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Employment Discrimination Law Update
by
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I. The Statistics: 19,746 new EEO Cases were filed in Federal district courts in the twelve months ending Sept. 30, 2004. The striking figure is that the increase in civil filings in U.S. District Courts from calendar 2003 to FY 2004 was 10.1% at a time when EEO filings decreased by 3.7%. From 2000 to the present, the number of EEO cases initially filed as class actions increased less than 8%, while the number of FLSA collective actions has increased by more than 87%. 583 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, 2003, through Sept. 30, 2004, down from 25 trials in FY 1998. That is for civil and criminal trials combined. Nineteen trials represent 4% of the average 478 matters terminated. These data were downloaded on March 23, 2005, from http://www.uscourts.gov/cgi-bin/cmsd2004.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

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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.

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A. On February 18, 2005, the President signed into law a statute named in Orwellian doublespeak the "Class Action Fairness Act," a provision that contains new rules applicable to class actions in Federal courts, that expands the original jurisdiction of Federal courts over class actions under State law with more than $5 million at stake and any diversity, that expands the removal jurisdiction of the Federal courts, and that treats State-law "mass actions" as class actions for some purposes. The legislation was supported by major business groups proclaiming their concern that class members be treated fairly, and was opposed by national consumer, civil rights, and labor organizations. The statute is effective as to cases commenced on or after February 18, 2005. Employment attorneys should be aware of the substantial duties imposed on defendants to notify Federal and State officials of detailed information with respect to proposed settlements, the 90-day delay starting with the provision of the notice, and the ability of class members to escape being bound by the settlement if the notice is later held to be inadequate. The Act expands original and removal jurisdiction in Federal courts to state-law cases in which an aggregate of more than $5 million is at stake, and in which there is any diversity between any defendant and any member of the plaintiff class. The single-state exception, the new provision for appeal of orders remanding cases, and other provisions are too complex for this paper. They are explored further in Chapter 33 of the upcoming Spring 2005 edition of Equal Employment Law Update (BNA), copyright American Bar Association, 2005, and will also be explored in a forthcoming supplement to Elizabeth Cabraser, ed., CALIFORNIA CLASS ACTIONS PRACTICE AND PROCEDURE (Matthew Bender, 2005).

B. Taxes—The Bad News: *Commissioner v. Banks*, **__ U.S. __**, 125 S. Ct. 826 (2005), held that, when a client's recovery constitutes gross income, the client must pay income tax on the part of the recovery paid directly to the attorney as a contingent fee for services performed in obtaining the taxable income, under a contingent fee arrangement. The Court left some issues open, such as the tax effect of a court-awarded fee. This rule does not apply to the fees that generated nontaxable income or other nontaxable relief, such as an injunction.

The Good News: Part of the Civil Rights Tax Relief Act—the provision preventing double taxation of attorneys' fees to the plaintiff as well as counsel—went into effect on Oct. 26, 2004. Pub. L. No. 108–357. This creates an above-the-line deduction for attorneys' fees and costs. It is not subject to the Alternative Minimum Tax or the 2%-of-adjusted-gross-income exclusion. The client must report the fees in order to be able to take advantage of the Act. The bill applies to a wide variety of civil rights and employment statutes, including Title VII, the ADA, the ADEA, the NLRA, the FLSA, the Rehab Act, sec. 510 of ERISA, Title IX, the Employee Polygraph Protection Act, WARN, the FMLA, USERRA, secs. 1981, 1983, and 1985, the Fair Housing Act of 1968, Federal whistleblower claims, and a beautiful catch-all: "Any provision of Federal, State, or local law, or common law claims permitted under Federal, state, or local law—(i) providing for the enforcement of civil rights, or (ii) regulating any aspect of the employment relationship." It is doubly prospective: "The amendments made by this section shall apply to fees and costs paid after the date of enactment of this Act with respect to any judgment or settlement occurring after such date."

IV. The Constitution, Statutes, and Rules

A. Harassment Can Violate: (a) **Sec. 1981:** *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 190–91, 94 FEP Cases 577 (**4th Cir.** 2004); (b) **the ADA:** *Mannie v. Potter*, 394 F.3d 977, 982, 16 AD Cases 641 (**7th Cir.** 2005) (assumed); *Shaver v. Independent Stave Co.*, 350 F.3d 716, 719, 14 AD Cases 1889 (**8th Cir.** 2003); *Lanman v. Johnson County*, 393 F.3d

1151, 1154–56, 16 AD Cases 449 (**10th Cir.** 2004); (c) **the ADEA:** *Kriescher v. Fox Hills Golf Resort and Conference Center*, 384 F.3d 912, 94 FEP Cases 1007 (**7th Cir.** 2004); (d) **the Duties of Unions:** *Eliserio v. United Steelworkers of America Local 310*, 398 F.3d 1071, 95 FEP Cases 421 (**8th Cir.** 2005); and (e) **Protections Against Retaliation:** *Noviello v. City of Boston*, 398 F.3d 76, 89 (**1st Cir.** 2005); *Smith v. Northeastern Illinois University*, 388 F.3d 559, 567 n.5, 94 FEP Cases 1295 (**7th Cir.** 2004); *Baker v. John Morrell & Co.*, 382 F.3d 816, 830 (**8th Cir.** 2004).

B. Title VII

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

Favoritism: *Preston v. Wisconsin Health Fund*, 397 F.3d 539, 541, 95 FEP Cases 234 (**7th Cir.** 2005), affirmed SJ, holding: "A male executive's romantically motivated favoritism toward a female subordinate is not sex discrimination even when it disadvantages a male competitor of the woman. . . . Neither in purpose nor in consequence can favoritism resulting from a personal relationship be equated to sex discrimination." (Citations omitted).

Union Liability: *Eliserio v. United Steelworkers of America Local 310*, 398 F.3d 1071, 95 FEP Cases 421 (**8th Cir.** 2005), reversed SJ on Title VII and § 1981 harassment and retaliation claims. The court held that the union endorsed a broad campaign of unlawful harassment by paying for nonracial stickers to be used in conjunction with a racial graffiti campaign. The plaintiff's problems began when he crossed a picket line during a strike, but the campaign against him degenerated into ethnic slurs. In addition, a Local 301 official asked Firestone to remove plaintiff from his work area, and the company demoted plaintiff. The court held that "any meaningful adverse action is sufficient when the retaliation defendant is a union," and that this request qualified. *Id.* at 1079. The court also held that Local 301 could not escape an inference of retaliation by its successful prosecution of plaintiff's grievance, because the official "was bound by union policies to file the grievance, and Firestone had to reinstate Eliserio because the reasons cited for his demotion were not listed in the collective bargaining agreement as permissible grounds." *Id.* at 1080.

Adverse Employment Action: *Gillis v. Georgia Department of Corrections*, __ F.3d __, 95 FEP Cases 427 (**11th Cir.** Feb. 18, 2005), reversed the grant of summary judgment to the Title VII defendant. The court held that an annual performance evaluation was actionable when it resulted in plaintiff's receiving a 3% annual raise, rather than a 5% raise.

C. ADEA

Rachid v. Jack In The Box, Inc., 376 F.3d 305, 313, 93 FEP Cases 1761 (**5th Cir.** 2004), reversed the grant of summary judgment to the ADEA defendant. The court held that it was not necessary to determine whether a five-year difference in ages was presumptively material, because defendant's age-related comments showed that the difference was important to defendant.

D. ADA and Rehabilitation Act

Major Victory on Definition of Disability: *Emory v. Astranzeneca Pharmaceuticals LP*, __ F.3d __, 2005 WL 563175 (**3d Cir.** 2005), reversed SJ, holding that plaintiff showed a genuine issue of material fact as to whether his cerebral palsy was disabling. Plaintiff had great difficulty performing basic life tasks, but had found ways to accomplish many of them by hard work to bypass his limitations. The district court held that his accomplishments showed he was not disabled. The court of appeals disagreed, stating that the focus has to be on his physical and mental impairments, not on the fact that with great difficulty he had found ways to function.

Bogus Offers Do Not Mean There Was No Adverse Employment Action: *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, 1019 n.8, 16 AD Cases 801 (**8th Cir.** 2005), reversed SJ. While plaintiff—an Executive Vice-President of defendant—was on maternity leave, she enrolled her Down's Syndrome baby in defendant's health-care plan. Before she returned, she was fired. The court held that her termination was an adverse employment action notwithstanding defendant's statement that she could apply for a position as Vice-President in the reorganized structure. "As a general matter, such a gesture is materially different from a change in position or reappointment in which the same terms and conditions of employment are retained. Moreover, in this particular case, the evidence indicates that this was an empty gesture—at the same time that Ziegler told her she could apply for the VP of Customer Support position, he also told her that she was not considered to be a viable candidate for the job."

Causation: *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, 1019–20, 16 AD Cases 801 (**8th Cir.** 2005), reversed SJ, holding that temporal proximity helped raise an inference of causation. "In view of the evidence establishing a close temporal proximity between the birth of Strate's disabled child and her termination, combined with the evidence indicating that she maintained a stellar employment record at the Bank over an eleven-year period leading up to the child's birth and was objectively qualified for the new the VP of Customer Support position but was dismissed from the start as a non-viable candidate, we hold that a reasonable fact finder could conclude that Strate's association with her disabled newborn child was a motivating factor in the decision to terminate her." (Footnote omitted.)

V. The Inferential Model and Mixed Motives

Machinchick v. PB Power, Inc., 398 F.3d 345, 352, 95 FEP Cases 152 (**5th Cir.** 2005), reversed the grant of summary judgment to the ADEA defendant. The court stated: "Under this integrated approach, a plaintiff relying on circumstantial evidence has two options for surviving summary judgment in an ADEA case: (1) the plaintiff may offer evidence showing that the defendant's proffered nondiscriminatory reasons are false; or (2) the plaintiff may offer evidence showing that his age was a motivating factor for the defendant's adverse employment decision." *Accord, Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 312, 93 FEP Cases 1761 (**5th Cir.** 2004).

Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011, 1017–18, 16 AD Cases 801 (**8th Cir.** 2005), held that *Desert Palace* made no difference to Eighth Circuit summary-judgment practice, because Circuit case law already allowed a plaintiff to prevail "notwithstanding the plaintiff's inability to directly disprove the defendant's proffered reason for the adverse employment action." (Citations omitted.)

Griffith v. City of Des Moines, 387 F.3d 733, 735, 94 FEP Cases 993 (**8th Cir.** 2004), held that *Costa* did not affect summary-judgment practice: "At the summary judgment stage, the issue is whether the plaintiff has sufficient evidence that unlawful discrimination was a

motivating factor in the defendant's adverse employment action. If so, the presence of additional legitimate motives will not entitle the defendant to summary judgment. Therefore, evidence of additional motives, and the question whether the presence of mixed motives defeats all or some part of plaintiff's claim, are trial issues, not summary judgment issues." The court stated: "Direct evidence in this context is not the converse of circumstantial evidence, as many seem to assume. Rather, direct evidence is evidence 'showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated' the adverse employment action. . . . Thus, 'direct' refers to the causal strength of the proof, not whether it is "circumstantial" evidence. A plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action does not need the three-part McDonnell Douglas analysis to get to the jury, regardless of whether his strong evidence is circumstantial. But if the plaintiff lacks evidence that clearly points to the presence of an illegal motive, he must avoid summary judgment by creating the requisite inference of unlawful discrimination through the *McDonnell Douglas* analysis, including sufficient evidence of pretext." *Id.* at 736 (footnote and citations omitted). Judge Magnuson concurred specially. *Id.* at 739–48.

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

Application of *Desert Palace* Outside of Title VII: *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 311, 93 FEP Cases 1761 (**5th Cir.** 2004) (*Costa* applies to ADEA cases); *Calmat Co. v. U.S. Department of Labor*, 364 F.3d 1117, 1123 n.4 (**9th Cir.** 2004) (citing *Costa* without discussion for the proposition that direct evidence of retaliation is not required to invoke mixed-motives analysis in whistleblower cases).

Meaning of "Motivating Factor": *Boyd v. Illinois State Police*, 384 F.3d 888, 894–95, 94 FEP Cases 839 (**7th Cir.** 2004), affirmed the grant of summary judgment to the Title VII defendants. The court disapproved of the lower court's supplemental instruction defining "motivating factor" as a "catalyst" without which something different would have happened. The court held that term was not used in Title VII, and imposed a burden on plaintiffs higher than it should have been. In the circumstances of the case, however, it was harmless error.

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

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

VI. No Immunity for "Holding Company" Structures

Flowers v. Columbia College Chicago, 397 F.3d 532, 533–34, 95 FEP Cases 237 (**7th Cir.** 2005), reversed the Rule 12(b)(6) dismissal of plaintiff's Title VII retaliation claim, holding

that Title VII protects an employee who complains of discrimination by a third party. Here, plaintiff was employed by defendant but was assigned to work with the Chicago School System under a contract between it and defendant. The court rejected defendant's argument that Title VII protects only employees who file a complaint against their employers: "If the College were right, then any firm could opt out of Title VII by adopting a holding-company structure. Suppose that Acme Industries were to create two subsidiaries: Acme Personnel and Acme Operations. Acme Personnel would hire and pay all employees; Acme Operations would carry on the firm's production using employees from Acme Personnel. On the College's legal view, Acme Operations could engage in religious (and other) discrimination with impunity, because it would not be the 'employer,' while Acme Personnel could fire anyone who complained about discrimination at Acme Operations, because the complaint would not concern Acme Personnel's conduct. That *reductio ad absurdum* can be avoided by reading § 2000e–3(a) to mean what it says. No employer may retaliate against someone who makes or supports a charge of discrimination against any employer."

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.

Ezell v. Potter, __ F.3d __, 2005 WL 602958 (**7th Cir.** March 16, 2005), reversed SJ plaintiff's claim of disparate treatment. The court held that a subsequently withdrawn Notice of Termination was still an adverse employment action, explaining that "to hold otherwise would allow harassing supervisors to demote employees who rejected their advances with impunity, so long as they later reversed the demotion and restored the employees to their former positions." (Citation omitted.) The court held that plaintiff was damaged "from the time it was issued until it was reversed through the union grievance process."

VIII. Comparators

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

Ezell v. Potter, __ F.3d __, 2005 WL 602958 (**7th Cir.** March 16, 2005), reversed summary judgment. The old white male plaintiff was notified of his removal for asking payment for a long lunch when he was not working, and the court accepted a comparator who was not disciplined for losing a piece of certified mail. The court held that the lower court took too narrow an approach and that similarly serious misconduct was acceptable. It rejected the Postal Service's claim that losing certified mail was not serious.

Salazar v. Washington Metropolitan Transit Authority, __ F.3d __, 2005 WL 645224 (**D.C. Cir.** March 22, 2005), reversed SJ because plaintiff showed departures from ordinary procedures that suggested defendant weighted the process to bar plaintiff's advancement. The

court stated: "The possibility that the interview process for the Metro Center job may not have been fairly designed increases in light of the fact that Tucker, the successful candidate, never held that job. Instead, Lewis transferred Tucker to what Salazar described as a less difficult job in Greenbelt—a characterization not contested by WMATA. From this, we think a reasonable jury could infer that Tucker was unsuited for the Metro Center job and that the selection process was geared not to finding the best person for the position, but rather to keeping Salazar from advancing." The court held that a reasonable jury could find defendant's explanation pretextual. Judge Williams dissented, and the panel majority criticized the dissent for raising arguments defendant never raised, and for engaging in speculation that there might be innocent reasons for the oddities, instead of drawing inferences in plaintiff's favor.

IX. Statistics

Obrey v. Johnson, __ F.3d __, 2005 WL 502861 (**9th Cir.** March 4, 2005), reversed the judgment on a jury verdict for the Title VII defendant. Plaintiff is an Asian-Pacific Islander who claimed that persons of his race were systematically excluded from senior management positions at the Pearl Harbor Naval Shipyard. The lower court excluded his statistical study because it did not account for the relative qualifications of the candidates, and the court held that this was an abuse of discretion.

X. 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*), was settled while certiorari was pending, and remains Circuit law. 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."

Machinchick v. PB Power, Inc., 398 F.3d 345, 353, 95 FEP Cases 152 (**5th Cir.** 2005), reversed SJ to the ADEA defendant. The court relied on statements in a business plan, some made at different times and for different purposes, to provide an inference of age bias. "Taken together, Knowlton's e-mail and PB Power's business plan provide evidence that PB Power intended to assemble a younger workforce, creating an inference that Machinchick's age was a factor in his termination." The court also relied on "age stereotyping remarks," such as "inflexible," "not adaptable," and possessing a "business-as-usual attitude."

Ezell v. Potter, __ F.3d __, 2005 WL 602958 (**7th Cir.** March 16, 2005), reversed SJ on plaintiff's claim of disparate treatment. It held that plaintiff showed direct evidence of discrimination because of the anti-white, anti-male, and anti-older worker remarks of his supervisors, who provided the information on which the decisionmaker acted: "Wright's co-supervisor, Mike Pavlides, told a new hire that their (Pavlides's and Wright's) plan was to get rid of older carriers and replace them with younger, faster carriers. Wright also frequently made disparaging remarks about older workers, referred often to Ezell's gray hair and beard, commented on his slowness and suggested that because of his speed, he should consider another line of work. Pavlides's statement that he and Wright had a plan to get rid of older workers and replace them with younger, faster workers is direct evidence of discriminatory intent and is sufficient evidence to allow Ezell to take his case to trial."

XI. Harassment

Who is a Supervisor? *Noviello v. City of Boston*, 398 F.3d 76, 96 (**1st Cir.** 2005), affirmed SJ, holding that plaintiff's harassers were merely second-rung "supervisors" who, despite their title, were not supervisors within the meaning of *Faragher* and *Ellerth*: "Having in mind both common law agency principles and the purposes of the anti-discrimination and anti-retaliation laws, we agree with the Seventh Circuit that 'the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment.' . . . This authority 'primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee.' . . . Without some modicum of this authority, a harasser cannot qualify as a supervisor for purposes of imputing vicarious liability to the employer in a Title VII case, but, rather, should be regarded as an ordinary coworker." (Citations omitted.)

Porter v. California Dept. of Corrections, 383 F.3d 1018, 1025–26, 94 FEP Cases 928 (**9th Cir.** 2004), reversed SJ, holding that plaintiff established a *prima facie* case of *quid pro quo* sexual harassment when she showed that transfer to a position with significantly different responsibilities was denied because she had rejected the decisionmaker's demands for sexual favors prior to his becoming a supervisor, when he was a co-worker and union official assigned to investigate her claims of sexual harassment by another supervisor, and because she showed that he was influenced in his decisions by the other supervisor she had rejected. Judge Tallman dissented as to this part of the decision. *Id.* at 1031–35.

Nieto v. Kapoor, 268 F.3d 1208, 1215–17, 18 IER Cases 97 (**10th Cir.** 2001), affirmed judgment for $3,750,000 in compensatory and punitive damages to five former employees of the Eastern New Mexico Medical Center, against the defendant contractor who is the Medical Director of the Radiation Oncology Department, for extreme racial and sexual harassment of them and of patients in violation of the Equal Protection Clause, First Amendment retaliation, and intentional infliction of emotional distress. The court held that the lower court did not err in finding that Dr. Kapoor was a state actor. Because of the powers he was given to direct the Department, it did not matter that he was a contractor instead of an employee. It is the function that matters. Here, the plaintiff employees had no choice about their supervisor, and he carried out all of the managerial duties of an employee manager. There was a clear nexus between his authority and the violation.

What Makes an Environment Hostile?—What Plaintiff Experienced: Not Enough: *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 190–91, 94 FEP Cases 577 (**4th Cir.** 2004); *Septimus v. University of Houston*, __ F.3d __, 2005 WL 237351 (**5th Cir.** Feb. 2, 2005); *Ezell v. Potter*, __ F.3d __, 2005 WL 602958 (**7th Cir.** March 16, 2005); *Mannie v. Potter*, 394 F.3d 977, 982–83, 16 AD Cases 641 (**7th Cir.** 2005); *Luckie v. Ameritech Corp.*, 389 F.3d 708, 713–14, 94 FEP Cases 1351 (**7th Cir.** 2004); *Smith v. Northeastern Illinois University*, 388 F.3d 559, 94 FEP Cases 1295 (**7th Cir.** 2004); *Herron v. DaimlerChrysler Corp.*, 388 F.3d 293, 303, 94 FEP Cases 1219 (**7th Cir.** 2004); *Dandy v. United Parcel Service, Inc.*, 388 F.3d 263, 271, 94 FEP Cases 1156 (**7th Cir.** 2004); *McPherson v. City of Waukegan*, 379 F.3d 430, 439, 94 FEP Cases 247, 94 FEP Cases 257 (**7th Cir.** 2004) (no hostile environment until the assault); *Griffith v. City of Des Moines*, 387 F.3d 733, 739, 94 FEP Cases 993 (**8th Cir.** 2004); *Bainbridge v. Loffredo Gardens, Inc.*, 378 F.3d 756, 760, 94 FEP Cases 283 (**8th Cir.** 2004); *Lanman v. Johnson County*, 393 F.3d 1151, 1157, 16 AD Cases 449 (**10th Cir.** 2004); and *Sandoval v. City of Boulder*, 388 F.3d 1312, 94 FEP Cases 1226 (**10th Cir.** 2004).

Degradation and Feeling Physically Threatened is Enough: *Robinson v. Sappington*, 351 F.3d 317, 330, 93 FEP Cases 75 (**7th Cir.** 2003); *Baker v. John Morrell & Co.*, 382 F.3d 816 (**8th Cir.** 2004) ($839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys' fees and costs, a total of $1,386,632); and *Jackson v. Flint Ink North American Corp.*, 382 F.3d 869, 870, 94 FEP Cases 549 (**8th Cir.** 2004).

Multiple Statements and Conduct Neutral in Form But Worse for a Protected Class Are Enough: *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 795–96, 94 FEP Cases 266 (**8th Cir.** 2004).

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

Supervisory Involvement Not Required: *Cerros v. Steel Technologies, Inc.*, 398 F.3d 944, 951 (**7th Cir.** 2005).

Steady Barrage Needed: *Chavez v. State of New Mexico*, 397 F.3d 826, 95 FEP Cases 434 (**10th Cir.** 2005), affirmed summary judgment on plaintiffs' Title VII racial harassment claim, but reversed summary judgment on the sexual harassment claim.

Worst Decision of the Year: *LeGrand v. Area Resources for Community and Human Services*, 394 F.3d 1098, 95 FEP Cases 14 (**8th Cir.** 2005), affirmed summary judgment to the Title VII same-sex sexual harassment defendant. The court of appeals held that repeated sexual advances on the male plaintiff by a priest on defendant's board of directors were not actionable despite the priest's admission of his demands that plaintiff watch pornographic movies with him, hugging the plaintiff, kissing the plaintiff on the mouth, touching his crotch, and making explicit sexual suggestions, all of which occurred after plaintiff had followed defendant's procedures and complained following the priest's first sexual overtures.

Not Because of Sex: *Hesse v. Avis Rent A Car System, Inc.*, 394 F.3d 624, 630, 94 FEP Cases 1805 (**8th Cir.** 2005), affirmed SJ, holding that the loud noises and bumptious conduct of the alleged harasser were directed equally to male and female employees under his supervision; *Griffith v. City of Des Moines*, 387 F.3d 733, 739, 94 FEP Cases 993 (**8th Cir.** 2004), affirmed SJ on the hostile environment claim because plaintiff complained of comments about his being a child molester, stemming from his well-publicized arrest and guilty plea to a lesser offense. The court held that this is not covered by Title VII. Judge Magnuson concurred specially..

What Makes an Environment Hostile?—What Others Experienced and Plaintiff Only Heard About: *Septimus v. University of Houston*, __ F.3d __, 2005 WL 237351 (**5th Cir.** Feb. 2, 2005), held at *7 that "evidence of a hostile environment pertaining to other women in the OGC, not Septimus . . . therefore is not relevant." *Ezell v. Potter*, __ F.3d __, 2005 WL 602958 (**7th Cir.** March 16, 2005), stated: "We have characterized this 'second-hand' harassment as lesser in impact than harassment directed at the plaintiff." (Citations omitted.)

Mannie v. Potter, 394 F.3d 977, 983, 16 AD Cases 641 (**7th Cir.** 2005), affirmed the grant of summary judgment, stating: "Most of the conduct that forms the basis of her claim consists of derogatory statements made by supervisors or co-workers out of her hearing." *Smith v. Northeastern Illinois University*, 388 F.3d 559, 567, 94 FEP Cases 1295 (**7th Cir.** 2004), affirmed summary judgment and judgment on a jury verdict, stating that plaintiff only heard second-hand about an official's repeated use of the "n" word, and that this is relevant but has less impact. *McKenzie v. Milwaukee County*, 381 F.3d 619, 624, 94 FEP Cases 532 (**7th Cir.** 2004), affirmed summary judgment, and stated: "Several of the incidents involved other female employees of the sheriff's office, and the impact of such 'second-hand' harassment is not as great as harassment directed at McKenzie herself." (Citations omitted.)

Secondhand Remarks Can Be Enough: *Dandy v. United Parcel Service, Inc.*, 388 F.3d 263, 271–72, 94 FEP Cases 1156 (**7th Cir.** 2004), affirmed summary judgment but stated: "Repeated use of such highly offensive terms in the work environment (especially considering the fact that racial epithets are meant to denigrate a group of people) may create an objectively hostile work environment, even if they are heard secondhand."

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

Incidents of Which Plaintiff "Could Have Been Aware" are Irrelevant to Liability: *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 795, 94 FEP Cases 266 (**8th Cir.** 2004), affirmed judgment on a jury verdict for the Title VII, § 1981, and Arkansas Civil Rights Act racial harassment and termination plaintiff, including the remitted awards of $173,156 in compensatory damages and $500,000 in punitive damages on the termination claim and compensatory damages of $600,000 on the harassment claim, but ordered that the punitive-damage award on the harassment claim be remitted to $600,000 from the jury's verdict of $6,063,750. The court held that plaintiff could not rely, for purposes of his harassment claim, on discriminatory actions of which he was unaware, because that would violate his duty to show that the working environment was subjectively hostile.

Conduct Neutral in Form Can Be Enough: *Singletary v. District of Columbia*, 351 F.3d 519, 526–28, 92 FEP Cases 1799 (**D.C. Cir.** 2003); *Chavez v. State of New Mexico*, 397 F.3d 826, 833, 95 FEP Cases 434 (**10th Cir.** 2005) ("Conduct that appears gender-neutral in isolation may in fact be gender-based, but may appear so only when viewed in the context of other gender-based behavior." However, harassment in retaliation for reporting food theft is not covered by Title VII.). (Citation omitted.)

Severe or Pervasive: *Cerros v. Steel Technologies, Inc.*, 398 F.3d 944, 950 (**7th Cir.** 2005), reversed the judgment after a bench trial for the Title VII defendant, and ordered that the case be assigned to a different judge on remand, pursuant to Circuit Rule 36. The court held that the lower court erred by apparently requiring that the harassment be both severe and pervasive, when either would do.

Former Lovers: *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1188, 86 FEP Cases 1409, 87 FEP Cases 1851 (**11th Cir.** 2001), reversed JMOL. Plaintiff was fired after she complained of harassment, and the case turned on whether she had a good-faith, objectively reasonable belief that she was being harassed sexually, as opposed to feeling the results of ill will after the end of her relationship with the harasser. The court stated that "while a prior intimate relationship is an important factor to consider, it is not determinative of a sexual harassment claim." The court continued: "The fact that Knuth and Lipphardt had a prior intimate relationship does not give Knuth a free pass to harass Lipphardt at work. While we recognize that '[p]ersonal animosity is not the equivalent of sex discrimination and is not proscribed by Title VII,' . . . there is a point where inappropriate behavior crosses the line into Title VII harassment." (Citation omitted.)

Same-Group Harassment: *LeGrand v. Area Resources for Community and Human Services*, 394 F.3d 1098, 1101–03, 95 FEP Cases 14 (**8th Cir.** 2005) (affirmed SJ, setting an extreme standard for actionable harassment, but not suggesting that the standard should be higher for homosexual than for heterosexual harassment); *Dick v. Phone Directories Co., Inc.*, 397 F.3d 1256, 1265–66, 95 FEP Cases 293 (**10th Cir.** 2005) (reversed SJ, holding that plaintiff need show only that the harassment was partly motivated by sexual desire); *Kang v. U. Lim America, Inc.*, 296 F.3d 810, 817, 89 FEP Cases 566 (**9th Cir.** 2002) (reversed SJ ("Here, however, Kang alleged that he and other Korean workers were subjected to physical and verbal abuse because their supervisor viewed their national origin as superior. The form is unusual, but such stereotyping is an evil at which the statute is aimed." (Citation omitted.) Judge Fernandez dissented. *Id.* at 821–23.

District Courts That Just Did Not Get It: *Petrosino v. Bell Atlantic*, 385 F.3d 210, 221–22, 94 FEP Cases 903 (**2d Cir.** 2004) (reversed SJ, stating: "The mere fact that men and women are both exposed to the same offensive circumstances on the job site, however, does not mean that, as a matter of law, their work conditions are necessarily equally harsh."); *Robinson v. Sappington*, 351 F.3d 317, 93 FEP Cases 75 (**7th Cir.** 2003); *Chavez v. State of New Mexico*, 397 F.3d 826, 95 FEP Cases 434 (**10th Cir.** 2005) (reversing SJ).

Tangible Employment Actions: *Pennsylvania State Police v. Suders*, **__ U.S. __**, 124 S. Ct. 2342, 93 FEP Cases 1473 (2004), held that an employer does not have the benefit of the affirmative defense when a constructive discharge is caused by a tangible employment action; *Lee-Crespo v. Schering-Plough Del Caribe Inc.*, 354 F.3d 34, 93 FEP Cases 47 (**1st Cir.** 2003), affirmed SJ, assuming that denial of a transfer could be a tangible employment action, but holding there was no causal link between the harassment and the denial; *McPherson v. City of Waukegan*, 379 F.3d 430, 439–41, 94 FEP Cases 247, 94 FEP Cases 257 (**7th Cir.** 2004), affirmed SJ, holding that a supervisor's unreported sexual assaults were not tangible employment actions.

Employer's Duty to Prevent Harassment: *Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7, 21–22, 89 FEP Cases 1361 (**1st Cir.** 2002), affirmed liability, holding that a reasonable jury could find that there was no sexual harassment policy in existence, in light of plaintiff's corroborated denial that employees were even informed about such a policy, defendant's inability to produced a dated copy of the policy or a signed statement that plaintiff had received it, defendant's testimony about the posting of sexual harassment posters that was contradicted by the film of the workplace, and contradictions in the defendant's officials' testimony. *Petrosino v. Bell Atlantic*, 385 F.3d 210, 225–26, 94 FEP Cases 903 (**2d Cir.** 2004), reversed SJ because

plaintiff showed a material issue as to the "'reasonable care' element of the affirmative defense because defendant's hotline refused plaintiff's request for a female counselor, and then failed to proceed. *Robinson v. Sappington*, 351 F.3d 317, 337 n.13, 93 FEP Cases 75 (**7th Cir.** 2003), reversed SJ and stated in *dicta* that a reasonable jury might find the defendants' adoption without promulgation of an anti-harassment policy inadequate. *McPherson v. City of Waukegan*, 379 F.3d 430, 441, 94 FEP Cases 247, 94 FEP Cases 257 (**7th Cir.** 2004), affirmed SJ because plaintiff failed to show that defendant had previously been placed on notice of harasser's conduct.

Employer's Duty to Cure Any Harassment That Does Occur: *McCombs v. Meijer, Inc.*, 395 F.3d 346, 95 FEP Cases 1 (**6th Cir.** 2005), affirmed judgment for plaintiff, stating that employer liability for co-worker harassment depends on whether its response "'manifests indifference or unreasonableness in light of the facts the employer knew or should have known.'" Plaintiff complained orally, but defendant dissuaded plaintiff from filing a written complaint so that the harasser's job would not be jeopardized. The court rejected defendant's argument that the relevant time period was after plaintiff filed her first written complaint. *Cerros v. Steel Technologies, Inc.*, 398 F.3d 944, 953–55 (**7th Cir.** 2005), reversed the judgment for defendant, and ordered that the case be assigned to a different judge on remand. The court rejected the lower court's view that plaintiff's claim must fail because defendant had an adequate policy in place, pointing out that the employer also had a duty to cure any problems that occurred and to prevent future harassment. *Loughman v. Malnati Organization Inc.*, 395 F.3d 404, 407, 95 FEP Cases 92 (**7th Cir.** 2005), reversed SJ, holding that "when it comes to remedying a bad situation, greater vigor is necessary when the harassment is physically assaultive." *Id.* at 407. The court also relied on the fact that two other employees had previously complained of being assaulted by some of the employees who harassed plaintiff. "Put together with the recurring nature of the harassment against Loughman, a reasonable jury could find that Malnati's was negligent in addressing its clear sexual harassment problems." *Id.* at 408.

Truly Stupid Employer Responses to Complaints: *Baker v. John Morrell & Co.*, 382 F.3d 816, 822 (**8th Cir.** 2004), affirmed judgment for plaintiff for a total of $1,386,632. The HR Director, who had ignored years of complaints by several women told plaintiff in the presence of her harasser, that she and her primary harasser "had a 'hard-on for each other' and told them to get along." Subsequently, a company foreman told plaintiff she could no longer meet with the HR Director because he was tired of her complaints. *Rowe v. Hussmann Corp.*, 381 F.3d 775, 778, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed $1.5 million judgment for plaintiff, where plaintiff's supervisor told her she should be understanding because her harasser only had an eighth-grade education and did not know any better. *Bowen v. Missouri Department of Social Services*, 311 F.3d 878, 884, 90 FEP Cases 782 (**8th Cir.** 2002), reversed SJ, where defendant told plaintiff it could not guarantee her personal safety from the harasser.

Claims Rejected Because of Failures to Complain: *McPherson v. City of Waukegan*, 379 F.3d 430, 441–42, 94 FEP Cases 247, 94 FEP Cases 257 (**7th Cir.** 2004); *Okruhlik v. University of Arkansas*, 395 F.3d 872, 881–82, 95 FEP Cases 82 (**8th Cir.** 2005).

To Whom Must a Complainant Complain? *Cerros v. Steel Technologies, Inc.*, 398 F.3d 944, 952 (**7th Cir.** 2005), reversed judgment for defendant, and ordered that the case be assigned to a different judge on remand. The court held that an otherwise adequate complaint is not defective merely because complainant did not use the company's procedures. "At bottom, the employer's knowledge of the misconduct is what is critical, not how the employer came to

have that knowledge. . . . The relevant inquiry is therefore whether the employee adequately alerted her employer to the harassment, thereby satisfying her obligation to avoid the harm, not whether she followed the letter of the reporting procedures set out in the employer's harassment policy." (Citations omitted.) *Loughman v. Malnati Organization Inc.*, 395 F.3d 404, 408, 95 FEP Cases 92 (**7th Cir.** 2005), reversed SJ: "And while Malnati's sexual harassment policy allowed employees to report incidents to upper management, a reasonable jury could find that Loughman took adequate steps by reporting the incidents to Solis, one of her supervisors."

How Many Times Should a Complainant Complain? *McCombs v. Meijer, Inc.*, 395 F.3d 346, 95 FEP Cases 1 (**6th Cir.** 2005), affirmed the judgment for a plaintiff who complained orally several times was discouraged from filing a written complaint, but still filed three of them. *Baker v. John Morrell & Co.*, 382 F.3d 816, 824 (**8th Cir.** 2004), affirmed judgment for plaintiff, including the awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys' fees and costs, a total of $1,386,632 where plaintiff and other women had unsuccessfully complained for years about severe and pervasive harassment and degradation interfering with their work and their ability to work, and at one point, plaintiff had made 15 complaints over a two-month period. *Rowe v. Hussmann Corp.*, 381 F.3d 775, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed the $1.5 million judgment for plaintiff, where plaintiff complained "'at least two or three times a month,'" but little positive happened. *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 796, 94 FEP Cases 266 (**8th Cir.** 2004), affirmed judgment for almost $1.9 million for plaintiff, and relied on the fact that plaintiff complained repeatedly to upper management, over a period of several years, without any meaningful action being taken, in upholding the remitted award of $600,000 in punitive damages on the harassment claim.

What if Another Complained First? *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 475–76, 89 FEP Cases 1861 **(5th Cir.** 2002), reversed JMOL, relying in part on defendant's inadequate investigation and failure to provide relief on earlier complaints placing it on notice. *Rowe v. Hussmann Corp.*, 381 F.3d 775, 778, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed the $1.5 million judgment for plaintiff, where her direct supervisor responded to a complaint "by saying that Moore should know better because he had had two earlier incidents of similar behavior, and that he (Weston) would talk to Moore about the matter."

Judicial Acceptance of Failures to Complain: *Loughman v. Malnati Organization Inc.*, 395 F.3d 404, 408, 95 FEP Cases 92 (**7th Cir.** 2005), reversed SJ, holding that a reasonable jury could infer that plaintiff's complaints to her supervisors were adequate to discharge her burden although she did not complain to senior management for almost a year, and stating that defendant's past reprimand of plaintiff for flirting might have weakened defendant's policy. *Rowe v. Hussmann Corp.*, 381 F.3d 775, 781, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed judgment where plaintiff complained repeatedly to no effect, but apparently did not complain during the 300-day charge-filing period and defendant lacked knowledge of what happened during that period.

XII. Litigation

Disqualification of Defense Counsel for Making Representations of Personal Knowledge at Argument: *Cerros v. Steel Technologies, Inc.*, 398 F.3d 944, 955 (**7th Cir.** 2005).

Constructive Amendments to Pleadings: *Torry v. Northrop Grumman Corp.*, __ F.3d __, 2005 WL 502835 (**7th Cir.** March 4, 2005), affirmed SJ to the age and race discrimination defendant. Plaintiff's EEOC charge alleged both age and racial discrimination, but she pleaded only age discrimination in her court Complaint, and never amended it to include a claim of racial discrimination. Although plaintiff lost on her claims, the court held that the racial discrimination claims were properly before the district court notwithstanding the lack of a pleading asserting them, because the parties had consistently treated the race claims as being in the case.

Post-Verdict Amendment of Pleadings, and "Case of the Year": *Baker v. John Morrell & Co.*, 382 F.3d 816, 830–32 (**8th Cir.** 2004).

Arbitration: *Walker v. Ryan's Family Steak Houses, Inc.*, __ F.3d __, 2005 WL 544353, 10 WH Cases 2d 609 (6th Cir. March 9, 2005).

Evidence of What Happened to Others: *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 794, 94 FEP Cases 266 (**8th Cir.** 2004) (evidence of toleration of racial harassment helps make claim of racial motivation in personnel actions more credible); *Obrey v. Johnson*, __ F.3d __, 2005 WL 502861 (**9th Cir.** March 4, 2005) (prejudicial error to exclude anecdotal evidence of other employees where plaintiff alleged a pattern and practice of discrimination).

XIII. Relief

Compensatory Damages: *Baker v. John Morrell & Co.*, 382 F.3d 816, 830–32 (**8th Cir.** 2004), affirmed the judgment on a jury verdict for the Title VII and Iowa Human Rights Act sexual harassment and retaliation plaintiff, including the awards of $839,470 in compensatory damages, $33,314 in back pay, $38,921 in front pay, $650,000 in punitive damages (remitted to $300,000), and $174,927 in attorneys' fees and costs, a total of $1,386,632. *Rowe v. Hussmann Corp.*, 381 F.3d 775, 782 n.6, 94 FEP Cases 520 (**8th Cir.** 2004), affirmed $500,000 in compensatory damages for years-long harassment by co-worker Moore, including forced touchings, demands for sexual favors, foul verbal conduct, and threats of rape and murder. The court held that damages could be awarded for conduct outside the charge-filing period.

Punitive Damages: *Baker v. John Morrell & Co.*, 382 F.3d 816, 832 n.4 (**8th Cir.** 2004) (post-verdict amendment allowed; court would not consider permissibility of allocating all punitive damages to Title VII claim and all compensatory damages to State-law claim, maximizing relief, because defendant waived challenge); *Rowe v. Hussmann Corp.*, 381 F.3d 775, 782 n.6, 94 FEP Cases 520 (**8th Cir.** 2004) (holding that million-dollar punitive-damage award was not excessive in light of years-long harassment); *Wilbur v. Correctional Services Corp.*, 393 F.3d 1192, 1205 (**11th Cir.** 2004) (no punitive damages where employer has only constructive knowledge of harassment); *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 477, 89 FEP Cases 1861 **(5th Cir.** 2002) (no punitive damages because defendant made out its affirmative defense of good faith); *Lust v. Sealy, Inc.*, 383 F.3d 580, 590, 94 FEP Cases 645 (**7th Cir.** 2004), affirmed $27,000 in compensatory damages but remitted punitive damages to $150,000 in light of remedial efforts, and holding that the caps made it unnecessary to address the ratio between the punitive and compensatory damage awards; *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 796–97, 94 FEP Cases 266 (**8th Cir.** 2004) (upholding a remitted $600,000 in punitive damages on the harassment claim where defendant ignored complaints for several years, and upholding $500,000 in punitive damages on termination claim where several officials gave different explanations).