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Employment Discrimination Law Update
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I. The Statistics: 13,107 new EEO Cases were filed in Federal district courts in the twelve months ending Sept. 30, 2006, compared to 24,174 in 1997. The striking figure is that there has been a 45.8% decline since 1997 in the number of new fair-employment cases filed in Federal district courts.

II. The EEOC: From FY 1997 to FY 2007, there were significant differences in the types of discrimination charges filed. Equal Pay Act charges declined 27.9%, and ADA charges declined 2.1%. Race discrimination charges increased only 4.5% and sex discrimination charges increased only 0.4%. By contrast, age discrimination charges increased 21.0%, national origin discrimination charges increased 40.0%, retaliation charges under all statutes increased 46.5%, and religious discrimination charges increased 68.5%.

III. The Constitution, Statutes, and Rules

A. The First Amendment: *Charles v. Grief*, __ F.3d __, 2008 WL 788618 (5th Cir. March 26, 2008) (No. 07-50537), affirmed the lower court's denial of qualified immunity to the defendant official of the Texas Lottery Commission, as to plaintiff's § 1983 claim that he was fired in retaliation for complaining of racial discrimination and mismanagement by the Commission. The court held that plaintiff complained as a private citizen, not as a Commission employee. The case provides a useful road map for developing the facts—where available—to meet the *Garcetti* test.

B. The First and Fourteenth Amendments as to the Ministerial Exception: *Rweyemamu v. Cote*, __ F.3d __, 2008 WL 746822 (2d Cir. March 21, 2008) (No. 06-1041-cv), affirmed the dismissal for lack of jurisdiction of the plaintiff priest's promotional and termination claims against the Bishop of his diocese. The court stated at p. *8 that "our limited precedent to date supports the following propositions: (1) Title VII and the ADEA are not inapplicable to religious organizations as a general matter; (2) we will permit lay employees—but perhaps not religious employees—to bring discrimination suits against their religious employers; and (3) even when we permit suits by lay employees, we will not subject to examination the genuineness of a proffered religious reason for an employment action."

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C. 42 U.S.C. § 1981

Application to Municipalities: *Arendale v. City of Memphis*, __ F.3d __, 2008 WL 731226 (6th Cir. March 20, 2008) (No. 07-5230), affirmed the grant of summary judgment to defendant on plaintiff's § 1981 claim, holding that § 1981 does not allow a private cause of action against municipalities. **Comment:** There is a Circuit split on this question, with the majority of Circuits addressing the issue holding that § 1983 provides the only cause of action for violation of the rights created by § 1981. Plaintiffs' attorneys should plead § 1983 to protect the claims at issue.

What is "Race"? *Abdullahi v. Prada USA Corp.*, __ F.3d __, 2008 WL 746848, 102 FEP Cases 1537 (7th Cir. March 21, 2008) (No. 07-2489), reversed the grant of summary judgment to defendant on plaintiff's § 1981 claim, holding that plaintiff's *pro se* form Amended Complaint was adequate to state a § 1981 claim notwithstanding her failure to check the "Race" box on the form, because the form did not explain the difference between "race" and "national origin" and it was clear that plaintiff was complaining of discrimination because of her Iranian ancestry, which could involve race but did not necessarily involve race.

Application of *National R.R. Passenger Corp. v. Morgan*: *Tademy v. Union Pacific Corp.*, __ F.3d __, 2008 WL 852491 (10th Cir. April 1, 2008) (No. 06-4073), held that the holdings of *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 88 FEP Cases 1601 (2002), with respect to the timeliness of hostile-environment claims, applies to § 1981 cases.

D. 42 U.S.C. § 1983 Inaction Claims: *Arendale v. City of Memphis*, __ F.3d __, 2008 WL 731226 (6th Cir. March 20, 2008) (No. 07-5230), affirmed the grant of summary judgment to defendant on plaintiff's § 1983 claim, stating at p. *10: "To state a municipal liability claim under an "inaction" theory, Plaintiff must establish: (1) the existence of a clear and persistent pattern of discrimination by municipal employees; (2) notice or constructive notice on the part of the City; (3) the City's tacit approval of the unconstitutional conduct, such that its deliberate indifference in its failure to act can be said to amount to an official policy of inaction; and (4) that the City's custom was the 'moving force' or direct causal link in the constitutional deprivation." (Citations omitted.)

E. Title VII Interracial Association Claims: *Holcomb v. Iona College*, __ F.3d __, 2008 WL 852129 (2d Cir. April 1, 2008) (No. 06-3815-CV), vacated the grant of summary judgment to the Title VII defendant, and stated at p. *1: "We hold, for the first time, that an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race." The court discussed lower-court decisions to the contrary, and stated: "We reject this restrictive reading of Title VII. The reason is simple: where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race." *Id/* at p. *9 (emphasis in original; citations omitted).

F. The Americans with Disabilities Act and Rehabilitation Act

Disability: *Maclin v. SBC Ameritech*, __ F.3d __, 2008 WL 852582 (7th Cir. April 1, 2008) (No. 07-1751), affirmed the grant of summary judgment to defendant on plaintiff's ADA claims. The court held at p.*4 that the inability to sit or more than two hours without severe pain was not a disability.

"Qualified" Individuals: *Garg v. Potter*, __ F.3d __, 2008 WL 901462 (7th Cir. April 4, 2008) (No. 07-2377), affirmed summary judgment to the Rehabilitation Act defendant because

plaintiff did not perform the essential functions of her job even with reasonable accommodation for her allergies. *Brannon v. Luco Mop Co.*, __ F.3d __, 2008 WL 878289 (8th Cir. April 3, 2008) (No. 07-1434), affirmed summary judgment to the ADA defendant and held at p. *4 that plaintiff had not shown she was qualified because regular attendance was an essential function of her job, her attendance was poor, and "Brannon failed to demonstrate that her requested accommodation of additional time off to recuperate would have enabled her to have consistent attendance at work."

Regarded As Disabled: *Ruiz Rivera v. Pfizer Pharmaceuticals, LLC*, __ F.3d __, 2008 WL 802730 (1st Cir. March 27, 2008) (No. 07-1595), affirmed summary judgment to the ADA defendant. The court stated at p. *4: "Regarded as claims primarily fall into one of two categories: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." (Citations omitted.) The court stated that the plaintiff must show that the employer regarded the employee as disabled within the meaning of the ADA and, where the major life activity in question is working, that the employer regarded the employee as disabled from a class of jobs or broad range of jobs.

Wilson v. Phoenix Specialty Mfg. Co., Inc., 513 F.3d 378, 20 AD Cases 193 (4th Cir. 2008), affirmed the judgment for the ADA plaintiff on his claim that defendant discriminated against him because it regarded him as disabled. Plaintiff had Parkinson's Disease but his symptoms were controlled by medication. The court held that defendant thought his symptoms were considerably worse than they were, and that they interfered with the major life activity of performing manual tasks such as using a computer, writing, interfered with the major life activity of counting, and interfered with the major life activity of seeing. Judge Niemeyer dissented. *Id.* at 388–95.

G. Family and Medical Leave Act

Joint Employers and Integrated Enterprises: *Grace v. USCAR*, __ F.3d __, 2008 WL 782470 (6th Cir. March 26, 2008) (No. 06-2509), reversed the grant of summary judgment to defendants on plaintiff's FMLA claim and relied on DOL's FMLA regulations. The court held at p. *6 that USCAR and Bartech were not an "integrated enterprise" because there was no common management of the core responsibilities and operations of each business, their operations were not interrelated but performed entirely different functions at different locations, their employment relations as a whole were not interrelated even though both communicated with some of the same employees, and there was no common ownership or control. However, USCAR and Bartech were joint employers under 29 C.F.R. § 825.106. *Id.* at pp. *6-*8. The court held that Bartech was a successor in interest to the prior staffing agency, and was thus covered by the FMLA. *Id.* at pp. *11-*16. The court rejected USCAR's argument that it was not an employer because it did not have any employees on its payroll, holding that the relevant criterion is whether USCAR had employment relationships, not just whether such relationships were reflected on the payroll. *Id.* at p. *16. The court held at p. *10 that plaintiff's notice to her staffing agency was notice to both employers.

IV. Theories and Proof

Application: *Yeschick v. Mineta*, __ F.3d __, 2008 WL 850225 (6th Cir. April 1, 2008) (No. 06-4649), reversed the grant of summary judgment to the ADEA defendant Department of Transportation. Plaintiff was a former Air Traffic Controller and member of PATCO who had been fired under President Reagan because of unlawful strike activity. He re-applied in 1993 under President Clinton's authorization for re-employment, for those who re-applied within a 45-day window. The court of appeals held that there was a genuine issue or material fact as to whether the

application remained active, relying heavily on the lack of any systematic inactivation of applications for non-former-PATCO applicants or for younger applicants.

Adverse Employment Actions: *Maclin v. SBC Ameritech*, __ F.3d __, 2008 WL 852582 (7th Cir. April 1, 2008) (No. 07-1751), affirmed the grant of summary judgment to defendant on plaintiff's Title VII claims. The court held at p.*5 that denial of a discretionary bonus is not an adverse employment action. The court also held that plaintiff's change in job title after her return from leave was not an adverse employment action. The court stated at p. *6: "An adverse employment action must involve a material, substantive change in an employee's pay and responsibilities. . . . An employee has not suffered an adverse employment action if her title changes but her position remains the same in terms of responsibilities, salary, benefits and opportunities for promotion. . . . Even a change in title that deprives an employee of prestige is insufficient if it lacks more substantive effect." (Citations omitted.) **Comment:** The Seventh Circuit standard would result in immunizing an employer that gave only discretionary bonuses, but had a discount factor for race and sex under which the bonus was cut in half if it was to be awarded to a woman, and cut by three-quarters if it was to be awarded to an African-American. While one can understand the desire of the judiciary to resolve only issues they consider of importance, there is no *de minimis* exception in Title VII.

Davis v. Team Electric Co., __ F.3d __, 2008 WL 819885 (9th Cir. March 28, 2008) (No. 05-35877), reversed the grant of summary judgment to the Title VII defendant. The court reaffirmed at p. *6 that "assigning more, or more burdensome, work responsibilities, is an adverse employment action." (Citations omitted.) The court held that plaintiff established she was excluded from meetings with her supervisor and co-workers, and held this actionable in conjunction with other actions.

Replacement by Person Outside the Class: *Grace v. USCAR*, __ F.3d __, 2008 WL 782470 (6th Cir. March 26, 2008) (No. 06-2509), reversed the grant of summary judgment to defendants on plaintiff's FMLA claim. The court held at p. *11 that plaintiff showed a triable issue of fact whether she was replaced by another Bartech employee, as opposed to defendants' explanation that her job was eliminated in a restructuring. As to the issue of restructuring, the plaintiff points to the notes and deposition of Martin (the USCAR Director of Operations) from the meeting in which the decision to terminate Grace was made. After being apprised of the need to have a "legitimate business reason" to avoid the risk of being "sued by Roz [Grace] . . . [who was] out on *disability,"* the following question was raised: *"Can lawyers construct a way to make it* [Grace's termination] *doable?"* . . . This statement alone is a smoking gun and raises a genuine issue of material fact, subject to a jury determination, as to whether the restructuring would have occurred had she not taken leave due to her disability. . . ." (Emphasis in original; citation omitted.)

Knowledge of Age: *Ruiz Diaz v. Eagle Produce Ltd. Partnership*, __ F.3d __, 2008 WL 901677 (9th Cir. April 4, 2008) (No. 06-15878), affirmed in part the grant of summary judgment to the ADEA defendant. The court held at p. *6 that the decisionmaker must have known that his replacements were older than the persons he terminated because the work force was moderate in size and he had had personal contacts with them.

Circumstances Giving Rise to Inference of Discrimination: *Holcomb v. Iona College*, __ F.3d __, 2008 WL 852129 (2d Cir. April 1, 2008) (No. 06-3815-CV), found that the pattern of conduct of defendant's officials gave rise to an inference of discrimination based on interracial marriage) and vacated the grant of summary judgment to the Title VII defendant. The court added: "The fact that the college decided to keep Ruland, who was also in an interracial relationship, does not allay the suspicion that the firings were grounded in an illegitimate motive. It was agreed all

around that Ruland was simply too expensive to fire, with over five years left on his contract, whether or not he was in a relationship with a black woman. At the prima facie stage, then, these circumstances are more than sufficient to support an inference that Holcomb was terminated on the basis of his interracial marriage."

Adequacy of Employer's Nondiscriminatory Reason: *Duncan v. Fleetwood Motor Homes of Indiana, Inc.*, 518 F.3d 486, 102 FEP Cases 1249 (7th Cir. 2008) (*per curiam*), vacated the grant of summary judgment to the ADEA defendant. The court held that defendant never produced a legitimate nondiscriminatory reason for demoting plaintiff because it offered mutually contradictory reasons. Defendant agreed that plaintiff was meeting defendant's legitimate expectations in performing the Material Handler job, but demoted him for inability to perform the job as set forth on the paper job description. The court stated: "These positions are impossible to reconcile." *Id.* at 491.

Failure to Explain Why Plaintiff as Selected for Layoff: *Ruiz Diaz v. Eagle Produce Ltd. Partnership*, __ F.3d __, 2008 WL 901677 (9th Cir. April 4, 2008) (No. 06-15878); *Davis v. Team Electric Co.*, __ F.3d __, 2008 WL 819885 (9th Cir. March 28, 2008) (No. 05-35877).

Defendant's Attempted Outsourcing of Responsibility for Bias: *Duncan v. Fleetwood Motor Homes of Indiana, Inc.*, 518 F.3d 486, 492-93, 102 FEP Cases 1249 (7th Cir. 2008) (*per curiam*), vacated the grant of summary judgment to the ADEA defendant and rejected defendant's attempt to blame WorkSTEPS, assertedly a consultant, for the demotion, because there was no evidence of its involvement but a filled-in, unsigned form on its letterhead.

District Court's Adoption of Rationale Never Advanced by Defendant: *DeCaire v. Mukasey*, __ F.3d __, 2008 WL 642533 (1st Cir. March 11, 2008) (No. 07-1539), reversed the grant of summary judgment to the Title VII defendant on grounds never advanced by defendant. The court stated at p. *17: "We have great concern over the district court's utilization of a theory not advanced by either party to the case. Fairness alone requires that the parties have notice of the theories so that the parties can gear their evidence toward what is at stake. . . . Both sides to this litigation were prejudiced by the court's spontaneous introduction of a new theory of justification."

Pretext: Special Problems with Multiple Claims: *Grace v. USCAR*, __ F.3d __, 2008 WL 782470 (6th Cir. March 26, 2008) (No. 06-2509), reversed the grant of summary judgment to defendants on plaintiff's FMLA claim but affirmed the grant of summary judgment to defendants on plaintiff's Title VII claim. The court explained at p. *18: "Unlike the FMLA claim, where Grace need only demonstrate that her *prior position*—or equivalent—*still existed* at the time she returned from unpaid leave, the Title VII claim requires her to make some showing that gender informed the decision to hire a male to replace her." (Emphases in original.)

Fitzgerald v. Action, Inc., __ F.3d __, 2008 WL 899888 (8th Cir. April 4, 2008) (No. 07-2199), at p. *8, held that plaintiff had shown pretext as to the defendant's explanations for his termination and reversed the grant of summary judgment to defendant on plaintiff's ERISA § 510 claim but affirmed the grant of summary judgment on the ADEA claim because there was no evidence directly pointing to age discrimination and some evidence favored the defendant on that claim.

Temporal Proximity Between Misconduct and Discharge Supports Employer: *Ruiz Diaz v. Eagle Produce Ltd. Partnership*, __ F.3d __, 2008 WL 901677 (9th Cir. April 4, 2008) (No. 06-15878), affirmed in part the grant of summary judgment to the ADEA RIF defendant. The court held at p. *10 that defendant's discharge of plaintiff Moreno one day after he caused $10,000 in damage in

an accident "leaves little doubt that the property damage, rather than age, motivated Brandt's decision," despite the court's holding that plaintiff showed adequate evidence of satisfactory job performance to establish his *prima facie* case.

Multiple Consistent Explanations Do Not Raise Inference of Pretext: *Ruiz Diaz v. Eagle Produce Ltd. Partnership*, __ F.3d __, 2008 WL 901677 (9th Cir. April 4, 2008) (No. 06-15878), affirmed in part the grant of summary judgment to the ADEA RIF defendant. The court held at p. *9 that defendant's two explanations for laying off two employees—a downturn in business and comparative performance—were consistent and thus did not give rise to an inference of pretext.

Employer's Good-Faith Error Does Not Constitute Pretext: *Soto v. Core-Mark Int'l, Inc.*, __ F.3d __, 2008 WL 850237 (8th Cir. April 1, 2008) (No. 07-1301), affirmed the grant of summary judgment to the Title VII and Minnesota-law defendant. The court stated at p. *4: "In determining whether a plaintiff has produced sufficient evidence of pretext, the key question is not whether the stated basis for termination actually occurred, but whether the defendant believed it to have occurred." (Citation omitted)

Failure to Follow Handbook Policies Allows Inference of Pretext: *Ruiz Diaz v. Eagle Produce Ltd. Partnership*, __ F.3d __, 2008 WL 901677 (9th Cir. April 4, 2008) (No. 06-15878), reversed in part the grant of summary judgment to the ADEA RIF defendant. The court held at p. *10 that the decisionmaker's failure to follow the company policy set forth in the handbook in selecting employees for layoff, was evidence of pretext. It stated: "Reasonable jurors could conclude that this irregularity further undermines the credibility of the proffered explanations for the layoffs: if age was truly irrelevant to Brandt's decisionmaking, he presumably would not have failed to weigh the factor in the handbook that weighed most heavily in favor of retaining older workers. The evidence is consistent with the view that Brandt disregarded company policy because it conflicted with his intent to discriminate."

Circumstantial Evidence: *DeCaire v. Mukasey*, __ F.3d __, 2008 WL 642533 (1st Cir. March 11, 2008) (No. 07-1539), reversed the grant of summary judgment to the Title VII defendant. The court held at p. *17 that the lower court erred when it held that either direct evidence, or circumstantial evidence with a close temporal connection, was necessary in order to show pretext.

Direct Evidence Often Unavailable: *Holcomb v. Iona College*, __ F.3d __, 2008 WL 852129 (2d Cir. April 1, 2008) (No. 06-3815-CV), vacated the grant of summary judgment to the Title VII defendant, and stated at p. *11: "Direct evidence of discrimination, 'a smoking gun,' is typically unavailable . . . and this case is no exception to that pattern. It is well settled, however, that employment discrimination plaintiffs are entitled to rely on circumstantial evidence. In this respect, we have noted the need to be "alert to the fact that employers are rarely so cooperative as to include a notation in the personnel file that the firing is for a reason expressly forbidden by law." (Footnote and citations omitted.)

Degree of Specificity of Pretext Evidence: *Davis v. Team Electric Co.*, __ F.3d __, 2008 WL 819885 (9th Cir. March 28, 2008) (No. 05-35877), reversed the grant of summary judgment to the Title VII defendant. The court stated that there was no need to resolve the question whether plaintiff was required to show "specific" and "substantial" evidence of pretext, because she had made such a showing.

Same Decisionmaker: *Fitzgerald v. Action, Inc.*, __ F.3d __, 2008 WL 899888 (8th Cir. April 4, 2008) (No. 07-2199), at p. *8, affirmed the grant of summary judgment to the ADEA defendant

despite discriminatory remarks, in part because defendant hired plaintiff at the age of 50 and fired him at the age of 52. The court never indicated any awareness that it was extending the "same actor" inference to a "same company" inference.

Difference in Decisionmakers Made a Statistical Difference: *Ruiz Diaz v. Eagle Produce Ltd. Partnership*, __ F.3d __, 2008 WL 901677 (9th Cir. April 4, 2008) (No. 06-15878), affirmed in part the grant of summary judgment to the ADEA defendant. The court held at p. *6 that the statistical evidence was very different after one decisionmaker replaced another, and held that the difference gave rise to an inference of discrimination.

Discretionary-Action Defense: *DeCaire v. Mukasey*, __ F.3d __, 2008 WL 642533 (1st Cir. March 11, 2008) (No. 07-1539), reversed the grant of summary judgment to the Title VII defendant. The court held at p. 17 that the lower court erred in adopting a discretionary-action defense: "The district court also erroneously suggested that because an employer's action falls within an area of discretion, that is an adequate justification. . . . Discretion may be exercised in ways which are discriminatory or retaliatory." (Citation omitted.)

Disparate Impact "Cover" for Intentional Discrimination: *Dunlap v. Tennessee Valley Authority*, __ F.3d __, 2008 WL 746217, 102 FEP Cases 1538 (6th Cir. 2008) (No. 07-5381), affirmed the judgment for plaintiff on his Title VII disparate-treatment claim. The court held at pp. *4 to *6 that defendant had manipulated the ostensibly objective matrix system for making hiring decisions, so as to discriminate on the basis of race, by changing the weighting of factors and by biased scoring and biased score-balancing. Notwithstanding the court's reversal of the finding of disparate-impact discrimination, the court affirmed the awards of damages and attorneys' fees.

Associational Retaliation: *Thompson v. North American Stainless, LP*, __ F.3d __, 2008 WL 834005 (6th Cir. March 31, 2008) (No. 07-5040), reversed the grant of summary judgment. The court stated the case succinctly, at p. *1: "Shortly after Appellant Eric Thompson's fiancée filed a discrimination charge with the EEOC against their common employer, the Appellee, Thompson was terminated. The parties to this appeal ask whether the anti-retaliation provisions in Title VII of the Civil Rights Act protect a related or associated third party from retaliation under such circumstances. We hold that that they do, and REVERSE the district court's grant of summary judgment to the employer." The court relied on the EEOC COMPLIANCE MANUAL, and on the purposes of the statute. Judge Griffin dissented.

Protected Conduct: *Smith v. International Paper Co.*, __ F.3d __, 2008 WL 899949 (8th Cir. April 4, 2008) (No. 05-3615), affirmed the grant of summary judgment to the Title VII racial discrimination defendant on plaintiff's retaliation claim because plaintiff's internal complaints about his supervisor never said he was complaining of racial discrimination.

Refusal to Sign Post-Charge Arbitration Agreement is Protected Conduct: *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1279, 102 FEP Cases 716 (11th Cir. 2008), affirmed the jury verdict for the Title VII and § 1981 retaliation plaintiff. Plaintiff was fired immediately after he refused to sign an agreement to arbitrate his pending charge. The court held that the failure to sign the arbitration agreement was not a nondiscriminatory reason, because it was retaliatory.

How Specific Must Defendant's Knowledge of Protected Conduct Be? *Cline v. BWXT-12, LLC*, __ F.3d __, 2008 WL 850228 (6th Cir. April 1, 2008) (No. 07-5639), reversed the grant of summary judgment to the Tennessee Human Rights Act defendant. There was no dispute that the decisionmaker changed his decision to hire plaintiff because he was informed that plaintiff was in

litigation with the company. The lower court held that this was not enough, because there was no showing that the decisionmaker knew the substance of the claim involved in the litigation. Reversing, the court of appeals stated "we doubt that the Tennessee courts would allow the State's anti-retaliation provision to be so easily evaded by the simple expedient of refusing to hire (or discharging) any individual with any litigation claim against the company."

Actionable Conduct: *Billings v. Town of Grafton*, 515 F.3d 39, 53–57, 102 FEP Cases 1091 (1st Cir. 2008) (defendant's transfer of plaintiff from a non-union clerical position in the office of the Town Administrator to a union clerical position elsewhere, and barring her from coming into the Selectmen's Office to attend meetings there, opening an investigation of her for opening her boss's private mail from his attorney, and requiring her to take personal time off for her deposition, met the *Burlington Northern* standard and was actionable); *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 346, 102 FEP Cases 1165 (6th Cir. 2008), affirmed in part and reversed in part the grant of summary judgment to the Ohio law defendant, using Title VII principles. The court held that, in limited circumstances, Title VII permits claims against an employer for coworker retaliation (here, setting a car on fire); *Abdullahi v. Prada USA Corp.*, __ F.3d __, 2008 WL 746848, 102 FEP Cases 1537 (7th Cir. March 21, 2008) (No. 07-2489) (plaintiff stated a valid claim by alleging that her former employer spread derogatory rumors about her in retaliation for her filing of her charge of discrimination).

Causation: Temporal Proximity Can Provide Strong Evidence of Causation: *DeCaire v. Mukasey*, __ F.3d __, 2008 WL 642533 (1st Cir. March 11, 2008) (No. 07-1539); *Fitzgerald v. Action, Inc.*, __ F.3d __, 2008 WL 899888 (8th Cir. April 4, 2008) (No. 07-2199), at pp. *6-*7 ("Where an employer tolerates an undesirable condition for an extended period of time, and then, shortly after the employee takes part in protected conduct, takes an adverse action in purported reliance on the long-standing undesirable condition, a reasonable jury can infer the adverse action is based on the protected conduct."); *Davis v. Team Electric Co.*, __ F.3d __, 2008 WL 819885 (9th Cir. March 28, 2008) (No. 05-35877); *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1278, 102 FEP Cases 716 (11th Cir. 2008) (eight-month gap between the filing of plaintiff's EEOC charge and his termination did not preclude any inference of causation because plaintiff was fired immediately after he refused to sign an agreement to arbitrate his pending charge).

Disloyalty Defense: *DeCaire v. Mukasey*, __ F.3d __, 2008 WL 642533 (1st Cir. March 11, 2008) (No. 07-1539), reversed the grant of summary judgment to the Title VII defendant. The court rejected the lower court's disloyalty defense, which had not been urged by the parties. The court stated at p. *16: "As a matter of law, the filing of an EEO complaint cannot be an act of disloyalty to either the U.S. Marshals Service or the Marshal which would justify taking adverse actions."

Prior Discriminatory Actions Defense: *DeCaire v. Mukasey*, __ F.3d __, 2008 WL 642533 (1st Cir. March 11, 2008) (No. 07-1539), reversed the grant of summary judgment to the Title VII defendant. The court rejected at p. *16 the lower court's view that discrimination against plaintiff because of her gender before she filed her EEOC charge negated her claims of retaliation after she filed the charge.

Employer's Changing Stories is Evidence of Pretext: *Wilson v. Phoenix Specialty Mfg. Co., Inc.*, 513 F.3d 378, 387–88, 20 AD Cases 193 (4th Cir. 2008) (defendant offered explanation at trial it had not previously offered to the EEOC); *Fitzgerald v. Action, Inc.*, __ F.3d __, 2008 WL 899888 (8th Cir. April 4, 2008) (No. 07-2199) (employer gave employee one reason and gave the court a different reason, suggesting that neither official version was correct; court rejected defendant's argument that plaintiff's demand for a reason for his termination justified its changing stories).

Discriminatory Statements Help to Show Pretext: *Davis v. Team Electric Co.*, __ F.3d __, 2008 WL 819885 (9th Cir. March 28, 2008) (No. 05-35877).

Absence of Female Supervisors Helps to Show Pretext: *Davis v. Team Electric Co.*, __ F.3d __, 2008 WL 819885 (9th Cir. March 28, 2008) (No. 05-35877), reversed the grant of summary judgment to the Title VII defendant. The court relied on the absence of female supervisors as helping to show pretext. *Id.* at p. *8.

"Counterwight" Evidence Does Not Preclude Pretext: *Davis v. Team Electric Co.*, __ F.3d __, 2008 WL 819885 (9th Cir. March 28, 2008) (No. 05-35877), held that defendant's favorable response to some of plaintiff's complaints could not establish the absence of discrimination.

Defendant's Lack of Comparators: *Fitzgerald v. Action, Inc.*, __ F.3d __, 2008 WL 899888 (8th Cir. April 4, 2008) (No. 07-2199) stated: "We conclude Fitzgerald has shown that the circumstances surrounding his termination contravened Action's normal policies and are evidence Action's proffered explanation was pretextual."

Rejection of Defendant's Comparators: *Holcomb v. Iona College*, __ F.3d __, 2008 WL 852129 (2d Cir. April 1, 2008) (No. 06-3815-CV) rejected the defendant's comparator at p. *10, stating: "It was agreed all around that Ruland was simply too expensive to fire, with over five years left on his contract, whether or not he was in a relationship with a black woman."

Lower Court Took Too Narrow an Approach to Finding Plaintiff's Comparators Acceptable at *Prima Facie* Stage: *Jackson v. FedEx Corporate Services, Inc.*, __ F.3d __, 2008 WL 596534, 102 FEP Cases 1543 (6th Cir. March 6, 2008) (No. 06-5844);

Plaintiff's Comparators Accepted: *Fitzgerald v. Action, Inc.*, __ F.3d __, 2008 WL 899888 (8th Cir. April 4, 2008) (No. 07-2199), at p. *6; *Ruiz Diaz v. Eagle Produce Ltd. Partnership*, __ F.3d __, 2008 WL 901677 (9th Cir. April 4, 2008) (No. 06-15878) (decisionmaker's failure to fire less experienced younger workers gave rise to an inference of discrimination; it did not matter that, because of high turnover, plaintiffs could not identify their individual replacements).

Comparative Qualifications and Evidence Bearing on Employee Performance: *Ruiz Diaz v. Eagle Produce Ltd. Partnership*, __ F.3d __, 2008 WL 901677 (9th Cir. April 4, 2008) (No. 06-15878) (superior comparative qualifications of older workers laid off, compared to younger workers retained, gave rise to an inference of discrimination).

Statistics Broken Down by Supervisor Saved the Claim: *Ruiz Diaz v. Eagle Produce Ltd. Partnership*, __ F.3d __, 2008 WL 901677 (9th Cir. April 4, 2008) (No. 06-15878) at pp. *5-*6 (none of the statistical evidence would by itself support an inference that age discrimination was responsible for the layoff of the three plaintiffs with viable claims, but that the evidence was probative of age discrimination when the actions of individual supervisors were separated out).

Discriminatory Statements: *Fitzgerald v. Action, Inc.*, __ F.3d __, 2008 WL 899888 (8th Cir. April 4, 2008) (No. 07-2199), at p. *8 ("'Stray remarks' standing alone do not give rise to an inference of discrimination. . . . But, neither are they irrelevant. . . . '[S]uch comments are 'surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, thus providing additional threads of evidence that are relevant to the jury.'' . . . When combined with other evidence, stray remarks 'constitute circumstantial evidence that ... may give rise to a reasonable inference of age discrimination.'" However, other evidence showed that this particular termination was based on

ERISA discrimination and not age discrimination.); *Holcomb v. Iona College*, __ F.3d __, 2008 WL 852129 (2d Cir. April 1, 2008) (No. 06-3815-CV) (remarks showed that decisionmakers had either directly racist feelings or "had an incentive, for the purposes of alumni relations, to minimize the number of African Americans involved with the basketball team"; while not formal decisionmakers, a jury could find that they had a meaningful role in the decision); *Duncan v. Fleetwood Motor Homes of Indiana, Inc.*, 518 F.3d 486, 493, 102 FEP Cases 1249 (7th Cir. 2008) (*per curiam*) ("At his deposition Duncan also testified that before he was removed from his job he overheard a production manager comment that older workers cost the company a lot of money (Fleetwood itself introduced this testimony at summary judgment). Additionally, as Stucky was escorting Duncan out of the plant, Stucky made a comment that could be construed as indicating that Duncan was removed because of his age. Perhaps Stucky's words could be construed differently, but finding meaning in ambiguous statements is the province of the jury."); *Davis v. Team Electric Co.*, __ F.3d __, 2008 WL 819885 (9th Cir. March 28, 2008) (No. 05-35877) (discriminatory statements—"this is a man's working world out here, you know," assignment to foreman because he "needs a girlfriend," food for a meeting was only "for the guys," "the guys don't mind having a girl working with them if they don't complain"—were probative and helped to show pretext).

Type of Harassing Conduct: *EEOC v. Sunbelt Rentals, Inc.*, __ F.3d __, 2008 WL 836409 (4th Cir. March 31, 2008) (No. 07-1123) (hiding of timecard on day when charging party went to congregational prayers; court also held that conduct lacking a religious nexus could still be considered part of the religious harassment because there was so much harassment targeted at Muslims that "a reasonable jury could infer that other harassing incidents were also motivated by a disdain for Ingram's faith."); *Tademy v. Union Pacific Corp.*, __ F.3d __, 2008 WL 852491 (10th Cir. April 1, 2008) (No. 06-4073) (rejecting assertedly innocent reason for hanging a noose in the workplace, and stating at p. *8: "Like 'a slave-masters whip,' the image of a noose is 'deeply a part of this country's collective consciousness and history, any [further] explanation of how one could infer a racial motive appears quite unnecessary.'").

Severe or Pervasive Test: *Billings v. Town of Grafton*, 515 F.3d 39, 49–52, 102 FEP Cases 1091 (1st Cir. 2008) (repeatedly staring at the breasts of plaintiff and other women met the objective test of unwelcomeness and was sufficiently severe or pervasive to support a claim; court rejected defendant's argument that staring at a woman's breasts is not sexual); *EEOC v. Sunbelt Rentals, Inc.*, __ F.3d __, 2008 WL 836409 (4th Cir. March 31, 2008) (No. 07-1123) (reversed summary judgment to Title VII religious harassment defendant, and held that "severe or pervasive" test met); *Grace v. USCAR*, __ F.3d __, 2008 WL 782470 (6th Cir. March 26, 2008) (No. 06-2509) (affirmed summary judgment, holding that calling plaintiff a "dancing girl" or a "call girl," failure to interact with plaintiff except to comment on her appearance, and failure to take action because alleged perpetrator would leave in a few months was not "severe or pervasive"); *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 102 FEP Cases 1165 (6th Cir. 2008) (conduct that is personally invasive or threatening must be weighted more heavily, conduct that is continuous in nature must be weighted more heavily than conduct that is sporadic, factfinder may consider factors such as the severity and prevalence of the similar acts of harassment, whether the similar acts have been clearly established or are mere conjecture, and the proximity in time of the similar acts to the harassment alleged by the plaintiff."; Serial harassers raise different concerns, however: "On the other hand, more weight should be given to acts committed by a serial harasser if the plaintiff knows that the same individual committed offending acts in the past. This is because a serial harasser left free to harass again leaves the impression that acts of harassment are tolerated at the workplace and supports a plaintiff's claim that the workplace is both objectively and subjectively hostile."); *Davis v. Team Electric Co.*, __ F.3d __, 2008 WL 819885 (9th Cir. March 28, 2008) (No. 05-35877) ("In close cases such as this one, where the severity of frequent abuse is questionable, it is more appropriate to leave the assessment to the

fact-finder than for the court to decide the case on summary judgment."); *Tademy v. Union Pacific Corp.*, __ F.3d __, 2008 WL 852491 (10th Cir. April 1, 2008) (No. 06-4073) at pp. *8-*9 (reasonable jury could find that racist graffiti, Mr. Cagle's use of the term "boy," the slaves e-mail, and Mr. Bleckert's reference to "F* * *ing Kunta Kinte" were part of the same hostile work environment as the hanging of the noose, and that "each was calculated to demean or intimidate African-American employees.").

The "Boorish Workplace" Defense: *EEOC v. Sunbelt Rentals, Inc.*, __ F.3d __, 2008 WL 836409 (4th Cir. March 31, 2008) (No. 07-1123) "Title VII contains no such 'crude environment' exception, and to read one into it might vitiate statutory safeguards for those who need them most. Of course, if Sunbelt's environment was somehow so universally crude that the treatment of Ingram was nothing out of the ordinary, the jury would be entitled to take that into account.").

The "Paramour" Defense: *Forrest v. Brinker International Payroll Co.*, 511 F.3d 225, 229 (1st Cir. 2007), affirmed summary judgment to the Title VII defendant, but disagreed with the lower court's determination that harassment by a former paramour is not harassment because of sex. "Whether a harasser picks his or her targets because of a prior intimate relationship, desire for a future intimate relationship, or any other factor that draws the harasser's attention should not be the focus of the Title VII analysis. Instead, improper gender bias can be inferred from conduct; if the harassing conduct is gender-based, Title VII's requirement that the harassment be 'based upon sex' is satisfied."

Employer's Vicarious Liability: *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 338–40, 102 FEP Cases 1165 (6th Cir. 2008) (plaintiffs Hill and Cunningham had put defendant on notice; while Cunningham later denied she had been harassed, this was months later and it did not affect defendant's notice); *Davis v. Team Electric Co.*, __ F.3d __, 2008 WL 819885 (9th Cir. March 28, 2008) (No. 05-35877) at p. *12 (participation of defendant's managers in the harassment of plaintiff made the defendant liable).

Employer's Failure to Cure Harassment: *EEOC v. Sunbelt Rentals, Inc.*, __ F.3d __, 2008 WL 836409 (4th Cir. March 31, 2008) (No. 07-1123) at pp. *11-*12 ("Defendant did little to investigate or provide a remedy for the actions described in the charging party's verbal complaints. While local managers did perform an investigation after a written complaint was faxed to Human Resources, and warned employees not to comment on the charging party or on Islam, they simply accepted everyone's denial of engaging in harassment and urged the charging party to adopt a more positive attitude." "Rather than investigating the matter further or taking any form of corrective action, Dempster dismissed Ingram's complaint and accused him of 'being paranoid,' 'seeing things,' and 'trying to build a case against' Sunbelt." "The mere existence of an anti-harassment policy does not allow Sunbelt to escape liability."); *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 340–41, 102 FEP Cases 1165 (6th Cir. 2008) (defendant's sexual harassment policy did not entitle it to summary judgment); *Davis v. Team Electric Co.*, __ F.3d __, 2008 WL 819885 (9th Cir. March 28, 2008) (No. 05-35877) (lack of clear policy and failure to take action not sufficient); *Tademy v. Union Pacific Corp.*, __ F.3d __, 2008 WL 852491 (10th Cir. April 1, 2008) (No. 06-4073) at pp. *14-*16 (defendant routinely failed to investigate or follow up on the many complaints made).

Failure to Complain, and Adequacy of Complaints: *EEOC v. Sunbelt Rentals, Inc.*, __ F.3d __, 2008 WL 836409 (4th Cir. March 31, 2008) (No. 07-1123) ("Evidence of repeated complaints to supervisors and managers creates a triable issue as to whether the employer had notice of the harassment.").

V. Litigation Questions

Exhaustion: *Federal Express Corp. v. Holowecki*, __ U.S. __, 128 S. Ct. 1147, 102 FEP Cases 1153 (2008), held by a 7-2 majority that an intake questionnaire attached to a sworn affidavit was an adequate ADEA charge of discrimination, where the affidavit requested the EEOC to obtain relief for the complainant and the EEOC construed the document as a charge, even though it was not served on the employer and no formal charge was filed until after suit had been filed. The Court cautioned that the holding should not be assumed to be applicable to other statutes enforced by the EEOC, because of differences in statutory wording. *Id.* at 1153. The Court held that the ADEA and the EEOC's implementing regulations in 29 C.F.R. §§ 1626.6 and 1626.8 did not clearly set forth the required elements of a charge, but deferred to the EEOC's interpretation of its own regulations under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *Id.* at 1155. The Court accepted the EEOC's policy, even though unevenly applied, that a charge must contain a request for action. The Court summarized its holding succinctly: "We conclude as follows: In addition to the information required by the regulations, *i.e.*, an allegation and the name of the charged party, if a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee." *Id.* at 1157-58. The Court rejected the employer's argument that a filing can only be considered a charge if it is served on the respondent. The Court was concerned that plaintiff's filing of suit before filing of a formal charge was unfair to the employer: "The court that hears the merits of this litigation can attempt to remedy this deficiency by staying the proceedings to allow an opportunity for conciliation and settlement. True, that remedy would be imperfect." *Id.* at 1160–61.

Timeliness of Hostile Environment Claim: *Tademy v. Union Pacific Corp.*, __ F.3d __, 2008 WL 852491 (10th Cir. April 1, 2008) (No. 06-4073) (enough racially harassing activity within the charge-filing period to make plaintiff's claim timely, but one incident, involving an employee's failure to follow plaintiff's orders because of his race, was not part of the same pattern of harassment. The court rejected defendant's argument that there had to be the same type of harassment, frequency, and perpetrator, stating at p. 9: "Under Union Pacific's theory, an employer could escape liability for a racially hostile work environment by employing a legion of bigots, each of whom committed but a solitary act of racism. Such a workplace would hardly operate to 'achieve equality of employment opportunities.' Furthermore, requiring proof of repeat perpetrators would also provide employers with a reason to avoid conducting thorough investigations aimed at rooting out the culpable party.").

Pleading: *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), an antitrust case, tightened the rules for pleading Complaints. The Court held that antitrust plaintiffs could not merely allege parallel conduct and their belief that an unlawful conspiracy had taken place, but must allege facts sufficient to permit the inference of conspiracy. The Court overruled any implications to the contrary in *Conley v. Gibson*, 355 U.S. 41 (1947). The Court denied that it was undermining *Swierkewicz v. Sorema*, 534 U.S. 506 (2002). *Id.* at 1973–74.

Mendiondo v. Centinela Hospital Medical Center, __ F.3d __, 2008 WL 852186 (9th Cir. April 1, 2008) (No. 06-55981), reversed the Rule 12(b)(6) dismissal of plaintiffs' claims for failure to state a claim, holding that claims for wrongful termination in violation of the Federal and California False Claims Acts are subject to the pleading standards of Rule 8(a), and are not subject to the heightened pleading standards of Rule 9(b), Fed. R. Civ. Pro. The court distinguished between claims of substantive violations of the FCA, which are subject to Rule 9(b), and claims of retaliation under the FCA, which are not.

Arbitration: *Hall Street Associates, L.L.C. v. Mattel, Inc.*, __ U.S. __, 128 S. Ct. 1396 (2008), held that the provisions for judicial review in §§ 10 and 11 of the FAA, 9. U.S.C. §§ 10, 11, are exclusive and may not be expanded by contract. The Court held open the possibility that the

parties might contract for review under State law. *Id.* at 1406. The Court also held that it was unclear whether this particular agreement was entered into pursuant to the FAA alone, or pursuant to the lower court's authority over alternative dispute resolution procedures. *Id.* at 1407–08.

Preston v. Ferrer, __ U.S. __, 128 S. Ct. 978, 27 IER Cases 257 (2008), held that the Federal Arbitration Act preempts State laws providing for the resolution of specific types of disputes by administrative machinery.

Summary Judgment: Undue Concern for Usurping the Role of the Jury: *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, __ U.S. __, 127 S. Ct. 2499, 2511–12, 168 L. Ed. 2d 179 (2007), a securities case in which Justice Ginsburg wrote for the majority, stated:

> Accounting for its construction of § 21D(b)(2), the Seventh Circuit explained that the court "th[ought] it wis[e] to adopt an approach that [could not] be misunderstood as a usurpation of the jury's role." . . . In our view, the Seventh Circuit's concern was undue.[7] A court's comparative assessment of plausible inferences, while constantly assuming the plaintiff's allegations to be true, we think it plain, does not impinge upon the Seventh Amendment right to jury trial.[8]
>
> _____
>
> [7] The Seventh Circuit raised the possibility of a Seventh Amendment problem on its own initiative. The Shareholders did not contend below that dismissal of their complaint under § 21D(b)(2) would violate their right to trial by jury. *Cf. Monroe Employees Retirement System v. Bridgestone Corp.*, 399 F.3d 651, 683, n. 25 (C.A.6 2005) (noting possible Seventh Amendment argument but declining to address it when not raised by plaintiffs).
>
> [8] In numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury's judgment without violating the Seventh Amendment. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 **U.S.** 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (expert testimony can be excluded based on judicial determination of reliability); *Neely v. Martin K. Eby Constr. Co.*, 386 **U.S.** 317, 321, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1967) (judgment as a matter of law); *Pease v. Rathbun-Jones Engineering Co.*, 243 **U.S.** 273, 278, 37 S. Ct. 283, 61 L. Ed. 715 (1917) (summary judgment).

Summary Judgment: Due Concern for Usurping the Role of the Jury: *Holcomb v. Iona College*, __ F.3d __, 2008 WL 852129 (2d Cir. April 1, 2008) (No. 06-3815-CV), vacated summary judgment to the Title VII defendant, and stated at p. *7: "We have repeatedly expressed the need for caution about granting summary judgment to an employer in a discrimination case where, as here, the merits turn on a dispute as to the employer's intent. . . . Where an employer has acted with discriminatory intent, direct evidence of that intent will only rarely be available, so that 'affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination.' . . . . Even in the discrimination context, however, a plaintiff must provide more than conclusory allegations to resist a motion for summary judgment." (Citations omitted) The court added at p. *11: "In this respect, we have noted the need to be 'alert to the fact that employers are rarely so cooperative as to include a notation in the personnel file that the firing is for a reason expressly forbidden by law.'" (Citations omitted)

Evidence: Other Instances of Discrimination: *Sprint/United Management Co. v. Mendelsohn*, __ U.S. __, 128 S. Ct. 1140, 102 FEP Cases 1057 (2008), reversed and remanded the decision of the Tenth Circuit, and held that the lower court erred in concluding that a two-line minute entry of the district court meant that the lower court had adopted a *per se* rule barring testimony of

other instances of discrimination, and in conducting its own balancing test as to such testimony instead of remanding the case to the district court. The unanimous Court stated its views on the evidentiary issue succinctly:

> The question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. Applying Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry. Because Rules 401 and 403 do not make such evidence per se admissible or per se inadmissible, and because the inquiry required by those Rules is within the province of the District Court in the first instance, we vacate the judgment of the Court of Appeals and remand the case with instructions to have the District Court clarify the basis for its evidentiary ruling under the applicable Rules.

Id. at 1147.

Evidence: The Many Uses of Other Instances of Discrimination: *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1285–87, 102 FEP Cases 716 (11th Cir. 2008), affirmed the jury verdict for the Title VII and § 1981 retaliation plaintiff. The court held that the lower court did not abuse its discretion in admitting evidence of other instances of discrimination, although for the wrong reason. The court rejected the lower court's reliance on Fed. R. Evid. 406, because four instances of termination after filing an EEOC charge are not enough to show a habit. The court held that the evidence was properly admissible under Rule 403(b) to show defendant's motive, intent, and plan to discriminate and retaliate. The court stated: "Goldsmith and coworkers Jemison and Thomas were discriminated against by the same supervisor, Farley, so the experiences of Jemison and Thomas are probative of Farley's intent to discriminate. Steber was involved in the termination decisions of all four individuals, so the experiences of Jemison, Peoples, and Thomas are probative of Steber's intent." The court held that the evidence was also admissible under Rule 402 to prove a hostile work environment. *Id.* at 1286. The court held that the evidence was also admissible to impeach company officials as to their answers on direct examination.

Evidence: The EEOC "Reasonable Cause" Determination, the Use of Racial Slurs by Defendant's Top Officials, and the Courtroom Deputy's Testimony: *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1287–89, 102 FEP Cases 716 (11th Cir. 2008), affirmed the jury verdict for the Title VII and § 1981 retaliation plaintiff. The court held that the lower court did not abuse its discretion in admitting the EEOC reasonable-cause determination because it was adequately discussed by witnesses and given context at the trial, and that the special instruction provided by the trial court was sufficient to prevent any abuse of the determination. The court held that the lower court did not abuse its discretion in admitting evidence of racial slurs uttered by Arthur Bagby and Hunter Bagby, top officials of the company, outside the workplace and at least once referring to Bagby employees, even though they were not decisionmakers. The court held that utterance of the slurs was relevant to the existence of racial harassment, was relevant to the company's asserted antidiscrimination policy, was relevant where uttered in front of the decisionmaker, was relevant where uttered by the official who insisted on forcing plaintiff to arbitrate the pending dispute and who rejected his proposed amendment that would have exempted the pending dispute, was relevant to the good-faith defense, was especially relevant where uttered on company premises, and was relevant to impeach the officials. The racial slurs, in short, were relevant. The court also held that the lower court did not abuse its discretion in admitting the testimony of the courtroom deputy that, when she went to the witness room to escort a company supervisor to the stand, Arthur Bagby told him "Go get 'em, champ."

Evidence: The Time Period for Which Evidence Was Permitted: *Abner v. Kansas City Southern R. Co.*, 513 F.3d 154, 166–68, 102 FEP Cases 616 (5th Cir. 2008), affirmed the award of $125,000 in punitive damages to the Title VII and § 1981 racial harassment plaintiffs. The court held that the lower court did not abuse its discretion in allowing evidence covering a ten-year time period, or in allowing some evidence predating that period, because of the nature of hostile-environment actions under *Morgan*. The court rejected defendant's argument that any evidence not pinned down to a specific date must necessarily have fallen outside of the time period.

Evidence: Criminal Conviction Followed by Pardon: *Abner v. Kansas City Southern R. Co.*, 513 F.3d 154, 168–69, 102 FEP Cases 616 (5th Cir. 2008), affirmed $125,000 in punitive damages to the Title VII and § 1981 racial harassment plaintiffs. The court held that the lower court did not abuse its discretion in allowing evidence that Foreman Moore, one of plaintiffs' asserted harassers, had been convicted of a KKK-related offense in 1992 although he had received a pardon in 1995 that did not require any action on his part. "The court determined, after carefully considering both parties' arguments on the issue and the evidence in the case, that the probative value of the conviction evidence outweighed its prejudicial value. The court also made it clear that it would not tolerate 'exaggerated discussion, questions and answers, over and over and over about the conviction of Mr. Moore.'" (Footnote omitted.)

Split Jury Verdicts Are Harder to Challenge: *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1287, 102 FEP Cases 716 (11th Cir. 2008), affirmed the jury verdict for the Title VII and § 1981 retaliation plaintiff. In connection with the court's holding on the permissibility of admitting evidence of other instances of discrimination, the court stated: "The jury reached a split verdict that discharged Bagby Elevator from liability for Goldsmith's claim of a hostile work environment and his claim about a failure to promote. A split verdict suggests that the jury reached a 'reasoned conclusion free of undue influence.'" (Citation omitted.)

VI. Remedies

Front Pay: *Wilson v. Phoenix Specialty Mfg. Co., Inc.*, 513 F.3d 378, 388, 20 AD Cases 193 (4th Cir. 2008), affirmed the judgment for the ADA plaintiff on his claim that defendant discriminated against him because it regarded him as disabled. The court affirmed the denial of front pay because plaintiff's neurologist testified that "Wilson was competitively unemployable by the end of 2005, which was six months before the entry of judgment." Judge Niemeyer dissented. *Id.* at 388–95.

Punitive Damages: Upholding Entitlement: *EEOC v. Federal Express Corp.*, 513 F.3d 360, 20 AD Cases 204 (4th Cir. 2008), affirmed $100,000 in punitive damages for a failure to accommodate the charging party's profound deafness by providing a certified ASL translator for meetings and important documents. The court described the four *Lowery* factors relevant to entitlement to punitive damages:

> (1) That the employer's decision maker discriminated in the face of a perceived risk that the decision would violate federal law;
>
> (2) That the decision maker was a principal or served the employer in a managerial capacity;
>
> (3) That the decision maker acted within the scope of his employment in making the challenged decision; and

(4) That the employer failed to engage in good-faith efforts to comply with the law.

Id. at 372. The court noted that defendant admitted the second and third factors were met, and challenged only the first and fourth factors. The court observed that FedEx did not object to the jury instructions, which did require a specification of which person "could be considered as a relevant FedEx managerial official," so that if any of the four possible officials could reasonably be found to have perceived the risk that a failure to accommodate Lockhart would violate the ADA, the first *Lowery* finding would be met. *Id.* at 373. The court held that Hanratty was aware of defendant's ADA compliance policy, and that Cofield had contacted other FedEx supervisors seeking clarification on ADA reasonable accommodations. *Id.* at 373–74. The court held that the jury could find that the first factor was met. The court also rejected defendant's argument that the mere existence of its ADA policy required a finding that it engaged in good-faith compliance efforts. "Unfortunately for FedEx, the mere existence of an ADA compliance policy will not alone insulate an employer from punitive damages liability. Rather, in order to avoid liability for the discriminatory acts of one of its management officials, an employer maintaining such a compliance policy must also take affirmative steps to ensure its implementation." *Id.* at 374. The court held that higher-level officials were aware of the problem, including by the service of plaintiff's EEOC charge—and failed to take action. *Id.* at 375. The court noted that defendant did not even provide the charging party with a copy of its ADA reasonable-accommodation request form until three years after he started work, the same month he was fired.

Punitive Damages Under Title VII and § 1981 Permissible Even Without Compensatory Damages or Back Pay: *Abner v. Kansas City Southern R. Co.*, 513 F.3d 154, 102 FEP Cases 616 (5th Cir. 2008), affirmed the award of $125,000 in punitive damages to each of the eight Title VII and § 1981 racial harassment plaintiffs, although the jury did not award compensatory damages and no back pay was involved. The court stated at 160: "We agree with the conclusion of several of our sister circuits that a punitive damages award under Title VII and § 1981 need not be accompanied by compensatory damages. We base our holding on the language of the statute, its provision of a cap, and the purpose of punitive damages under Title VII." The court held that no "ceremonial anchor" award of nominal damages is necessary. *Id.* at 165.

Harassment Policy in name Only Does Not Bar Punitive Damages, and Demand to Sign Post-Charge Arbitration Policy Showed Recklessness: *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1280–82, 102 FEP Cases 716 (11th Cir. 2008), affirmed the judgment on a jury verdict for the Title VII and § 1981 retaliation plaintiff. Plaintiff was fired immediately after he refused to sign an agreement to arbitrate his pending charge. Because he was willing to arbitrate future claims, the dispute was only about arbitration of his pending employment discrimination claim. The court held that there was sufficient evidence that Bagby was recklessly indifferent to plaintiff's Federally guaranteed rights in requiring him to sign the arbitration agreement and refusing to allow a modification that would have excluded his pending claim. The court held that the evidence on plaintiff's underlying racial harassment case also showed recklessness. *Id.* at 1280–81. The court rejected defendant's argument that its policy on harassment barred the imposition of punitive damages, because the policy existed in name only and retaliation was the defendant's routine response to complaints. *Id.* at 1281–82.

Punitive Damages Amounts: *EEOC v. Federal Express Corp.*, 513 F.3d 360, 376, 20 AD Cases 204 (4th Cir. 2008), affirmed the award of $8,000 in compensatory damages and $100,000 in punitive damages for a failure to accommodate the charging party's profound deafness by providing a certified ASL translator for meetings and important documents. The court also rejected defendant's argument that the 12.5 ratio of punitive to compensatory damages was unconstitutionally excessive,

holding that such ratios are merely instructive and do not establish bright lines. *Id.* at 377–78. Moreover, the court held that the fact the total award was well below the $300,000 statutory cap showed it was reasonable.

Abner v. Kansas City Southern R. Co., 513 F.3d 154, 165, 102 FEP Cases 616 (5th Cir. 2008), affirmed the award of $125,000 in punitive damages to the Title VII and § 1981 racial harassment plaintiffs, although the jury did not award compensatory damages and no back pay was involved. The court reviewed recent decisions, and stated: "We similarly refuse to strike down the jury award here, as it fell well below the cap, and there is no indication that it resulted from jury bias or insufficient evidence of malice."

Sec. 1981 Punitive Damages Five Times the Title VII Cap Are Not Unreasonable: *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1282–85, 102 FEP Cases 716 (11th Cir. 2008), affirmed the lower court's refusal to order a remittitur on the jury award of $500,000 in punitive damages, on top of the award of $27,160.59 in back pay and $27,160.59 in damages for mental anguish for the Title VII and § 1981 retaliation plaintiff. The court stated at 1283: "One factor that suggests that the misconduct of Bagby Elevator was reprehensible is that Goldsmith suffered both economic harm and emotional and psychological harm. Goldsmith's relationships with his family suffered, he attended counseling after his termination, and his termination made him feel 'hurt' and 'upset.' . . . The record also establishes that Goldsmith was financially vulnerable and had to borrow money after he was terminated." The court added: "Another factor that suggests that the misconduct of Bagby Elevator was reprehensible is that Bagby Elevator engaged in a pattern of retaliatory and discriminatory misconduct." *Id.* at 1283. The court also rejected defendant's argument that the 9.2-to-1 ratio of punitive to compensatory damages (including back pay) was excessive. The court stated that a higher ratio could also have been upheld. It noted that Bagby had 150 employees, and a Title VII damages cap of $100,000. It held that "an award of five times that amount is not excessive." *Id.* at 1284.

Attorneys' Fees: *Sole v. Wyner*, __ U.S. __, 127 S. Ct. 2188, 167 L. Ed. 2d 1069 (2007), a § 1983 case involving nudist "performance art," unanimously held that plaintiffs who prevail in obtaining a preliminary injunction but lose on the merits are not entitled to attorney's fees under 42 U.S.C. § 1988. The Court held: "A plaintiff who achieves a transient victory at the threshold of an action can gain no award under that fee-shifting provision if, at the end of the litigation, her initial success is undone and she leaves the courthouse emptyhanded." *Id.* at 2192. The Court expressed no view as to cases in which the grant of a preliminary injunction is not followed by a loss on the merits. The Court stated in note 3 that the opinion was consistent with the views of both the majority and the dissenters in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health and Human Resources*, 532 U. S. 598, 600 (2001).

Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1291–92, 102 FEP Cases 716 (11th Cir. 2008), affirmed the lower court's award of approximately $160,000 in fees to the successful Title VII and § 1981 retaliation plaintiff, who recovered $500,000 in punitive damages, $27,160.59 in back pay, and $27,160.59 in damages for mental anguish. The court held that the lower court did not abuse its discretion in declining to reduce the award because plaintiff had lost approximately half the issues. The court stated at 1292: "The evidence regarding Goldsmith's failure to promote claim provided the basis for Goldsmith's first EEOC charge, which was in turn necessary for Goldsmith to prove his claim of retaliation. The evidence regarding the EEOC investigation and cause determination supported all of Goldsmith's claims. Because Goldsmith's successful claim of retaliation was related to his unsuccessful claims and he 'won substantial relief,' we conclude that the refusal of the district court to reduce the amount of attorney's fees and costs was not an abuse of discretion."

Costs: *Little v. Mitsubishi Motors North America, Inc.*, 514 F.3d 699, 102 FEP Cases 977 (7th Cir. 2008) (*per curiam*), affirmed the lower court's award under 28 U.S.C. § 1920 of the costs of both video-taping and stenographically transcribing depositions. The court also held that the costs of computerized research were recoverable under § 1920.

Taxes: *Murphy v. Internal Revenue Service*, 493 F.3d 170 (D.C. Cir. 2007), overturned its own earlier decision and held that the Constitution allows imposition of the income tax on emotional-distress damages unrelated to earnings.

VII. Appellate Tips for Effective Advocacy

Garg v. Potter, __ F.3d __, 2008 WL 901462 (7th Cir. April 4, 2008) (No. 07-2377), affirmed the grant of summary judgment to the Rehabilitation Act defendant U.S. Postal Service because plaintiff did not perform the essential functions of her job even with reasonable accommodation. The court held that plaintiff waived any argument that the accommodations afforded her were not reasonable, because her entire brief on appeal was devoted to arguing that she was disabled, and she did not address the reasonableness of the accommodations.