) authorizes recovery of damages for emotional distress in FLSA retaliation cases. The court stated at 564:

> As noted by the Seventh Circuit, which is the only other circuit to address at length the question of whether the provision of § 216(b) at issue here provides for damages for emotional distress, the provision allows for "appropriate" relief, and "compensation for emotional distress ... [is] appropriate for intentional torts such as retaliatory discharge." *Travis*, 921 F.2d at 112. In addition, both the Eighth and Ninth Circuits have allowed damages for emotional distress to stand without directly addressing the issue. *See Broadus v. O.K. Indus., Inc.*, 238 F.3d 990, 992 (**8th Cir.** 2001); *Lambert v. Ackerley*, 180 F.3d 997, 1011 (**9th Cir.** 1999). Although the circuits are divided on the question of whether the statute permits punitive damages, *compare Travis*, 921 F.2d at 111–12, *with Snapp*, 208 F.3d at 934, consensus on the issue of compensatory damages for mental and emotional distress seems to be developing. We now join our sister circuits in finding that the damages awarded by the jury in this case fall within the ambit of § 216(b).

Snapp v. Unlimited Concepts, Inc., 208 F.3d 928, 932–39, 5 WH Cases 2d 1761 (**11th Cir.** 2000), *cert. denied,* 532 U.S. 975 (2001), held that punitive damages are not allowed by § 216(b) but stated in *dicta* that some additional compensatory relief is available in retaliation cases, such as reinstatement or front pay. *Id.* at 937. Judge Carnes concurred. *Id.* at 939–40.

Injunctive Relief: *Bailey v. Gulf Coast Transp., Inc.*, 280 F.3d 1333, 7 WH Cases 2d 968 (**11th Cir.** 2002), held that injunctive relief is available under the 1977 amendment to § 216(b).

2. Temporal Proximity as Showing Causation

Singletary v. District of Columbia, 351 F.3d 519, 525, 92 FEP Cases 1799 (**D.C. Cir.** 2003), reversed as clearly erroneous and remanded the lower court's finding that plaintiff had not shown causation between his protected activity and his denial of promotion, because the lower

court had considered only plaintiff's original filings and had not considered the one-month gap between plaintiff's filing of a 1993 appeal—showing that his discrimination claims were still alive—and the 1993 denial of promotion. The court described the temporal proximity as "quite close." The court also held that letters sent by plaintiffs' counsel were protected activity.

Wright v. CompUSA, Inc., 352 F.3d 472, 477–78, 15 AD Cases 16 (**1st Cir.** 2003), reversed the grant of summary judgment to the ADA retaliation defendant. The court held that requesting an accommodation is protected activity, and that plaintiff had made a showing of causation sufficient to overcome summary judgment by showing that he was fired immediately after he returned from medical leave and requested an accommodation for his attention deficit disorder, and by showing a genuine dispute whether defendant's stated ground for the discharge was the actual ground.

Stegall v. Citadel Broadcasting Co., 350 F.3d 1061, 1069–70, 92 FEP Cases 1769 (**9th Cir.** 2003), reversed the grant of summary judgment to the Title VII retaliation defendant, and relied in part on the short nine-day interval between plaintiff's complaints of discrimination and her discharge, to show causation for her retaliation claim. Judge Gould dissented on this point, based on his view of the facts of the case. *Id.* at 1077.

I. Responsibility of One Employer for Acts of Another

Bowling Transp., Inc. v. N.L.R.B., 352 F.3d 274, 284, 173 LRRM 2807 (**6th Cir.** 2003), held that petitioner, which provided on-site services to AK Steel, violated the NLRA by acceding to AK Steel's demand that employees be fired for engaging in concerted activity not related to the organization of a union. In reaching its decision, the court stated in *dicta*:

> This principle is reinforced by looking to a more egregious example of discrimination. If instead AK Steel had banished Ashby, Hanks, and Horton from its facilities because they were African-American or because they were women, it would hardly be an appropriate defense for Bowling to follow AK Steel's directive to remove them, even if it were facing complete elimination from the site. Instead, it would have been Bowling's obligation under the civil rights laws to resist AK Steel's influence and perhaps file suit against AK Steel for breach of its contract and/or join its employees in a race discrimination suit against AK Steel, as the employer did in *Lewis v. Haskell Co., Inc.*, 108 F.Supp.2d 1288 (**M.D. Ala.** 2000). [FN12]
>
> _____
>
> FN12. Presumably, such an employer facing this situation would have a federal cause of action, too, under 42 U.S.C. § 1981 (1991), which prohibits racial discrimination in the making and enforcement of private contracts, *Newman v. Fed. Express Corp.*, 266 F.3d 401, 406 (**6th Cir.** 2001).

V. The Inferential Model

Generalized Statement of Interest Not Enough to Constitute Application: *Smith v. J. Smith Lanier & Co.*, 352 F.3d 1342, 92 FEP Cases 1729 (**11th Cir.** 2003), affirmed the grant of summary judgment to the ADEA RIF defendant, holding that plaintiff had not adequately applied for vacant positions by simply stating that she was willing to take any open position, where she knew of the company's practice of posting vacancies and knew of its policy requiring formal applications.

Sole Motive: *Hedrick v. Western Reserve Care System*, 355 F.3d 444, 454, 15 AD Cases 1 (**6th Cir.** 2004), affirmed the grant of summary judgment to the ADA defendant, and held that plaintiff was required to show that defendant's sole motive was disability discrimination. The court held mixed-motives analysis inapplicable to ADA claims. *Peebles v. Potter*, 354 F.3d 761, 767 n.5, 15 AD Cases 146 (**8th Cir.** 2004), held that plaintiffs are required by the language of the Act to show that the challenged action was motivated solely by the disability.

Rules for Accepting Subjective Explanations: *Chambers v. Metropolitan Property and Cas. Ins. Co.*, 351 F.3d 848, 855, 92 FEP Cases 1739 (**8th Cir.** 2003), affirmed summary judgment to the ADEA RIF defendant and upheld as not pretextual defendant's subjective explanation for some positions that plaintiff had too aggressive a style for the position in question, and its subjective determinations of relative qualifications. The court rejected plaintiff's general attack on the adequacy of subjective explanations, and stated that there was no evidence of fabrication of any explanation. *See also Chapman v. AI Transport*, 229 F.3d 1012, 1033–37, 83 FEP Cases 1849 (**11th Cir.** 2000) (*en banc*).

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

Plaintiff Shows Pretextual Explanation Was Not to Conceal Discrimination: *Neal v. Roche*, 349 F.3d 1246, 92 FEP Cases 1601 (**10th Cir.** 2003), affirmed summary judgment, holding that plaintiff had shown the defendant's explanation for her non-selection for a job to be pretextual, but that she had also shown it was nondiscriminatory, having been intended to shield a white employee from layoff.

VI. Mixed Motives

Desert Palace, Inc. v. Costa, 539 **U.S.** 90, 123 S. Ct. 2148, 91 FEP Cases 1569 (2003), unanimously affirmed the Ninth Circuit, cited *Reeves*, and held that § 703(m) of the Civil Rights Act of 1964, added by the Civil Rights Act of 1991, allows plaintiffs to obtain mixed-motives analysis if they show that race, color, national origin, sex, or religion was one of the factors motivating the challenged decision. The Court held that circumstantial evidence is sufficient, and is not disfavored in employment discrimination cases. This decision will make mixed-motives analysis available generally in intentional-discrimination cases, and will eliminate the requirement that plaintiffs show pretext as to each nondiscriminatory reason proffered by a defendant. It will make it harder for defendants to obtain summary judgment, but may give defendants two bites at the apple in the minds of jurors. It is critical for plaintiffs to emphasize deceit, in cases in which defendant has misrepresented its reasons to the plaintiff, to co-workers, to enforcement agencies, or to the courts. The Court did not address the critical question whether defendants as well as plaintiffs can trigger mixed-motives analysis. Plaintiffs will argue that they are the masters of their own cases, and that defendants cannot be allowed to transform their cases into something they did not intend. A lot of litigation lies in store. Finally, *Price Waterhouse* remains the standard for types of claims not covered by § 703(m).

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

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

(Citations and footnote omitted; emphases in original.)

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

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

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

Hill v. Lockheed Martin Logistics Management, Inc., 354 F.3d 277, 285 n.2, 93 FEP Cases 1 (**4th Cir.** 2004) (*en banc*), assumed without deciding that the *Price Waterhouse* burden-shifting model still applies to ADEA cases, but held the evidence insufficient under either the § 703(m) model or the *Price Waterhouse* model. *Accord*, *Mereish v. Walker*, __ F.3d __, 2004 WL 318471 (**4th Cir.** Feb. 20, 2004) at *8 ("And maintaining the higher evidentiary burden in Price Waterhouse for ADEA claims is not implausible, given that age is often correlated with perfectly legitimate, non-discriminatory employment decisions."); *Trammel v. Simmons First*

Bank of Searcy, 345 F.3d 611, 615, 92 FEP Cases 1061 (**8th Cir.** 2003) ("But even if we assume, without deciding, that the holding in *Costa* applies to ADEA claims, we do not believe that this helps Mr. Trammel because he has presented insufficient evidence to support a finding that his age was a 'motivating factor' in the decision to discharge him.").

VII. Curing Discrimination Before Suit

Taylor v. Small, 350 F.3d 1286, 92 FEP Cases 1785, 15 AD Cases 25 (**D.C. Cir.** 2003), held that, while denial of a bonus because of delay in providing an employment evaluation may be actionable, the employer may cure this kind of violation prior to suit and thus avoid liability

VIII. Comparators

Comparators Not Needed in Every Case: *Bryant v. Aiken Regional Medical Centers Inc.*, 333 F.3d 536, 545–46, 92 FEP Cases 233 (**4th Cir.** 2003), *cert. denied*, __ **U.S.** __, 124 S. Ct. 1048 (2004), affirmed judgment for the Title VII and § 1981 plaintiff on a jury verdict, rejecting defendant's argument that plaintiff's claim must fail for lack of evidence of a white comparator. "Bryant is not required as a matter of law to point to a similarly situated white comparator in order to succeed on a race discrimination claim. . . . We would never hold, for example, that an employer who categorically refused to hire black applicants would be insulated from judicial review because no white applicant had happened to apply for a position during the time frame in question. . . . However helpful a showing of a white comparator may be to proving a discrimination claim, it is not a necessary element of such a claim." (Citation omitted.) The court also held that the jury was not required to find for defendant because of defendant's comparators: "But neither employee relied upon by ARMC here was situated similarly to Bryant. One of the applicants was not hired until several months after Bryant filed charges of racial discrimination with the EEOC. The other applicant was only hired for a part- time position. Neither hiring sufficiently rebuts the inference of discrimination to the point that no reasonable jury could have found in Bryant's favor." *Id.* at 546.

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

Comparative Qualifications and Evidence Bearing on Employee Performance: Even before *Reeves* but at an accelerated pace thereafter, the courts have been much more willing to infer discrimination from differences in qualifications and evidence of job performance. See, e.g., *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 62–63, 80 FEP Cases 537 (**1st Cir.** 1999), *cert. denied*, 528 **U.S.** 1161 (2000); *Koster v. Trans World Airlines, Inc.*, 181 F.3d 24, 31–32, 80 FEP Cases 343 (**1st Cir.**), *cert. denied*, 528 **U.S.** 1021 (1999); *Carlton v. Mystic Transportation, Inc.*, 202 F.3d 129, 136, 81 FEP Cases 1449 (**2d Cir.**), *cert. denied*, 530 **U.S.** 1261 (2000); *Banks v. Travelers Companies*, 180 F.3d 358, 362, 80 FEP Cases 30 (**2d Cir.** 1999); *Corti v. Storage Technology Corp.*, 304 F.3d 336, 338–39, 89 FEP Cases 1477 (**4th Cir.** 2002); *Thomas v. Texas Department of Criminal Justice*, 220 F.3d 389, 393–94, 83 FEP Cases 1081 (**5th Cir.** 2000);

Vance v. Union Planters Corp., 209 F.3d 438, 442, 82 FEP Cases 1199 (**5th Cir.** 2000); *Rutherford v. Harris County*, 197 F.3d 173, 181–82, 81 FEP Cases 1775 (**5th Cir.** 1999); *Casarez v. Burlington Northern/Santa Fe Co.*, 193 F.3d 334, 337–38, 81 FEP Cases 412 (**5th Cir.** 1999), *reh'g denied*, 201 F.3d 383, 81 FEP Cases 1246 (**5th Cir.** 2000); *Bell v. E.P.A.*, 232 F.3d 546, 551–52, 84 FEP Cases 630 (**7th Cir.** 2000); *Adams v. Ameritech Services, Inc.*, 231 F.3d 414, 429, 84 FEP Cases 178, 25 EB Cases 1101 (**7th Cir.** 2000); *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 386–87, 82 FEP Cases 550 (**7th Cir.** 2000); *Hocevar v. Purdue Frederick Co.*, 223 F.3d 721, 726–27, 83 FEP Cases 1196 (**8th Cir.** 2000); *Juarez v. ACS Government Solutions Group, Inc.*, 314 F.3d 1243, 1246, 90 FEP Cases 1104 (**10th Cir.** 2003); *Dodoo v. Seagate Technology, Inc.*, 235 F.3d 522, 527, 84 FEP Cases 933 (**10th Cir.** 2000); *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 815–16 (**10th Cir.** 2000); *Durley v. APAC, Inc.*, 236 F.3d 651, 656–57, 84 FEP Cases 1177 (**11th Cir.** 2000); *Beaver v. Rayonier, Inc.*, 200 F.3d 723, 729 (**11th Cir.** 1999), *cert. dismissed*, 529 **U.S.** 1095 (2000).

IX. Discriminatory Statements

Speakers Who Were Not Formal Decisionmakers: *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277, 290–91, 93 FEP Cases 1 (**4th Cir.** 2004) (*en banc*), affirmed the summary judgment. It discussed the "cat's paw" decisions of other Circuits and limited them. It relied on agency principles and stated its holding:

> To conclude, Title VII and the ADEA do not limit the discrimination inquiry to the actions or statements of formal decisionmakers for the employer. Such a construction of those discrimination statutes would thwart the very purposes of the acts by allowing employers to insulate themselves from liability simply by hiding behind the blind approvals, albeit non-biased, of formal decisionmakers. . . . However, we decline to endorse a construction of the discrimination statutes that would allow a biased subordinate who has no supervisory or disciplinary authority and who does not make the final or formal employment decision to become a decisionmaker simply because he had a substantial influence on the ultimate decision or because he has played a role, even a significant one, in the adverse employment decision.

The court stated: "In sum, to survive summary judgment, an aggrieved employee who rests a discrimination claim under Title VII or the ADEA upon the discriminatory motivations of a subordinate employee must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer."

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

X. Harassment

Types of Harassment Covered: *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)."

Who is a Supervisor? *Joens v. John Morrell & Co.*, 354 F.3d 938, 940–41, 93 FEP Cases 72 (**8th Cir.** 2004), affirmed summary judgment, holding that the alleged harasser was not plaintiff's supervisor, but more like an internal customer for plaintiff's production. The court canvassed the approaches of different Circuits, but relied on the lack of any unique control over plaintiff.

Tangible Employment Actions: *Suders v. Easton,* 325 F.3d 432 (**3d Cir.** 2003), *petition for cert. granted,* 72 USLW 3105 (**U.S.**, Dec. 1, 2003) (No. 03–95), held that a constructive discharge is a tangible employment action for purposes of *Faragher* and *Ellerth*. *Lee-Crespo v. Schering-Plough Del Caribe Inc.*, 354 F.3d 34, 93 FEP Cases 47 (**1st Cir.** 2003), affirmed summary judgment and held that plaintiff had to show that the tangible action was causally related to the harassment and harasser. *Robinson v. Sappington*, 351 F.3d 317, 333–36, 93 FEP Cases 75 (**7th Cir.** 2003), reversed summary judgment, surveyed the law of the Circuits, and held that a constructive discharge prompted by official actions of plaintiff's supervisor is a tangible employment action for purposes of *Faragher* and *Ellerth*.

Existence and Adequacy of the Policy: *Robinson v. Sappington*, 351 F.3d 317, 337 n.13, 93 FEP Cases 75 (**7th Cir.** 2003), reversed summary judgment 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 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. Knowledge of where to take general workplace complaints "does not absolve her employer of the responsibility to take reasonable steps to protect her from sexual harassment."

XI. Jurisdiction

Limitations and the Unequivocal Communication of the Adverse Action: *Flannery v. Recording Industry Ass'n of America*, 354 F.3d 632, 93 FEP Cases 65 (**7th Cir.** 2004), reversed the Rule 12(b)(6) dismissal of the ADEA and ADA plaintiff's Complaint, holding that the timeliness of plaintiff's EEOC charge must be determined by when the defendant unequivocally communicated its intent to terminate him, and plaintiff had adequately pleaded a timely claim under this standard.

Defective Notice of Appeal: *Moore v. Freeman*, 355 F.3d 558, 565, 9 WH Cases 2d 321 (**6th Cir.** 2004), an FLSA retaliation case, rejected plaintiff's appeal from the denial of liquidated damages because plaintiff's Notice of Appeal stated that plaintiff was appealing from the order awarding attorneys' fees, and did not mention the earlier order denying liquidated damages.

Defendant's Waiver of the Bar of Limitations: *Rodriguez-Garcia v. Municipality of*

Caguas, 354 F.3d 91, 100 (**1st Cir.** 2004), vacated the grant of summary judgment on timeliness grounds to defendants, and held that the newly added defendants waived their statute-of-limitations defense by failing to give it more than a passing mention in the motion for summary judgment, and failing to mention it at all in their appellate brief.

Defendant's Waiver of Appeal from Punitive-Damage Award: *Local Union No. 38, Sheet Metal Workers' Int'l. Ass'n, AFL-CIO v. Pelella*, 350 F.3d 73, 173 LRRM 2673, 173 LRRM 2843 (**2d Cir.** 2003), held that the plaintiff union waived its right to appeal the award of $28,000 in punitive damages to the defendant union member on his employer-financed LMRDA counterclaim where it failed to object to the instruction below, and failed to make or provide a record showing that its points were raised below.

Variance Between EEOC Charge and Complaint: *Flannery v. Recording Industry Ass'n of America*, 354 F.3d 632, 638, 93 FEP Cases 65 (**7th Cir.** 2004), reversed the Rule 12(b)(6) dismissal of the ADEA and ADA plaintiff's Complaint, holding that statements in plaintiff's EEOC charge that were arguably inconsistent with those in the Complaint to which it was attached and Amended Complaint did not estop him from making the assertion in court.

XII. Arbitration

Demise of *Duffield:* *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 92 FEP Cases 1121 (**9th Cir.** 2003) (*en banc*), overruled *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 76 FEP Cases 1450 (**9th Cir.**), *cert. denied*, 525 **U.S.** 982 (1998), that § 118 of the Civil Rights Act of 1991 barred mandatory predispute arbitration "agreements."

Costs of Arbitration: *Spinetti v. Service Corp. Int'l*, 324 F.3d 212, 91 FEP Cases 745 (**3d Cir.** 2003) (costs unconscionable, but cists provision severable); *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 91 FEP Cases 771 (**11th Cir.** 2003) ("loser pays" provision should be analyzed on a case-by-case basis, like other costs).

Arbitration "Agreements" Conflicting with Statutes: *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478, 92 FEP Cases 1090 (**5th Cir.** 2003), held an arbitration agreement valid even though it barred awards of punitive damages, but held that the clause barring punitive damages was unenforceable in a Title VII case, and must be severed from the agreement. The court rejected plaintiff's argument that the clause made the entire agreement unenforceable. *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821, 824, 9 WH Cases 2d 11 (**8th Cir.** 2003), held that plaintiffs' FLSA claims were subject to arbitration notwithstanding that the arbitration agreement contained a one-year period of limitations, required cost-sharing, specified a California venue, and did not provide for collective actions. The court stated that these matters were for the arbitrator to resolve, and that contractual terms were to be overridden by the statutory terms. *Summers v. Dillard's, Inc.*, 351 F.3d 1100, 92 FEP Cases 1710 (**11th Cir.** 2003), reversed the denial of defendant's motion to compel arbitration of her Title VII, ADEA, and other claims. The court held that plaintiff could not avoid arbitration merely because the purported agreement provided that plaintiff would recover fees only if she won the arbitration completely. Ignoring *Waffle House*, the court held that the denial of fees was only speculative, and that plaintiff should seek relief from a court after the arbitration, "if she feels that her available remedies were hindered."

Arbitration "Agreements" Specifying an Improper Venue: *Cap Gemini Ernst &*

Young, U.S., L.L.C. v. Nackel, 346 F.3d 360, 364 (**2d Cir.** 2003), vacated an order compelling arbitration of a claim pending in California state court. The court stated: "While the FAA expresses a strong federal policy in favor of arbitration, the purpose of Congress in enacting the FAA 'was to make arbitration agreements as enforceable as other contracts, *but not more so*.'"

Unconscionable "Agreements": *Alexander v. Anthony Intern., L.P.*, 341 F.3d 256, 264, 20 IER Cases 466 (**3d Cir.** 2003), a wrongful discharge case, held that a court must determine whether a purported agreement to arbitrate is valid before compelling arbitration, and that an examination of unconscionability is part of the determination whether there is a generally applicable defense to the asserted contract. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 91 FEP Cases 1426 (**9th Cir.** 2003), *cert. denied*, __ **U.S.** __, 124 S. Ct. 1169 (2004), held that the defendant's arbitration agreement was procedurally and substantively unconscionable. By contrast, *Stephan v. Goldinger*, 325 F.3d 874, 876–77 (**7th Cir.**), *cert. denied sub nom. Stephan v. Refco, Inc.*, __ **U.S.** __, 124 S. Ct. 227, 157 L. Ed. 2d 138 (2003), held that the two-year limitations period in the Commodities Exchange Act could validly be shortened to one year in an arbitration agreement. Judge Posner held that there was no indication in the Act of an intent to benefit plaintiffs with respect to the limitations period, a factor that could distinguish this case from discrimination and harassment cases.

Unilateral Power to Pick the Panel from Which Arbitrators Are Chosen: *McMullen v. Meijer, Inc.*, 355 F.3d 485, 488, 93 FEP Cases 236 (**6th Cir.** 2004) (*per curiam*), reversed an order compelling arbitration because defendant unilaterally selected the pool, even though it did so from the lists of the FMCS or AAA, where it usually used the same five to seven arbitrators in Michigan. The court remanded the case for the lower court to determine if the agreement can be enforced without the arbitrator-selection provision. *Id.* at 495–96.

XIII. Class Actions Seeking Monetary Relief

In re Monumental Life Ins. Co., 343 F.3d 331, 339–40 (**5th Cir.** 2003), reversed the denial of class certification seeking common-law damages for racially discriminatory insurance policies sold over a long period of time by 280 largely predecessor companies. There, plaintiffs sought injunctive relief for restitution in the form of a constructive trust, which the court defined as equitable monetary relief comparable to a Title VII back pay award.

Allen v. International Truck and Engine Corp., 358 F.3d 469 (**7th Cir.** 2004) (Easterbrook, J.), granted the Title VII plaintiffs' Rule 23(f) petition for interlocutory review of the denial of class certification for about 350 present and former black employees of defendant's Indianapolis plant on their claims for injunctive relief and damages for racial harassment, summarily reversed the denial of Rule 23(b)(2) certification on the claims for injunctive relief, and remanded the case with directions to reconsider the extent to which the employees' damages claims could also benefit from class certification.

XIV. Discovery of Electronic Evidence

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

XV. Summary Judgment

Ineffective Oppositions: *Taylor v. Small*, 350 F.3d 1286, 1295, 92 FEP Cases 1785, 15 AD Cases 25 (**D.C. Cir.** 2003), affirmed summary judgment. The court upheld the lower court's refusal to consider various documents, and stated: "Because mention of these purported requests and denials appear only in Taylor's memorandum in opposition to the Smithsonian's motion for summary judgment, and not in her complaint or other verified pleading, the district court properly concluded it was not obliged to deal with them at all."

Crossley v. Georgia-Pacific Corp., 355 F.3d 1112, 1113–14 (**8th Cir.** 2004), affirmed summary judgment and held that the lower court was not required to consider the transcripts provided by plaintiff where there were no designations of specific pages to consider. The court quoted *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991), which stated: "Judges are not like pigs, hunting for truffles buried in briefs.".

XVI. Evidence

Reprimand of Plaintiff's Supervisor for Failing to Discipline Harasser Adequately is Admissible in Victim's Case: *Sellers v. Mineta*, 350 F.3d 706, 92 FEP Cases 1665 (**8th Cir.** 2003), upheld the lower court's admission of the reprimand, offered to show that the discipline was inadequate and that plaintiff had objected to the conduct. For this purpose, the court held that its probative value outweighed its prejudicial effect.

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

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 defendant's motion for a new trial, upholding the lower court's barring the testimony of a witness not listed in the pretrial order as a potential witness for that defendant, although all other parties had listed the witness.

XVII. Punitive Damages

State Farm Mutual Auto. Ins. Co. v. Campbell, 538 **U.S.** 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), reversed in a 6-3 decision the award of $145 million in punitive damages for bad-faith failure to defend an accident claim, where plaintiffs' post-remittitur award for compensatory damages was only $1 million. The Court held that the award was excessive and violated the Due Process Clause.

Civil rights cases after *Campbell*: *Rivera-Torres v. Ortiz Velez*, 341 F.3d 86, 102–03 (**1st Cir.** 2003), *petition for cert. filed*, 72 USLW 3428 (Dec. 22, 2003) (No. 03–898), a § 1983 case challenging adverse employment actions motivated by political discrimination, the court relied on *Campbell* to uphold the jury's award of $250,000 in punitive damages "given the

reprehensibility of defendants' conduct and the resultant injuries inflicted on Rivera and his family," although the employee plaintiff received only $26,400 in economic damages and $125,000 in compensatory damages.

Williams v. Kaufman County, 352 F.3d 994, 1016 (**5th Cir.** 2003), a case involving illegal strip searches of individuals without individualized probable cause, affirmed an award of $100 in nominal damages and $15,000 in punitive damages for each plaintiff. The court stated that the ratio between compensatory and punitive damages is less important in § 1983 civil rights cases than in other cases, and stated that ratios between punitive and compensatory damages do not apply to cases in which nominal damages are awarded.

Lincoln v. Case, 340 F.3d 283, 293 (**5th Cir.** 2003), a Fair Housing act case, affirmed the reduction of a punitive-damage award of $100,000 to $55,000 (the amount of the maximum civil penalty for first-time findings of violations) where the award of compensatory damages was only $500.

Bell v. Clackamas County, 341 F.3d 858, 867–68, 92 FEP Cases 879 (**9th Cir.** 2003), reversed the trial court's reduction of 42 U.S.C. § 1981 and § 1983 punitive-damage awards against defendant deputies who were fellow employees of the plaintiff, and who had retaliated against him for his complaints of racial discrimination. The court remanded punitive damages with instructions that the trial court evaluate the individual reprehensibility of each individual defendant, and that it consider evidence of each defendant's net worth to the extent that the deputy would not be reimbursed by the County for the punitive damage award against him.

Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020, 1043–44, 92 FEP Cases 641 (**9th Cir.** 2003), *petition for cert. filed*, 72 USLW 3451 (Dec. 22, 2003) (No. 03–944), an individual Title VII and § 1981 case involving anti-Asian discrimination, affirmed the award of $2.6 million in punitive damages, $360,000 in compensatory damages for emotional distress, and $193,000 in lost wages and wages unlawfully withheld. The court observed that intentional racial discrimination was far more reprehensible than the mere economic harm involved in *BMW v. Gore* and *Campbell*. It added: "Racial discrimination often results in large punitive damage awards." *Id.* at 1043 (citations omitted). The court found that the seven-to-one ratio was permissible. *Id.* at 1044. The court refused to consider the $300,000 punitive-damages cap in the Civil Rights Act of 1991 as a civil penalty limiting the permissible size of the punitive-damages award under § 1981 because Congress had refused to cap such damages under § 1981. It held that the ratio between the $2.6 million punitive-damages award and the $300,000 cap was reasonable. *Id.* at 1044–45.

Bogle v. McClure, 332 F.3d 1347, 92 FEP Cases 16 (**11th Cir.** 2003), *cert. dismissed*, 124 S.Ct. 1168 (2004), affirmed an award of $500,000 in compensatory damages and $ 2 million in punitive damages to each plaintiff Caucasian librarian harmed by racial discrimination in violation of § 1983.

Other Punitive –Damage Cases after *Campbell*: *DiSorbo v. Hoy*, 343 F.3d 172 (**2d Cir.** 2003), reversed a $400,000 compensatory-damage award to the female plaintiff for her serious injuries, holding that $250,000 would be adequate, and reversed the $1.275 million punitive award, holding that a reasonable amount would be $75,000 based on other awards, because only one officer beat her, and he stopped beating and choking her when she was about to lose her vision.

Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672, 678 (**7th Cir.** 2003) (Posner, J.), upheld an award of $186,000 apiece, and $5,000 in compensatory damages apiece, to two plaintiffs bitten by bedbugs.