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Employment Discrimination Law Update
by Richard T. Seymour, Washington, D.C.*

I. The Statistics: 14,353 new EEO Cases were filed in Federal district courts in the twelve months ending Sept. 30, 2006, compared to 16,930 a year earlier and 24,174 in 1997. The striking figure is that there has been a 40.6% decline since 1997 in the number of new fair-employment cases filed in Federal district courts. From the third calendar quarter of 2005 to the third calendar quarter of 2006, there has been a *2.5% increase* in general civil filings but a *15.2% decrease* in EEO filings in Federal courts.

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 civil and criminal trials from Oct. 1, 2005, through Sept. 30, 2006, down from 25 trials in FY 1998. Nineteen trials represented 3.7% of the average 517 matters terminated. These data were downloaded on March 24, 2007, from http://www.uscourts.gov/cgi-bin/cmsd2006.pl.

In the 12 months ending June 30, 2005, U.S. District Courts conducted only 613 Federal-question employment discrimination trials, 526 of which were jury trials. 3.5% of the employment discrimination cases reached trial, a rate higher than any other category of Federal-question cases except tort and patent cases. These data were downloaded on March 24, 2007, from http://www.uscourts.gov/stats/june05/C04Jun05.pdf.

III. The Government: The Advisory Committee on the Civil Rules is looking at the possibility of changes to Rule 30(b)(6), FED. R. CIV. PRO., and the Advisory Committee on the Rules of Evidence is looking at the possibility of amendments to FED. R. EVID. 502 providing selective waivers of privilege when information is turned over to the government.

IV. Look-Out List for the Supreme Court

- *BCI Coca-Cola Co. v. United States*, No. 06–341, a case involving an employer's liability for the bias of a person who affected the challenged decision but was not the formal decision-maker. There has been a wide divergence among the Circuits in their approach to this issue.

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* Law Office of Richard T. Seymour, P.L.L.C., 1150 Connecticut Avenue N.W., Suite 900, Washington, D.C. 20036-4129. Telephone: 202-862-4320. Cell: 202-549-1454. Facsimile: 800-805-1065. E-mail: rick@rickseymourlaw.net.

- *Ledbetter v. Goodyear*, No. 05-1074, was argued Nov. 27, 2006. It will decide the proper application of the Title VII limitations period to claims of intentional pay discrimination.

V. Look-Out List for Congress

H.R. 1540, the Civil Rights Tax Relief Act of 2007, was introduced on March 15, 2007, by Rep. Lewis and a bipartisan group of co-sponsors. The bill would exempt compensatory damages for emotional distress from income tax, and allow income-averaging of back-pay and front-pay awards.

H.R. 985, the Whistleblower Protection Enhancement Act, was passed by the House of Representatives on March 14 by a 331 to 94 vote. It now goes to the Senate. All Democrats, and 102 Republicans, voted in favor. The bill covers Federal employees, and private employees working for contractors paid with Federal funds. It applies to all lawful communications of misconduct, making *Garcetti* inapplicable. Other bills covering private employees are pending in the House.

VI. The Constitution, Statutes, and Rules

A. The First Amendment: *Casey v. West Las Vegas Independent School District*, 473 F.3d 1323, 1332–33 (**10th Cir.** 2007), reversed SJ to the First Amendment defendants as to the plaintiff former Superintendent's communications with the New Mexico Attorney General's office about the Board's violations of the New Mexico Open Meetings Act, because this communication, unlike all others, did not involve her responsibility to advise the Board or to report to other governmental agencies, and thus met the *Garcetti* test.

B. The Fifth Amendment: Private-Sector CBA of Government Contractor Can Create Due Process Rights as to Government Interference: *Wilson v. MVM, Inc.*, 475 F.3d 166, 178, 18 AD Cases 1711 (**3d Cir.** 2007), held that "a private employment contract with a 'just cause' termination clause can create a constitutionally protected property interest."

C. 42 U.S.C. § 1981

(a) Seventh Circuit Holds that § 1981 Does, After All, Cover Retaliation: *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 391–403, 99 FEP Cases 872 (**7th Cir.** 2007).

(b) Sec. 1981 Does Not Apply Extraterritorially: *Ofori-Tenkorang v. American International Group, Inc.*, 460 F.3d 296, 98 FEP Cases 1089 (**2d Cir.** 2006).

D. Equal Pay Act: *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 697, 99 FEP Cases 577 (**7th Cir.** 2006), affirmed summary judgment to the Title VII and Equal Pay Act defendant, holding in part that the higher pay rate of Craig Wehr, hired to fill a new position with some duties in common with plaintiff's, was justified by his superior education, job-related experience, and market forces. The court cautioned at 697 n.6 that reliance on "market forces" must not be discriminatory.

E. Title VII of the Civil Rights Act of 1964:

(a) Company Directors on the Payroll Are Not *Per Se* Excluded from Count of Employees: *De Jesus v. LTT Card Services, Inc.*, 474 F.3d 16, 99 FEP Cases 1048, 18 AD Cases 1505 (**1st Cir.** 2007), vacated summary judgment to the Title VII and ADA defendant, holding that the lower court improperly failed to examine the six *Clackamas* factors.

(b) "Agents" of Employers: *Muhammad v. Dallas County Community Supervision And Corrections Dept.*, __ F.3d __, 2007 WL 466246, 99 FEP Cases 1281 (**5th Cir.** Feb, 14, 2007) (No. 05–10580), reversed the Rule 12(b)(6) dismissal of plaintiff's Title VII claims, holding that the question whether the defendant, or Dallas County judges, were plaintiff's employer should have been resolved by the hybrid economic realities analysis, with an emphasis on the right to control the employee's conduct. "The economic realities component of the test focuses on 'whether the alleged employer paid the employee's salary, withheld taxes, provided benefits, and set the terms and conditions of employment.'"

(c) Pregnancy Discrimination: *Asmo v. Keane, Inc.*, 471 F.3d 588, 592–94, 99 FEP Cases 678 (**6th Cir.** 2006), reversed summary judgment to the Title VII pregnancy discrimination defendant, holding that defendant's selection of plaintiff for termination in a RIF two months after learning of her pregnancy with twins gave rise to an inference of a causal link, both for the *prima facie* case and for showing pretext. Judge Griffin dissented. *Id.* at 598–601.

(d) Exclusion of Contraception from Health Plan: *In re Union Pacific Railroad Employment Practices Litigation*, __ F.3d __, 2007 WL 763842 (**8th Cir.** 2007), reversed partial summary judgment to the Title VII plaintiffs, holding that defendant's exclusion of contraception from its health care benefits for both genders did not violate Title VII. Judge Bye dissented.

F. The Age Discrimination in Employment Act

(a) Exclusion from "Leave Bank" Based on Combined Age and Retirement Eligibility Violates ADEA: *EEOC v. City of Independence*, 471 F.3d 891, 896, 99 FEP Cases 770 (**8th Cir.** 2006). Retirement-eligible employees (at least 60 years old, with five years' service) could not draw on donated leave in defendant's leave-bank program. The court held this was a direct-evidence case, and rejected the argument that the decision was not based on age because some under-60 employees were also barred: "The city and the district court ignore that the 'correlated' language in Hazen applies only where the employer's decision is 'wholly' motivated by factors other than age."

(b) Denial of Car Allowance and Use of Company Car Not Enough to Show Constructive Discharge: *Velazquez-Fernandez v. NCE Foods, Inc.*, 476 F.3d 6, 13, 99 FEP Cases 1031, 12 WH Cases 2d 417 (**1st Cir.** 2007) ("Generally, a constructive discharge claim cannot be based solely on the elimination of an allowance, where the job duty that was funded by the allowance was also eliminated based on a legitimate business judgment.").

(c) Federal Employees Not Protected from Retaliation for ADEA Activities: *Gomez-Perez v. Potter*, 476 F.3d 54, 59–60, 99 FEP Cases 1185 (**1st Cir.** 2007).

G. The Americans with Disabilities Act and Rehabilitation Act

(a) Sovereign Immunity under Title II of the ADA: *United States v. Georgia*, __ **U.S.** __, 126 S. Ct. 877, 881–82, 163 L.Ed.2d 650, 17 AD Cases 673 (2006), a case brought by a paraplegic prison inmate, held that Title II validly waived State sovereign immunity to suits for damages for conduct that actually violates the Fourteenth Amendment.

(b) Broad Class of Jobs: Where Job Had Only General Duties, Employer's Belief that Plaintiff Could Not Perform It Meant that Employer Believed Plaintiff Could Not Perform "Broad Class of Jobs": *Chalfant v. Titan Distribution, Inc.*, 475 F.3d 982, 989, 18 AD Cases 1601 (**8th Cir.** 2007), affirmed the judgment on a jury verdict for the ADA plaintiff, who claimed that

defendant regarded him as disabled because of his heart condition and arthritis. The court stated: "In the absence of any job description by Titan, Chalfant's vocational expert relied on the occupational literature's classification of a second shift supervisor and testified that if Titan believed Chalfant was unable to perform the duties of a second shift supervisor, a job that is classified as having light to medium strength demands, Chalfant would have been prevented from performing 70 percent of the jobs in the Dictionary of Occupational Titles. Thus, there was sufficient evidence from which a reasonable jury could have found that Titan did not believe that a person with Chalfant's medical impairments could work in a class of jobs or a broad range of jobs in various classes."

(c) "Completely Disabled" Letter Plaintiff Obtained from Reluctant Physician Did Not Bind Him Where USPS Pressured Him to Take Permanent Disability: *Wishkin v. Potter*, 476 F.3d 180, 187, 18 AD Cases 1719 (3d Cir. 2007), reversed summary judgment to the Rehabilitation Act defendant U.S. Postal Service where plaintiff's supervisor pressured him and other disabled employees to take disability retirement, telling them that the bag room where they worked was going to be mechanized. Plaintiff was mentally disabled, and worked under restrictions because of a job-related hernia injury. He pressured his very reluctant doctor to provide a letter stating that he was unfit for duty, and provided it to Mary Green, his supervisor, in response to her pressure. He was ordered to submit to a fitness-for-duty examination by a USPS doctor, who pronounced him fit. His supervisor angrily demanded that he return and get an "unfit" letter. He did, and she then pressured him to sign disability retirement papers. He refused because he wanted to continue working, and his supervisor barred him from working for a year. The court held that "there is substantial evidence, particularly when the evidence is viewed in the light most favorable to Wishkin, the non-moving party, to support his argument that the letter was only procured under duress and as a result of a calculated attempt to force similarly situated disabled employees to take permanent disability retirement."

(d) Restrictions Described by Plaintiff's Doctor Did Not Bind Him: *Chalfant v. Titan Distribution, Inc.*, 475 F.3d 982, 990, 18 AD Cases 1601 (**8th Cir.** 2007), affirmed the judgment on a jury verdict for the ADA plaintiff, who claimed that defendant regarded him as disabled because of his heart condition and arthritis. Plaintiff's doctor testified he could not lift more than five pounds, and could not walk more than a half-mile a day. Plaintiff routinely did much more, explained that he only called the physician to testify about his arthritis, and relied on the vocational expert as to his limitations. The court held the evidence was sufficient to justify the verdict.

(e) Not "Regarded As" Disabled Where Only Customer Deemed Them Unable to Work: *Wilson v. MVM, Inc.*, 475 F.3d 166, 179, 18 AD Cases 1711 (**3d Cir.** 2007), affirmed the dismissals of plaintiffs' claims. They were Court Security Officers working for a private security company under contract with the U.S. Marshals Service. They were fired after the Marshals Service determined they were medically unqualified for duty, and MVM determined that no alternative positions were available. The court explained: "The undisputed evidence shows that MVM did not consider the appellants in any way disabled and would have reinstated them immediately if the USMS would have determined the appellants were medically qualified."

(f) "**Direct Threat" Cannot Be Based on Naked Speculation at Variance With the Facts:** *EEOC v. E.I. Du Pont de Nemours & Co.*, __ F.3d __, 2007 WL 610951 (**5th Cir.** March 1, 2007) (No. 05–30712), affirmed the judgment of ADA liability, rejecting defendant's assertion that plaintiff was a "direct threat" to herself and others because she assertedly could not evacuate the building safely: "Despite her medical restriction from walking, Barrios safely ambulated the evacuation route without assistance in 2003, and testimony at trial supported that she could safely evacuate without threatening the safety of others." (Citations omitted.)

(g) Direct Threat Cannot Be Based on Assumption that Plaintiff Would Not Have Accommodation: *EEOC v. Wal-Mart Stores, Inc.*, __ F.3d __, 2007 WL 447941, 18 AD Cases 1697 (**8th Cir.** Feb. 13, 2007) (No. 06–1583), reversed summary judgment to the ADA defendant, holding that it could not establish as a matter of law the affirmative defense that the charging party would pose a direct threat where defendant's expert based his entire opinion on the charging party's standing on crutches while working as a greeter or cashier, and the charging party could simply use a wheelchair instead. "Furthermore, Wal-Mart has failed to explain how Bradley, using a wheelchair or other similar device, poses any more of a threat than Wal-Mart customers who shop using such devices."

(h) Waiver by Failure to Press Accommodation Claim Explicitly: *Timmons v. General Motors Corp.*, 469 F.3d 1122, 18 AD Cases 1281 (**7th Cir.** 2006), affirmed the grant of summary judgment to the ADA defendant, holding that plaintiff waived any failure-to-accommodate claim by pleading and pressing only his disparate-treatment claims.

H. ERISA, Age, and Cash-Benefit Pension Plans: *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 38 EB Cases 1801 (**7th Cir.** 2006), reversed the judgment for cash-benefit pension-plan participants claiming age discrimination in violation of ERISA, and directed that judgment be entered in favor of IBM. The court held that plaintiff's theory was fundamentally flawed. It stated at 638: "This approach treats the time value of money as age discrimination. Yet the statute does not require that equation. Interest is not treated as age discrimination for a defined-contribution plan, and the fact that these subsections are so close in both function and expression implies that it should not be treated as discriminatory for a defined-benefit plan either."

I. Family and Medical Leave Act

(a) CBA Can Restrain Employers' Ability to Substitute Other Leave for FMLA Leave: *Brotherhood of Maintenance of Way Employees v. CSX Transportation, Inc.*, __ F.3d __, 2007 WL 623791 (**7th Cir.** March 2, 2007) (No. 06-2744), affirmed at p. *1 the grant of a declaratory judgment to the union providing "that if a collective bargaining agreement (CBA) grants employees the right to determine when or how they use paid vacation or personal leave, those provisions prevent the railroads from substituting contractual leave for leave under the FMLA."

(b) Retaliation Claims vs. Interference Claims: *Campbell v. Gambro Healthcare, Inc.*, __ F.3d __, 2007 WL 706934 (**10th Cir.** March 9, 2007) (No. 06-3062), affirmed the grant of summary judgment on plaintiff's FMLA claims. The court explained the difference between interference claims under 29 U.S.C. § 2615(a)(1), and retaliation claims under § 2615(a)(2):

> To establish an interference claim, Campbell must show: "(1) that [s]he was entitled to FMLA leave, (2) that some adverse action by the employer interfered with h[er] right to take FMLA leave, and (3) that the employer's action was related to the exercise or attempted exercise of h[er] FMLA rights." . . . To make out a prima facie retaliation claim, Campbell must show that: "(1) she engaged in a protected activity; (2) [Gambro] took an action that a reasonable employee would have found materially adverse; and (3) there exists a causal connection between the protected activity and the adverse action." . . . We have characterized the showing required to satisfy the third prong under a retaliation theory to be a showing of bad intent or "retaliatory motive" on the part of the employer. . . . Notably, we interpret retaliation claims under the burden-shifting architecture of *McDonnell Douglas Corp. v. Green*, 411 **U.S.** 792, 802–04 (1973), whereas the employer bears the burden of proof on the third element of an interference claim once the plaintiff has shown her FMLA leave was interfered with. . . . Due to this difference in where the burden lies with respect to the third

element of each theory, it is not unusual for a plaintiff to pursue an interference theory while the defendant argues that the evidence may only be analyzed under a retaliation theory.

Beyond differences in the elements and burdens of proof, the two claims differ with respect to the timing of the adverse action. In order to satisfy the second element of an interference claim, the employee must show that she was prevented from taking the full 12 weeks' of leave guaranteed by the FMLA, denied reinstatement following leave, or denied initial permission to take leave. . . . 29 C.F.R. § 825.216(a)(1). In contrast, a retaliation claim may be brought when the employee successfully took FMLA leave, was restored to her prior employment status, and was adversely affected by an employment action based on incidents post-dating her return to work. . . .

(Citations omitted.) The court rejected defendant's argument that plaintiff could not bring an interference claim for a post-leave adverse action: "When, as is the situation before us, the employer cites only factors predating the employee's return to work to justify the adverse action, the plaintiff is not foreclosed from bringing an interference claim. To hold otherwise would create a perverse incentive for employers to make the decision to terminate during an employee's FMLA leave, but allow the employee to return for a brief period before terminating her so as to insulate the employer from an interference claim."

(c) Notice: *Burnett v. LFW Inc.*, 472 F.3d 471, 480–81, 18 AD Cases 1536, 12 WH Cases 2d 193 (**7th Cir.** 2006), reversed summary judgment to defendant on the FMLA interference claim. The court held that plaintiff's four-month escalating series of statements to his supervisor, culminating in references to bladder cancer, with which he was diagnosed later, were far more than just saying he was "sick," and placed his employer on notice that he had a serious health condition.

J. IRCA Does Not Preempt California "Just-Cause" Law: *Incalza v. Fendi North America, Inc.*, __ F.3d __, 2007 WL 656355 (**9th Cir.** March 6, 2007) (No. 04–57119), affirmed the judgment on a jury verdict for the California "just cause" plaintiff, and held that IRCA does not preempt California's just-cause law where the employer had means of complying with IRCA other than discharge, such as suspending plaintiff or "placing him on leave without pay for a reasonable period while he was obtaining a change in work authorization to which he was entitled."

K. USERRA: *Velazquez-Garcia v. Horizon Lines Of Puerto Rico, Inc.*, 473 F.3d 11, 16, 181 LRRM 2097 (**1st Cir.** 2007), reversed summary judgment to the USERRA defendant. The court held that "under USERRA, the employee does not have the burden of demonstrating that the employer's stated reason is a pretext. Instead, the employer must show, by a preponderance of the evidence, that the stated reason was *not* a pretext; that is, that 'the action *would* have been taken in the absence of [the employee's military] service.' 38 U.S.C. § 4311(c) (emphasis added)."

L. NLRA: Work Rule Barring Complaints Outside the Chain of Command Can Be an Unfair Labor Practice: *Guardsmark, LLC v. N.L.R.B.*, 475 F.3d 369, 181 LRRM 2289 (**D.C. Cir.** 2007), held that each of the following practices was an unfair labor practice in violation of the N.L.R.A.: "Three of the handbook's rules are at issue here: a chain-of-command rule telling employees 'not [to] register complaints with any representative of the client'; a solicitation rule prohibiting solicitation and distribution of literature 'at all times while on duty or in uniform'; and a fraternization rule prohibiting employees from 'fraterniz[ing] on duty or off duty' with other employees." The court held that the fraternization rule was not expressly limited to romantic relationships, and could mislead employees into thinking they could not organize into unions.

VII. Models for Proof of Discrimination

A. The Inferential Model

(a) Direct and Indirect Evidence Both Remain Available under the Inferential Model: *Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 487, 490–91, 99 FEP Cases 1189 (**7th Cir.** 2007), affirmed the grant of summary judgment to the ADEA defendant, holding that both direct and indirect evidence are still available modes of proof under the inferential model.

(b) Employer's Deceit Creates Causal Link for *Prima Facie* Case: *Chalfant v. Titan Distribution, Inc.*, 475 F.3d 982, 990–91, 18 AD Cases 1601 (**8th Cir.** 2007) (defendant's false explanation for failing to hire plaintiff provided a causal link between defendant's disability discrimination and its failure to hire plaintiff, satisfying the *prima facie* case).

(c) Employer's Knowledge of Interest Sufficient to Satisfy Application Element, and EEOC Charge Provided Notice of Interest as to A Subsequent Opening: *Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 937–38, 99 FEP Cases 1127 (**8th Cir.** 2007) ("Failure to formally apply for a management position does not bar a plaintiff from establishing a prima facie claim, as long as the plaintiff 'made every reasonable attempt to convey [her] interest in the job to the employer.'" *Id.* at 937 (citations omitted). As to the November 2002 position, the court relied on plaintiff's intervening EEOC charge to show that defendant knew of her interest. *Id.* at 938.).

(d) Plaintiff's Inability to Understand Complaints of Rudeness Showed She Did Not Meet Defendant's Legitimate Expectations: *Fane v. Locke Reynolds, LLP*, __ F.3d __, 2007 WL 756933 (**7th Cir.** March 14, 2007) (No. 06–2200) (affirmed summary judgment to the § 1981 defendant law firm on the plaintiff former paralegal's claim that she was fired because of her race).

(e) Defendant's Failure to Cut Pay Rate Showed It Thought Demoted Plaintiff Was Still Qualified: *Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 937, 99 FEP Cases 1127 (**8th Cir.** 2007), affirmed the judgment for the Title VII racial-discrimination plaintiff as to defendant's failure to promote her to Store Manager on January 15, 2002. Defendant's asserted reason was that plaintiff, as an Assistant Store Manager, had previously been involved in a heated argument with her Store Manager behind closed doors. However, defendant continued to pay plaintiff at the Assistant Store Manager rate after it demoted and transferred her to a Cashier position, indicating that it still felt she was qualified. Judge Smith concurred in part and dissented in part. *Id.* at 945–46.

(f) Some Lateral Transfers are Adverse Employment Actions: *Czekalski v. Peters*, 475 F.3d 360, 99 FEP Cases 1121 (**D.C. Cir.** 2007), reversed summary judgment to the Title VII defendant, holding that lateral transfers involving a withdrawal of supervisory responsibilities, or that involve significantly different responsibilities, are adverse employment actions. *Id.* at 364.

(g) Assignment of Harder Tasks Not Adverse Employment Actions Where Employee Earns Overtime, and There is No Evidence of Discrimination: *Fane v. Locke Reynolds, LLP*, __ F.3d __, 2007 WL 756933 (**7th Cir.** March 14, 2007) (No. 06–2200) (affirming the grant of summary judgment to the § 1981 defendant law firm on the plaintiff former paralegal's claim that she was given substantially more work than her comparator paralegals).

(h) Proving Replacement, and Preserving the *Prima Facie* Case When Plaintiff's Replacement by Person Outside the Class Was Made by a Different Decisionmaker: *Lettieri v. Equant Inc.*, __ F.3d __, 2007 WL 641813 (**4th Cir.** March 5, 2007) (No. 05–1532), reversed

summary judgment to defendant on plaintiff's Title VII discrimination and retaliation claims. The court held at p. *6 that plaintiff established her *prima facie* case although a second decisionmaker had replaced her with a male, because the fourth prong is waived in such situations. It also held that she showed she was replaced by showing that her duties were temporarily assigned to a male employee for six months, to outlast her recall rights, before being assigned to a person selected for the job.

(i) Replacement by Temporary Employee Counts: *Tuttle v. Metropolitan Government of Nashville*, 474 F.3d 307, 317–18, 99 FEP Cases 974 (**6th Cir.** 2007) reversed the grant of judgment as a matter of law to the ADEA defendant, stating: "In cases where the new hire takes on the plaintiff's former job responsibilities, merely designating the new hire 'temporary' will not defeat the fourth element." *Id.* at 318.

(j) Poor Performance is Adequate Reason: *Douglas v. J.C. Penney Co., Inc.*, 474 F.3d 10, 14, 99 FEP Cases 985 (**1st Cir.** 2007), affirmed summary judgment to the Title VII defendant, stating: "There can be no question that, after more than four years of declining sales and mediocre or poor job performance, J.C. Penney was justified in showing Douglas the door."

(k) Prior Salary, Lack of Litigation Experience, and Performance Evaluations Legitimate Grounds for Pay Disparities: *Fane v. Locke Reynolds, LLP*, __ F.3d __, 2007 WL 756933 (**7th Cir.** March 14, 2007) (No. 06–2200), affirmed summary judgment to the § 1981 defendant. The court held that markedly higher previous salaries of plaintiff's paralegal comparators, their possession of litigation experience, her lack of it, their markedly higher evaluations reflecting greater experience, and complaints of her rudeness to clients, justified her lower pay.

(l) Employee's Insistence on Apology is Legitimate Reason: *Zamora v. Elite Logistics, Inc.*, __ F.3d __, 2007 WL 646134, 99 FEP Cases 1377 (**10th Cir.** Feb. 26, 2007) (No. 04 3205) (*en banc*), affirmed summary judgment to the Title VII defendant, which had invited plaintiff back to work from a suspension after confirming that his documents were in order, but fired him when he presented a letter stating that he would not return to work without an apology. The court rejected plaintiff's argument that no one could have believed he was serious.

(m) False Explanations Can Give Rise to Inference of Discrimination: *Czekalski v. Peters*, 475 F.3d 360, 366, 99 FEP Cases 1121 (**D.C. Cir.** 2007), reversed summary judgment to the Title VII gender discrimination defendant, holding that the provision of false explanations is also evidence from which discrimination can be inferred.

(n) Contradictory Statements Help Show Pretext: *Tuttle v. Metropolitan Government of Nashville*, 474 F.3d 307, 317–18, 99 FEP Cases 974 (**6th Cir.** 2007), reversed JMOL to the ADEA defendant, holding that irreconcilably contradictory statements by the decisionmaker, coupled with discriminatory remarks, were adequate evidence of pretext.

(o) Inconsistencies Between Reasons Given to Plaintiff At Time of Termination and Those Given in Litigation Showed an Issue as to Pretext: *Asmo v. Keane, Inc.*, 471 F.3d 588, 596, 99 FEP Cases 678 (**6th Cir.** 2006), reversed summary judgment to the Title VII pregnancy discrimination defendant, stating that "An employer's changing rationale for making an adverse employment decision can be evidence of pretext." The court contrasted the defendant's reasons communicated to plaintiff at the time and those provided at trial. The court stated: "Once a lawsuit was filed and Keane knew the reasons would be subject to scrutiny, it changed the justifications offered for Asmo's termination to include only those that were either circumstantially true or could

not be as easily penetrated as false. This change in rationale is suspicious and is evidence of pretext." (Citation omitted.) Judge Griffin dissented. *Id.* at 598–601.

(p) Evidence Supported Inference that Employee Was "Set Up," and Shoddiness of Investigation Supported Inference: *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 407, 99 FEP Cases 872 (**7th Cir.** 2007), reversed summary judgment on plaintiff's § 1981 retaliation claim. The court held that plaintiff had shown genuine issues as to pretext, including the fact that plaintiff was fired a week after complaining internally about racial discrimination, and a poor-quality investigation.

(q) Pretext *Per Se*: *EEOC v. Wal-Mart Stores, Inc.*, __ F.3d __, 2007 WL 447941, 18 AD Cases 1697 (**8th Cir.** Feb. 13, 2007) (No. 06–1583), reversed summary judgment to the ADA defendant, holding that employers cannot rely on *post hoc* rationalizations.

(r) Lack of Documentation and Inconsistencies Show Pretext: *Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 939, 99 FEP Cases 1127 (**8th Cir.** 2007), affirmed the judgment for the Title VII racial-discrimination and retaliation plaintiff, holding that the lower court did not err in rejecting defendant's explanation—that plaintiff had been involved in an altercation with her Store Manager—as a pretext for racial discrimination. It stated: "The lack of any disciplinary record in Allen's personnel file undermines TSI's proffered testimony suggesting Allen could be difficult."

(s) "Same Decisionmaker Defense" Not Accepted: *Czekalski v. Peters*, 475 F.3d 360, 368–69, 99 FEP Cases 1121 (**D.C. Cir.** 2007), reversed summary judgment to the Title VII gender discrimination defendant, rejecting the FAA's argument that the decisionmaker hired and promoted plaintiff, and must be presumed not to have discriminated against her in the reassignment. The court explained: "To be sure, this is probative evidence . . . . But the fact that Donohue once promoted Czekalski cannot immunize him from liability for subsequent discrimination, nor is it alone sufficient to keep this case from the jury. In light of all of Czekalski's evidence, a reasonable trier of fact could conclude that Donahue reassigned her for a discriminatory reason." (Citation omitted.)

(t) "Same Decisionmaker Defense" Not Accepted: *Tomassi v. Insignia Financial Group, Inc.*, __ F.3d __, 2007 WL 495314 (**2d Cir.** Feb. 16, 2007) (No. 05–6219–CV), vacated summary judgment, stating at n. 5 that the decisionmaker's favorable treatment of plaintiff in evaluations and pay raises "cut directly against" the poor-performance justification for termination. "Second, the notion that Tomassi's work was esteemed by Stadmeyer is not necessarily inconsistent with her account of his actions. Tomassi argues that Stadmeyer fired her, not because of her work performance, but because he decided that a younger face would attract a more-desirable demographic to PCV/ST. Evidence showing he thought highly of Tomassi's work does not contradict this claim."

B. Mixed Motives

Dukes v. Wal-Mart, Inc., 474 F.3d 1214, 1241 (**9th Cir.** 2007), *petition for reh'g en banc filed and response requested*, affirmed class certification and the limits the lower court imposed on back pay and punitive damages for promotion claims. The court rejected defendant's argument that class certification would improperly deprive it of the ability to assert a "same decision" defense under the Civil Rights Act of 1991. It explained: "Plaintiffs have the choice to proceed under a 'single motive' theory or a 'mixed motive' theory; Wal-Mart cannot force Plaintiffs to proceed under a 'mixed motive' theory simply because it wishes to present a 'same decision defense.' . . . In this case, Plaintiffs have elected to prove the 'single motive' theory. This means that Wal-Mart is not entitled to present a 'same decision defense' because such a defense at the remedy stage applies only where the conduct was the result of 'mixed motives.'" Judge Kleinfeld dissented. *Id.* at 1244–49.

C. Disparate Impact: Age Discrimination

Meacham v. Knolls Atomic Power Laboratory, 461 F.3d 134 (**2d Cir.** 2006), reversed the judgment on a jury verdict in favor of the ADEA RIF plaintiffs. The court held that an ADEA disparate-impact plaintiff bears the burden of persuasion that the employer's non-age-based factors are not reasonable factors other than age. It accepted the defendant's justifications for using a heavily subjective evaluation system that was inconsistently applied.

D. Retaliation

(a) Filing Facially Invalid Charge Not Protected Conduct: *Slagle v. County of Clarion*, 435 F.3d 262, 97 FEP Cases 386 (**3d Cir.** 2006) (Title VII; affirming summary judgment).

(b) Leaving Job to Complain, and Rejecting Supervisor's Advan Not Protected Conduct: *Lemaire v. State of Louisiana*, __ F.3d __, 2007 WL 582702 (**5th Cir.** Feb. 27, 2007) (No. 05-31134) (Title VII; affirming summary judgment).

(c) The "Pop Goes the Weasel" Theory of Protection from Retaliation: *Crawford v. City of Fairburn*, __ F.3d __, 2007 WL 519061, 99 FEP Cases 1405 (**11th Cir.** Feb. 21, 2007), *petition for rehearing en banc filed*, affirmed the grant of summary judgment to the Title VII retaliation defendant, holding that § 704(a) does not protect employees for participating during the conciliation stage of claim processing.

(d) Determinations of Actionable Conduct: *Burlington Northern and Santa Fe Ry. Co. v. White*, __ **U.S.** __, 126 S. Ct. 2405, 165 L. Ed. 2d 345, 98 FEP Cases 385 (2006), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff. The Court held that the language and purpose of § 704(a) of the Act required that it reach employer conduct not reached by § 703(a)n and that it "is not limited to discriminatory actions that affect the terms and conditions of employment." *Id.* at 2412–13. The Court summarized its holding:

> We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

Id. at 2409. The Court rejected the "ultimate employment decision" line of cases. *Id.* at 2414. The Court held that plaintiffs must still show that the action in question was "materially adverse," and that materiality is an important part of the standard. *Id.* at 2415. The Court expanded on the application of this standard to particular cases, making clear that there are few, if any, bright-line tests: "We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." The Court gave examples, and cited with approval the EEOC COMPLIANCE MANUAL statements that in some situations changes in work schedules, exclusion from training lunches, and the like may meet the standard. Here, plaintiff was assigned to a more arduous position, and was suspended without pay for 37 days, although she ultimately received back pay for this period. The Court held that each was actionable. It held that the eventual payment of back pay for the 37-day suspension did not cure its materially adverse character: "Many reasonable employees would find a month without a paycheck to be a serious hardship." *Id.* at 2417. It also stated: "And we have no reason to believe that a court could not have issued an injunction where an employer suspended an employee for retaliatory purposes, even if that employer later provided backpay," and referred to the additional remedies of compensatory and

punitive damages. Justice Alito concurred in the judgment. *Id.* at 2418–22.

(e) *Plus ça change, plus c'est la même chose*: *McGowan v. City of Eufala*, 472 F.3d 736, 99 FEP Cases 747 (**10th Cir.** 2006), affirmed summary judgment to the Title VII retaliation defendant, applying *Burlington Northern* and holding that the denial of plaintiff's request to be transferred to the day shift was not materially adverse because her desire was only a personal preference, and that alleged police harassment of her son and his girlfriend was not materially adverse because she was not being personally harassed.

(f) Causation Despite Seven-Month Lapse: *Lettieri v. Equant Inc.*, __ F.3d __, 2007 WL 641813 (**4th Cir.** March 5, 2007) (No. 05–1532), reversed summary judgment on plaintiff's Title VII gender discrimination and retaliation claims. The court held at p. *9 that plaintiff adequately showed causation despite the lapse of seven months between her protected activity and her termination, because "evidence of recurring retaliatory animus during the intervening period can be sufficient to satisfy the element of causation."

(g) Temporal Proximity of Threat: *Tuttle v. Metropolitan Government of Nashville*, 474 F.3d 307, 320, 99 FEP Cases 974 (**6th Cir.** 2007), reversed JMOL to the ADEA retaliation defendant, holding that temporal proximity alone is not enough to show a causal connection between the protected activity and the challenged employment action, but the combination of temporal proximity—plaintiff was fired three months after she filed her EEOC charge—and a threat to plaintiff, which she interpreted as related to her EEOC charge, were enough to show a triable issue of causation where the threat was made nine days after the supervisor uttering the threat received notice of the charge.

(h) 34 Months, and a Boatload of Intervening Customer and Co-Worker Complaints, Preclude Inference of Causation: *Wells v. SCI Management, L.P.*, 469 F.3d 697, 702, 99 FEP Cases 516 (**8th Cir.** 2006), affirmed summary judgment, holding that a 34-month gap between the protected activity and the adverse employment action, and the intervening complaints about plaintiff by customers and others, did not allow a reasonable inference of causation.

E. Circumstantial Evidence

Sun v. Board of Trustees of University of Illinois, 473 F.3d 799, 812, 99 FEP Cases 897 (**7th Cir.** 2007), affirmed summary judgment to the Title VII defendants. The court described the types of circumstantial evidence that can be used to prove discrimination: "(1) suspicious timing, ambiguous oral or written statements, or behavior toward or comments directed at other employees in the protected group; (2) evidence, whether or not rigorously statistical, that similarly situated employees outside the protected class received systematically better treatment; and (3) evidence that the employee was qualified for the job in question but was passed over in favor of a person outside the protected class and the employer's reason is a pretext for discrimination. . . ." (Citations omitted.)

F. Comparators

Lack of Comparator No Bar to Claim: *Czekalski v. Peters*, 475 F.3d 360, 365–66, 99 FEP Cases 1121 (**D.C. Cir.** 2007), reversed summary judgment to the Title VII defendant. It held that evidence as to comparators was only one way in which an inference of discrimination can arise. "In a discharge case, we explained, another way would be to show that 'the discharge was not attributable to the two [most] common legitimate reasons for discharge: performance below the employer's legitimate expectations or the elimination of the plaintiff's position altogether.' . . . The same suffices

in a reassignment case like this one." *Id.* at 366 (citation omitted). It stated that the provision of false explanations is also evidence from which discrimination can be inferred. *Id.*

No Requirement that Disparate Treatment be Universal Among Plaintiff's Protected Group: *Velazquez-Garcia v. Horizon Lines Of Puerto Rico, Inc.*, 473 F.3d 11, 20, 181 LRRM 2097 (**1st Cir.** 2007), reversed summary judgment to the USERRA defendant. The court held that the lower court erred in holding that defendant's failure to fire every employee who served in the military proved an absence of discrimination. The court stated: "As an initial matter, the failure to treat all members of a class with similar discriminatory animus does not preclude a claim by a member of that class who is so treated." (Citations omitted.) This conflicts with the Seventh Circuit's holdings in retaliation cases.

Comparators Showed the Fourth Prong of the *Prima Facie* Case: *Tuttle v. Metropolitan Government of Nashville*, 474 F.3d 307, 318–19, 99 FEP Cases 974 (**6th Cir.** 2007), reversed JMOL to the ADEA defendant, holding that plaintiff adequately showed that younger employees were treated much more favorably, helping to establish the fourth prong of her *prima-facie* case.

***Plus ça change, plus c'est la même chose*:** *Bender v. Hecht's Dept. Stores*, 455 F.3d 612, 626–27 (**6th Cir.** 2006), affirmed summary judgment to the ADEA RIF defendant, and held that *Ash* did not require reversal where there was no evidence of discrimination other than evidence that a plaintiff's qualifications were, in the eyes of the court of appeals, equal to those of an employee not laid off. Pointing out that *Ash* did not articulate a standard to replace the Eleventh Circuit's standard, the court declared its own standard: "in the case in which there is little or no other probative evidence of discrimination, to survive summary judgment the rejected applicant's qualifications must be so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former."

Comparability Should Be Exact as to Material Elements: *Fane v. Locke Reynolds, LLP*, __ F.3d __, 2007 WL 756933 (**7th Cir.** March 14, 2007) (No. 06–2200), affirmed summary judgment to the § 1981 defendant law firm on the plaintiff former paralegal's claim that she was fired because of her race. The court stated: "An employee is similarly situated to a plaintiff if the two employees deal with the same supervisor, are subject to the same standards, and have engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." (Citation omitted.) The court rejected plaintiff's effort to compare herself to a secretary on the ground that both paralegals and secretaries were exempt and were support personnel subject to the Director of Human Resources. It relied on defendant's Handbook placing them in different classes of employees, as well as on the obvious differences in duties. It rejected plaintiff's second comparator, a paralegal who reported to the same practice group supervisor, because plaintiff failed to identify the conduct for which that comparator had been given a vague criticism, and there was thus no basis for concluding that it was the same as, or worse, than, plaintiff's conduct triggering complaints from the firm's clients, from co-workers, or from her supervisor, or that the putative comparator had blinded herself to her conduct as rigorously as plaintiff had done.

Comparability Must Be Supported by Reasoned Basis: *Baylie v. Federal Reserve Bank of Chicago*, 476 F.3d 522, 526, 99 FEP Cases 1310 (**7th Cir.** 2007), affirmed summary judgment, stating that although comparators need not be identical, "there must be a reasoned basis for thinking the comparator close enough in material ways so that a reasonable fact-finder could think that race (sex, or another covered attribute) was the difference that the employer perceived." The failure to do so may be fatal.

One Side of the Coin is Preventing Cherry-Picking; the Other is that Substantial Comparability is Sufficient: *Crawford v. Indiana Harbor Belt R. Co.*, 461 F.3d 844, 98 FEP Cases 1398 (**7th Cir.** 2006), affirmed summary judgment, emphasizing that the plaintiff should include all relevant comparators in her analysis, not just a couple who were treated dissimilarly from the others and from her, to avoid misleading cherry-picking of unrepresentative examples. The court continued:

> But if as we believe cherry-picking is improper, the plaintiff should have to show only that the members of the comparison group are sufficiently comparable to her to suggest that she was singled out for worse treatment. . . . Otherwise plaintiffs will be in a box: if they pick just members of the comparison group who are comparable in every respect, they will be accused of cherry-picking; but if they look for a representative sample, they will unavoidably include some who were not comparable in every respect, but merely broadly comparable. The cases that say that the members of the comparison group must be comparable to the plaintiff in all material respects get this right. . . .

Id. at 846 (citations omitted). The court stated that length of service may be important if the comparison is to absolute numbers of incidents, because average numbers, or numbers in the same year, may be more relevant. *Id.* at 846–47. It stated that differences in supervisors are important where they have broad discretion. *Id.* at 847.

Comparability Need Not Be Exact: *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 404–05, 99 FEP Cases 872 (**7th Cir.** 2007), reversed the grant of summary judgment to defendant on plaintiff's § 1981 retaliation claim. The court rejected defendant's argument that "similarly situated comparators must have the same supervisors, the same job duties, the same work performance histories, and must have engaged in the same bad conduct as the plaintiff." The court held that such a requirement was "too rigid and inflexible," and that there was no "'magic formula.'" It added that "the purpose of the similarly situated requirement is to eliminate confounding variables, such as differing roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable: complaints about discrimination."

Comparator Showed Defendant's Reason Pretextual: *Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 937–38, 99 FEP Cases 1127 (**8th Cir.** 2007), affirmed judgment for the Title VII plaintiff on one claim where defendant's reason was that plaintiff, as an Assistant Store Manager, had previously been involved in a heated argument with her Store Manager behind closed doors after the store had closed, and plaintiff showed that defendant promoted to Store Manager a Cashier who had been involved in a heated argument with her Store Manager in front of customers. Judge Smith concurred in part and dissented in part. *Id.* at 945–46.

G. Statistics

Tiny Differences Do Not Matter: *Baylie v. Federal Reserve Bank of Chicago*, 476 F.3d 522, 525, 99 FEP Cases 1310 (**7th Cir.** 2007), affirmed summary judgment, holding that an average of one additional promotion of a white employee every 20 years was not probative of discrimination.

Foundation of Comparability Matters: *Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 487, 491–92, 99 FEP Cases 1189 (**7th Cir.** 2007), affirmed summary judgment, holding that plaintiff's statistics were too simple, and potentially non-comparable, to be probative. The court explained: "Statistical evidence is only helpful when the plaintiff faithfully compares one apple to another without being clouded by thoughts of Apple Pie ala Mode or Apple iPods."

Simple Statistics Involving Small Numbers Were Probative: *Sun v. Board of Trustees of University of Illinois*, 473 F.3d 799, 812–13, 99 FEP Cases 897 (**7th Cir.** 2007), affirmed summary judgment but held that plaintiff's simple statistical evidence on faculty promotions had some probative value, but cautioned: "We do not hold, however, that a questionable pattern of promotion, standing alone, is sufficient evidence to withstand summary judgment." *Id.* at 813.

Inexorable Zero Plus Loose Procedures Were Enough: *Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 938, 99 FEP Cases 1127 (**8th Cir.** 2007), affirmed judgment for the Title VII plaintiff, relying in part on statistics showing that there had been no black store managers in "eighty-two retail stores in states with large black populations" in ten years, there was no procedure for advancement in some of those years, and the defendant used a word-of-mouth system. Judge Smith concurred in part and dissented in part. *Id.* at 945–46.

No "Battle of Experts" in Class Certification: *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (**9th Cir.** 2007), *petition for reh'g en banc filed and response requested*, affirmed the grant of class certification and the limits the lower court imposed on back pay and punitive damages for promotion claims. The court held that the lower court did not err in rejecting defendant's store-by-store or subunit-by-subunit analysis. *Id.* at 1228–30.

H. Discriminatory Statements

Defendant's Assertion that Assertedly Biased Supervisor was "Equal Opportunity Bigot" Precludes Summary Judgment: *Czekalski v. Peters*, 475 F.3d 360, 368, 99 FEP Cases 1121 (**D.C. Cir.** 2007) (reversing summary judgment to Title VII defendant).

Biased Remark Decision of the Year: *Tomassi v. Insignia Financial Group, Inc.*, __ F.3d __, 2007 WL 495314 (**2d Cir.** Feb. 16, 2007) (No. 05–6219–CV), vacated summary judgment to the ADEA defendant, based in large part on age-biased remarks suggesting that the plaintiff was slowing down because of her age. The court held that the lower court erred in classifying remarks as "stray" and then disregarding them, and stated that "the court should have considered all the evidence in the light most favorable to the plaintiff to determine whether it could support a reasonable finding in the plaintiff's favor." It recognized the confusion in prior Circuit case law, and stated: "Where we described remarks as "stray," the purpose of doing so was to recognize that all comments pertaining to a protected class are not equally probative of discrimination and to explain in generalized terms why the evidence in the particular case was not sufficient. We did not mean to suggest that remarks should first be categorized either as stray or not stray and then disregarded if they fall into the stray category." The court rejected the lower court's view that offensiveness was the important factor, stating: "Where we described remarks as "stray," the purpose of doing so was to recognize that all comments pertaining to a protected class are not equally probative of discrimination and to explain in generalized terms why the evidence in the particular case was not sufficient." The court concluded: "Finally, we do not understand why the district court characterized Stadmeyer's remarks as stray. The remarks were made by the person who decided to terminate Tomassi. They could reasonably be construed, furthermore, as explaining why that decision was taken."

Silence Can Be a Biased Remark: *Asmo v. Keane, Inc.*, 471 F.3d 588, 594–95, 99 FEP Cases 678 (**6th Cir.** 2006), reversed the grant of summary judgment to the Title VII pregnancy discrimination defendant, holding that defendant's selection of plaintiff for termination in a RIF two months after learning of her pregnancy with twins gave rise to an inference of a causal link, both for purposes of plaintiff's *prima facie* case and for purposes of showing pretext. The court stated that a

supervisor's failure to congratulate plaintiff, or to ask plaintiff how she was going to handle the heavy travel requirements of her job, was evidence of pretext.

Age-Biased Remarks of Supervisor, But a Non-Decisionmaker, Probative: *Tuttle v. Metropolitan Government of Nashville*, 474 F.3d 307, 320, 99 FEP Cases 974 (**6th Cir.** 2007), reversed JMOL to the ADEA defendant, holding that age-discriminatory statements helped show pretext. They included remarks such as "how old are you? ... you will be retiring quicker than you think"; "this woman has no business on a PC"; "there have been others, and they took their retirement or pension"; "I want to apologize for causing you stress. I wouldn't want anything to happen to my mother and dad." The court held that these remarks by a supervisor but not decisionmaker were not direct evidence, but "could have provided circumstantial evidence to the jury of such discrimination."

Multiple Levels of Review Insulated Employer from Effect of Biased Remarks: *Sun v. Board of Trustees of University of Illinois*, 473 F.3d 799, 813–14, 99 FEP Cases 897 (**7th Cir.** 2007), affirmed summary judgment to the Title VII defendants.

I. Harassment

"Equal-Opportunity Harassment" Defense Rejected: *Kampmier v. Emeritus Corp.*, 472 F.3d 930, 940–41, 99 FEP Cases 755, 18 AD Cases 1607 (**7th Cir.** 2007), reversed summary judgment to the same-sex harassment defendant. Defendant argued that the female supervisor was an "equal-opportunity harasser" because she patted some male behinds, and apparently sexually propositioned one male. The court disagreed, because the harassment of women was far worse.

References to Plaintiff as Fat Woman, with Sexual References, Was Because of Sex: *Harsco Corp. v. Renner*, 475 F.3d 1179, 1187, 99 FEP Cases 1145 (**10th Cir.** 2007), affirmed liability on a jury verdict for the Title VII sexual harassment plaintiff.

Vague Allegations Not Enough: *Gilliam v. South Carolina Department of Juvenile Justice*, 474 F.3d 134, 142–43, 99 FEP Cases 865 (**4th Cir.** 2007), affirmed SJ because plaintiff did not show that the incidents were based on race, and made only general, conclusory statements.

Severe *or* Pervasive is Enough; Workplace Does Not Have to Be "Hellish": *Jackson v. County of Racine*, 474 F.3d 493, 99 FEP Cases 1025 (**7th Cir.** 2007), affirmed SJ, but held that plaintiffs had adequately shown they were subjected to a hostile environment. The court stated: "It is important to recall that harassing conduct does not need to be both severe *and* pervasive. . . . One instance of conduct that is sufficiently severe may be enough. . . . Conversely, conduct that is not particularly severe but that is an incessant part of the workplace environment may, in the end, be pervasive enough and corrosive enough that it meets the standard for liability." *Id.* at 499 (emphasis in original; citations omitted). The court continued: "We trust that in the future counsel will avoid the use of a single, overwrought word like 'hellish' to describe the workplace and focus on the question whether a protected group is experiencing abuse in the workplace, on account of their protected characteristic, to the detriment of their job performance or advancement." *Id.* at 500.

Defendant's Mechanical Analyses of Isolated Facts Not Enough to Overturn Jury Verdict: *Harsco Corp. v. Renner*, 475 F.3d 1179, 1187–88, 99 FEP Cases 1145 (**10th Cir.** 2007) (affirming judgment of liability on a jury verdict for Title VII sexual harassment plaintiff).

Racially Demeaning References to Plaintiff and His Son, Every Couple of Days for Four Years, was a "Close Case" but Enough: *Herrera v. Lufkin Industries, Inc.*, 474 F.3d 675, 680–83, 99 FEP Cases 809 (**10th Cir.** 2007) (reversing summary judgment to defendant).

Repeated Complaints Showed Same-Sex Conduct Was Offensive Despite Plaintiff's Ties to Alleged Harasser: *Kampmier v. Emeritus Corp.*, 472 F.3d 930, 941–43, 99 FEP Cases 755, 18 AD Cases 1607 (**7th Cir.** 2007) (reversing summary judgment).

Employment Actions Not Tangible Without a Causal Link: *Kampmier v. Emeritus Corp.*, 472 F.3d 930, 943, 99 FEP Cases 755, 18 AD Cases 1607 (**7th Cir.** 2007) (reversing SJ).

Failure to Act on Earlier Complaints by Another Employee, or on Plantiff's Repeated Complaints, Created Issues as to Affirmative Defense: *Kampmier v. Emeritus Corp.*, 472 F.3d 930, 943, 99 FEP Cases 755, 18 AD Cases 1607 (**7th Cir.** 2007) (reversing summary judgment).

Affirmative Defense Upheld Where Plaintiff Failed to Cooperate: *Jackson v. County of Racine*, 474 F.3d 493, 501–02, 99 FEP Cases 1025 (**7th Cir.** 2007), affirmed the grant of summary judgment to the Title VII sexual-harassment defendant, because defendant met its affirmative burden, acted relatively quickly in light of the difficulties caused by plaintiff's reluctance to make non-confidential complaints, failures to respond, and false assurances that everything was alright. The court rejected plaintiff's argument that defendant lost its affirmative defense by demoting the harasser rather than firing him.

Affirmative Defense Upheld, Rejecting "Bare Assertions" that Plaintiff Thought Complaints Would Be Ineffective: *Gordon v. Shafer Contracting Co., Inc.*, 469 F.3d 1191, 1195, 99 FEP Cases 513 (**8th Cir.** 2006) (affirming summary judgment).

Affirmative Defense Rejected Where Employer Responded Only to Formal Complaints, Did So Poorly, and Ignored Both Oral Complaints and Its Own Knowledge of Harassment: *Harsco Corp. v. Renner*, 475 F.3d 1179, 1188, 99 FEP Cases 1145 (**10th Cir.** 2007) (affirmed judgment of liability on a jury verdict).

Consent Not a Defense if Victim is Under State-Law Age of Consent: *Doe v. Oberweis Dairy*, 456 F.3d 704, 713–15, 98 FEP Cases 958, 98 FEP Cases 1022 (**7th Cir.** 2006), *cert. denied*, March 19, 2007 (No. 06B735), reversed summary judgment to the Title VII sexual harassment defendant, holding that the then 16-year-old plaintiff's consent to intercourse and other sexual acts with her then 25-year-old supervisor, was not a defense to the harassment claim.

Constructive Discharge Upheld: *Patton v. Keystone RV Co.*, 455 F.3d 812, 98 FEP Cases 937 (**7th Cir.** 2006), reversed summary judgment. Plaintiff alleged that her supervisor was obsessed with her, and stalked and harassed her for a month. In one instance, he put his hand under her shorts and up her thigh until he reached her underwear. The court held that she was entitled to quit immediately after she asked for a higher-level supervisor to come to the gate so that she could talk with him, he refused, and the harasser appeared instead. The court held that "a reasonable fact finder could agree with Patton's fear that her supervisor was an obsessed man who—based on previous acts showing no regard for Patton's right to control who could touch intimate areas of her body—was capable of, and desirous of, physically assaulting her in a serious way. We need not conclude that a rape or other assault was likely, but only whether a reasonable fact finder could find that Patton should have quit immediately to protect herself. We think the answer is yes." Id. at 818.

J. Affirmative Action

Alexander v. City of Milwaukee, 474 F.3d 437, 99 FEP Cases 961 (**7th Cir.** 2007), affirmed the judgment holding the City liable, and the then Police Chief and each of the members of the Board of Police and Fire Commissioners personally liable, under Title VII and 42 U.S.C. §§ 1981 and 1983 for racial and sexual discrimination against 17 white male plaintiffs in making promotions to the rank of Captain. Goals had been established in hiring litigation, but never in promotions. The Chief was evaluated on diversity accomplishments as well as other factors, achieved his highest evaluation scores on such accomplishments, and nominated women and members of minority groups disproportionately for the 41 promotions at issue. The court held that the individual defendants were not entitled to qualified immunity based on an affirmative action plan, and that no defendants had a legal defense on the merits based on such a plan, because they all denied taking race and gender into account, their emphasis on diversity was amorphous and did not contain clear limits, and their actions thus did not include the precise tailoring and narrowing essential to the defense.

VIII. Litigation

A. Exhaustion

Prudential, Title VII-Type Exhaustion Required for Rehab Act Claims; Failure to Exhaust CBA Remedies Bars Due-Process Claims: *Wilson v. MVM, Inc.*, 475 F.3d 166, 18 AD Cases 1711 (**3d Cir.** 2007).

Need to Plead Worksharing Agreements to Get 300 Days? *Mayers v. Laborers' Health & Safety Fund of North America*, __ F.3d __, 2007 WL 623641 (**D.C. Cir.** March 2, 2007) (No. 05–7137) (*per curiam*), *petition for rehearing en banc pending*, affirmed SJ to the ADA defendant, holding that the 180-day charge-filing period applied because plaintiff failed to allege a work-sharing agreement with the D.C. agency and did not dispute the applicability of the 180-day period.

Waiver of 300-Day Filing Period: *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504, 99 FEP Cases 610 (**2d Cir.** 2006), affirmed the grant of summary judgment to the Title VII defendant, holding that plaintiff waived the 300-day charge-filing period by failing to make the argument below.

Internal Complaint Shows Plaintiff Was Sufficiently Aware of Demotion to Start His Charge-Filing Time Running: *Roney v. Illinois Department of Transportation*, 474 F.3d 455, 460, 99 FEP Cases 1044 (**7th Cir.** 2007) (affirming SJ to Title VII defendant).

Harassment Charge Timely Even Where Related Act Within Period Not Actionable: *Gilliam v. South Carolina Department of Juvenile Justice*, 474 F.3d 134, 141, 99 FEP Cases 865 (**4th Cir.** 2007), affirmed SJ but held that the claim was timely as a continuing violation because a related act occurred within the 300-day charge-filing period, and there was no requirement that the related act be independently actionable. The court stated: "Under the continuing violation doctrine, none of the August 31 Acts had to be discriminatory in and of itself. It was only necessary for one of these acts to contribute to the behavior relating to the incidents that occurred prior to the limitations period."

Laches Applicable to Timely Hostile-Environment Claim, Discrete Actions Entwined with Harassment Are Not Part of Continuing Violation, and Plaintiff's All-or-Nothing Approach Barred Remedies Less than Dismissal: *Pruitt v. City of Chicago*, 472 F.3d 925, 99 FEP Cases 737 (**7th Cir.** 2006) (affirming SJ to Title VII and § 1981 racial harassment defendant).

B. Arbitration

AAA "Canon X" Commercial Arbitrators: With a three-member panel, it is possible for the parties to agree on all three, or for each side to pick one arbitrator and have them pick the third to act as chair. When each side picks one arbitrator, they can specify whether the wing members will be neutral arbitrators with the independence and no-contact rules applicable to judges, or predisposed arbitrators who are free to communicate with the side picking them until any part of the matter is taken under consideration, and even to help that side prepare for the hearing or to suggest lines of questioning, as long as they disclose at the earliest practicable time an intent to communicate and as long as the facts—but not the content—of all contacts are timely disclosed to all participants. Predisposed arbitrators are allowed under Canon X of the AAA Code of Ethics for Arbitrators in Commercial Disputes.

Employee Who Signed Arbitration Agreement Cannot Intervene in EEOC Case; CP's Unreasonable Attacks on Arbitration Agreement Blinded Court to Real Problem: *EEOC v. Woodmen of the World Life Insurance Society*, __ F.3d __, 2007 WL 702758 (**8th Cir.** March 9, 2007) (No. 06–1522) (reversing order allowing intervention).

California Ethics Standards Preempted by Securities Exchange Act and SEC Approval of NASD Regulations: *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1121, 22 IER Cases 774 (**9th Cir.** 2005) (affirming injunction barring plaintiff from arbitrating before the AAA).

Company Loses Effort to Vacate Arbitration Award in Favor of Discrimination Claimants Where Defendant Effectively Agreed to Extend Time Deadlines for Decisions, and Where Lack of Reasons for Award Made It Impossible for Company to Show Manifest Disregard of Law: *Electronic Data Systems Corp. v. Donelson*, 473 F.3d 684, 99 FEP Cases 1054, 18 AD Cases 1513 (**6th Cir.** 2007).

C. Bars to Actions

EEOC Collaterally Precluded from Seeking Make-Whole Relief Where Plaintiffs Failed in State-Court Tort Action While EEOC Charge is Pending: *EEOC v. Jefferson Dental Clinics, PA*, __ F.3d __, 2007 WL 441879, 99 FEP Cases 1313 (**5th Cir.** Feb. 12, 2007) (No. 06–10090).

Plaintiff's Concealment of Employment Discrimination Causes of Action in her Bankruptcy Filings Judicially Estopped her from Proceeding on those Claims: *Cannon-Stokes v. Potter*, 453 F.3d 446, 18 AD Cases 201 (**7th Cir.** 2006) (affirming SJ to USPS).

Release and Covenant Not to Sue Did Not Meet OWBPA Where Confusing, Internally Inconsistent, and Inadequately Explained: *Syverson v. International Business Machines Corp.*, 461 F.3d 1147, 98 FEP Cases 1345 (**9th Cir.** 2006); *Thomforde v. International Business Machines Corp.*, 406 F.3d 500, 95 FEP Cases 1145 (**8th Cir.** 2005).

Clear Release Binds Educated Plaintiff: *Myricks v. Federal Reserve Bank of Atlanta*, __ F.3d __, 2007 WL 675341 (**11th Cir.** March 7, 2007) (No. 06–11624) (affirming SJ).

D. Class Actions

Class Certification Upheld: *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (**9th Cir.** 2007), *petition for reh'g en banc filed and response requested*, affirmed the grant of class certification and the limits the lower court imposed on back pay and punitive damages for promotion claims.

Plaintiff Entitled to Discovery, But Has Burden of Showing Home-State or Local-Controversy Exceptions to Class Action Fairness Act: *Hart v. FedEx Ground Package System Inc.*, 457 F.3d 675 (**7th Cir.** 2006).

E. Summary Judgment

Defense Response to Plaintiff's Opposition Creates Issue That Cannot Be Resolved on Summary Judgment: *Czekalski v. Peters*, 475 F.3d 360, 368, 99 FEP Cases 1121 (**D.C. Cir.** 2007), held that defendant's reliance on the theory that a manager was an "equal-opportunity abuser" raised a genuine issue of material fact precluding summary judgment.

Lower Court Cannot Reflexively Dismiss Plaintiff's Specific Assertions as "Self-Serving": *Velazquez-Garcia v. Horizon Lines Of Puerto Rico, Inc.*, 473 F.3d 11, 17–18, 181 LRRM 2097 (**1st Cir.** 2007), reversed SJ to the USERRA defendant, holding: "Therefore, provided that the nonmovant's deposition testimony sets forth specific facts, within his personal knowledge, that, if proven, would affect the outcome of the trial, the testimony must be accepted as true for purposes of summary judgment."

Defendant's Motion Inadequate to Put Plaintiff on Notice to Produce Evidence of Harassment or Retaliation: *Lemaire v. State of Louisiana*, __ F.3d __, 2007 WL 582702 (**5th Cir.** Feb. 27, 2007) (No. 05-31134) (reversing SJ).

Earlier Failure to Complain Raises Jury Question in USERRA Discharge Case: *Velazquez-Garcia v. Horizon Lines Of Puerto Rico, Inc.*, 473 F.3d 11, 19, 181 LRRM 2097 (**1st Cir.** 2007), reversed summary judgment, stating: "In an atmosphere such as a working seaport, it is reasonable for a person to avoid making a scene over such behavior, or even to believe that the behavior is only in jest, only to discover too late that it was a harbinger of worse discrimination to come. Velázquez's failure to report the behavior may be considered by a jury in judging his credibility, but it is evident to us that a jury could reasonably decide to place no weight on his prior silence."

F. Remedies

Preliminary Injunctions More Freely Available? *Burlington Northern and Santa Fe Ry. Co. v. White*, __ **U.S.** __, 126 S. Ct. 2405, 2417, 165 L. Ed. 2d 345, 98 FEP Cases 385 (2006), affirmed the judgment on a jury verdict for the Title VII retaliation plaintiff. The Court held that the eventual recovery of back pay for a 37-day unpaid suspension did not mean it was not a material injury to plaintiff. In the course of its discussion, the Court stated in *dictum*: "And we have no reason to believe that a court could not have issued an injunction where an employer suspended an employee for retaliatory purposes, even if that employer later provided backpay."

- Plaintiffs should use this statement in seeking preliminary injunctions in some EEO and retaliation cases, to rebut the common perception among lower-court judges that the availability of back pay years later makes such relief unnecessary.

Plaintiffs' Burden to Establish the Probability that They Would be Promoted Over *All* Other Potential Candidates, to Get Back Pay and Emotional-Distress Damages: *Alexander v. City of Milwaukee*, 474 F.3d 437, 451, 99 FEP Cases 961 (**7th Cir.** 2007) (affirming judgment of liability but lower court erred in instructing the jury that, under the lost-chance method, plaintiffs

were to be evaluated only against other plaintiffs with respect to each of the promotional opportunities in question).

Mitigation Efforts Adequate Despite Conflicting Statements of Plaintiff's Expert: *Chalfant v. Titan Distribution, Inc.*, 475 F.3d 982, 992–93, 18 AD Cases 1601 (**8th Cir.** 2007) (affirming $60,000 back-pay judgment on jury verdict).

Back Pay Upheld Despite Charging Party's Physician's Certification: *EEOC v. E.I. Du Pont de Nemours & Co.*, __ F.3d __, 2007 WL 610951 (**5th Cir.** March 1, 2007) (No. 05–30712) (affirming award of $91,000 in back pay to the ADA charging party).

Overtime and Value of Flex Time Must Be Considered in Awarding Back Pay: *Alexander v. City of Milwaukee*, 474 F.3d 437, 452, 99 FEP Cases 961 (**7th Cir.** 2007).

Red-Circling Pay of Demoted Employee Supported Higher Calculation of Back Pay: *Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 941–42, 99 FEP Cases 1127 (**8th Cir.** 2007) (lower court did not err in finding that plaintiff would likely have received the top range of managerial pay rather than the bottom range, because plaintiff was still receiving Assistant Manager pay after her demotion to the job of Cashier. Judge Smith concurred in part and dissented in part. *Id.* at 945–46.

$200,000 in Front Pay Reversed Where ADA Plaintiff's Condition Had Deteriorated Sharply by Time of Judgment:*EEOC v. E.I. Du Pont de Nemours & Co.*, __ F.3d __, 2007 WL 610951 (**5th Cir.** March 1, 2007) (No. 05–30712).

"Lost Chance" Method Ends Front Pay When Plaintiff Obtains Right to Compete Equally, Even if Never Selected, and Bars Cutting Off Front Pay Before Such Right is Obtained: *Alexander v. City of Milwaukee*, 474 F.3d 437, 452–53, 99 FEP Cases 961 (**7th Cir.** 2007)

$18,750 Front Pay Award Upheld Where Plaintiff Continued Looking in the Classified Ads: *Chalfant v. Titan Distribution, Inc.*, 475 F.3d 982, 993, 18 AD Cases 1601 (**8th Cir.** 2007).

Liquidated Damages Instruction Properly Denied Where There Was No Evidence of a Knowing Violation: *Tuttle v. Metropolitan Government of Nashville*, 474 F.3d 307, 322, 99 FEP Cases 974 (**6th Cir.** 2007).

Punitive Damages Case of the Year for Plaintiffs: *EEOC v. E.I. Du Pont de Nemours & Co.*, __ F.3d __, 2007 WL 610951 (**5th Cir.** March 1, 2007) (No. 05–30712), affirmed $300,000 on a jury verdict for the ADA charging party, holding that punitive damages are permissible where only back pay has been awarded, because awards of back and front pay serve a compensatory function. The court also gave short shrift, at p. *6, to defendant's argument that the EEOC had failed to show malice or reckless disregard of the law: "DuPont was aware of its responsibilities under the ADA. Yet, viewed in the light most favorable to the verdict, DuPont made Barrios's job more difficult. The company placed Barrios's printer over one hundred feet from her desk in spite of her walking difficulties, whereas other lab clerks' printers were adjacent to their desks. DuPont refused to allow Barrios to demonstrate her ability to evacuate before she was terminated—for inability to evacuate. The company spent years trying to convince Barrios to retire on disability. But the crowning evidentiary blow against DuPont is that after Barrios attempted to get her job back, a DuPont supervisor stated that he no longer wanted to see her 'crippled crooked self, going down the hall hugging the walls.'" The court also held that the jury was entitled to disregard the good-faith defense where DuPont based it only on conclusory assertions that it complies with the law. . . .

Commissioners' Awareness of Police Chief's Racial Animus, and Inaction, Entitled Plaintiffs to Punitive Damages: *Alexander v. City of Milwaukee*, 474 F.3d 437, 453–54, 99 FEP Cases 961 (**7th Cir.** 2007).

ADA Defendant's Recidivism, Inconsistent Behavior, Passing the Buck as to the Decisionmaker, and Memory Improvement at Trial Justified Punitive Damages: *Chalfant v. Titan Distribution, Inc.*, 475 F.3d 982, 991–92, 18 AD Cases 1601 (**8th Cir.** 2007), affirmed the $100,000 punitive-damage award and stated: "A reasonable jury could infer that this unusual decision-making process occurred because Titan was aware at the time it decided not to hire Chalfant that it 'may [have been] acting in violation of federal law.'"

Plaintiff's Insubordination Was Enough to Disprove Malice, Barring Punitive Damages: *Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 942–43, 99 FEP Cases 1127 (**8th Cir.** 2007). The court stated: "Although TSI's rapid growth and promotion practices fail to justify the racial disparity within TSI's management personnel, those practices demonstrate justifiable business reasons or ineptness and not racial malice or reckless indifference directed toward Allen. Neither Allen nor the record before us demonstrates TSI acted with the requisite state of mind to support an award of punitive damages."

No Punitives Where Defendant Had Adequate Policies and Plaintiff Failed to Impute Managers' Actions to Corporation: *Harsco Corp. v. Renner*, 475 F.3d 1179, 1189–90, 99 FEP Cases 1145 (**10th Cir.** 2007) (affirming liability on a jury verdict for the Title VII sexual harassment plaintiff, but reversing award of punitive damages).

Punitive Damages Should Have Been Awarded Against Individual Officials in Proportion to Their Individual Fault, Not *Pro Rata*, and Upholding Amount: *Alexander v. City of Milwaukee*, 474 F.3d 437, 454–55, 99 FEP Cases 961 (**7th Cir.** 2007) (discussing the fact that some Commissioners had sat over a significantly smaller number of race and sex discriminatory promotions disfavoring white males, and holding that *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 **U.S.** 408 (2003), did not require any reduction in the punitive damages because the compensatory damages were relatively low, and the *State Farm* ratios do not apply in such instances.

G. Attorneys' Fees

Plaintiff Entitled to Appellate Fees Where Plaintiff Successfully Defended the Verdict: *Harsco Corp. v. Renner*, 475 F.3d 1179, 1191, 99 FEP Cases 1145 (**10th Cir.** 2007).

H. Sanctions

Sanctions for Improper Deposition Conduct: *Redwood v. Dobson*, __ F.3d __, 2007 WL 397499 (7th Cir. Feb. 7, 2007) (Nos. 05–4324, 06–1165), censured three attorneys, and admonished one attorney, for improper deposition conduct such as asking impertinent questions designed only to embarrass the deponents, and improper objections, and instructing witnesses not to answer although no question of privilege was involved. This is a "must read" case.

Vacation of Default Sanction Affirmed Where Lesser Remedies Were Available: *Sun v. Board of Trustees of University of Illinois*, 473 F.3d 799, 811–12, 99 FEP Cases 897 (**7th Cir.** 2007), affirmed the lower court's vacation of its own entry of default judgment as a sanction for defense counsel's discovery violations, because the penalty was unduly harsh. The court explained that the delay was not extreme, that defense counsel had consistently been involved in discovery, and the

lower court should have tried imposing monetary penalties directly on defense counsel before "entering a default, punishing the defendants and giving the plaintiff a windfall.".

Denial of Sanction of Dismissal of all Plaintiff's Claims Affirmed, Where Defendant Had Already Successfully Impeached Plaintiff on the Claims in Question: *Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931, 936, 99 FEP Cases 1127 (**8th Cir.** 2007).

Sanction Reversed for Procedural Error: *Amlong & Amlong, P.A. v. Denny's, Inc.*, 457 F.3d 1180, 98 FEP Cases 1617 (**11th Cir.** 2006), reversed $400,000 in sanctions against counsel for plaintiff in an unsuccessful sexual harassment lawsuit, because the lower court engaged in plenary review of findings of fact made by a magistrate judge who had conducted an evidentiary hearing, and did not conduct an evidentiary hearing of her own.

IX. Taxes

Tax Decision Vacated: *Murphy v. Internal Revenue Service*, 460 F.3d 79 (**D.C. Cir.** 2006), *vacated sua sponte and rehearing ordered*, 2006 WL 4005276 (**D.C. Cir.** Dec. 22, 2006) (No. 05–5139), held that the Sixteenth Amendment to the Constitution does not allow imposition of the income tax on emotional-distress damages unrelated to earnings. There is a strong sense that the court will change its decision.

X. Special Problems with the Federal Government as Employer

20-Month Late FMLA Claim Timely Because of Lack of Official Notice of How to Pursue FMLA Claim; AJ's Statement Not Enough: *Toyama v. Merit Systems Protection Board*, __ F.3d __, 2007 WL 738450 (**Fed. Cir.** March 13, 2007) (No. 2006–3281).

VEOA Claims Subject to Equitable Tolling; Federal Employees Have Right to Hearing on USERRA Claims: *Kirkendall v. Department of Army*, __ F.3d __, 2007 WL 675744 (**Fed. Cir.** March 7, 2007) (No. 05–3077), reversed the MSPB's dismissal of petitioner's claims under the Veterans Employment Opportunities Act of 1998 ("VEOA"), 5 U.S.C. § 3330a (2000), and the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4311 (2000). The court held that the deadline for asserting a VEOA claim is subject to equitable tolling. The court also held that Federal employees have a right to a hearing on their USERRA claims, and rejected the MSPB's practice of granting or denying hearings as a matter of grace, depending on its administrative convenience.

90-Day Title VII Suit-Filing Period Applies to Federal Employees' ADEA Claims: *Price v. Bernanke*, 470 F.3d 384, 389, 99 FEP Cases 687 (**D.C. Cir.** 2006), affirmed the dismissal as untimely of plaintiff's ADEA retaliation case against the Federal Reserve Board. The court stated: "Accordingly, we hold that when federal employees bring a civil action after pursuing administrative remedies under the ADEA, the action must be brought within 90 days of final agency action, the time period allowed for similar suits under Title VII." The court noted that the EEOC had endorsed such a result, and that four other Circuits had previously adopted that standard.

XI. Appellate Tips for Effective Advocacy

"Head in the Sand" Approach and Cursory Contentions Doomed: *Pruitt v. City of Chicago*, 472 F.3d 925, 930, 99 FEP Cases 737 (**7th Cir.** 2006) (affirming SJ).