

Chapter 12

Employment Law

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12.1 Introduction

Aristotle once said, “Law is order, and good law is good order.” While Aristotle is generally considered a learned fellow, his first premise is open to dispute—particularly in the field of employment law. It is true that courts rendered a number of decisions on the subject of employer-employee relationships in the year 2001, but it is also true that these decisions did not create a whole lot of order. In the last twelve months, many courts facing similar controversies reached divergent conclusions, highlighting where and how the circuit courts disagree rather than providing employers and employees with a clear picture of their respective rights and obligations. This article summarizes a number of these cases in an attempt to provide the reader with a big picture view of current trends and issues in employment law. While the authors hope this article is informative and timely, it is a legal article and as such, it must include a caveat or two. First, this survey of 2001 cases is not intended to be exhaustive. The authors highlighted what they found to be interesting federal appellate cases of the past year, with a few district or state court cases thrown in for good measure. Second, an attorney faced with an employment law issue should remember that the federal law detailed here is not the only source of legal authority; each state has its own set of laws governing the employment relationship, and many particularized federal statutes also address unique employment situations.

One interesting trend not illustrated by the cases reported in this Chapter bears mentioning at the outset. According to a recently-published study performed by Cornell University Law Professors Theodore Eisenberg and Stewart J. Schwab, between 1988 and 1997, federal courts frequently reversed employee victories on appeal. As reported in the November 2001 *ABA Journal*, “Federal courts reversed nearly 44 percent of plaintiffs’ victories in employment discrimination cases between 1988 and 1997.... Plaintiffs fare worse in federal appellate job bias cases than in any other kind of civil case.” During the same period, the courts of appeal reversed less than six percent of defense victories.

Employers should not view this trend as an opportunity to rest easy, however. A number of recent Supreme Court decisions are only now starting to affect circuit court jurisprudence. Additionally, while a few courts struggled last year to interpret and apply the Supreme Court’s most recent pronouncements, many faced issues that the Supreme Court has yet to address. A number of cases in these “gray areas” of employment law indicate that attorneys on both sides of an employment dispute should continue to proceed with caution.

Perhaps Ambrose Bierce, rather than Aristotle, provides more appropriate guidance to lawyers faced with a potential employment law claim. In his *Devil’s Dictionary*, the term “lawful” is defined as “compatible with the will of a judge having jurisdiction.”

12.2 Disability Discrimination

12.2.1 Who Can Sue Under the ADA?

Retired employees

Morgan v. Joint Administration Board, 268 F.3d 456 (7th Cir. 2001). When a retirement benefits plan was amended to grant a cost of living increase to normal and early retirees but not to disabled retirees, several disabled beneficiaries sued the plan administrator. The Seventh Circuit, refusing to join the Second and Third Circuits, held that former employees do not have a right to complain of post-employment discrimination unless the alleged discriminatory acts involve retaliation. “While the statutory language protecting individuals from retaliation protects all individuals, the statutory protections against discrimination absent retaliation are offered to “[otherwise] qualified individuals with a disability.” The court dismissed the case because “The plaintiffs...are certainly individuals, but they are not qualified individuals with a disability, that is qualified (able) to work with or without a reasonable accommodation to their disability; they are totally disabled and so utterly unable to work.”

Johnson v. K-Mart Corp., 273 F.3d 1035 (11th Cir. 2001). Under K-Mart’s benefits plan, employees disabled due to a mental illness receive salary replacement benefits for up to two years, while employees disabled due to a physical illness are eligible to receive benefits until age 65. Johnson, a mentally disabled former employee of K-Mart, sued alleging the cap on mental-health related benefits constituted an ADA violation. Reversing its prior stance, the Eleventh Circuit held that former employees are protected under the ADA. The Eleventh Circuit also repudiated the view held by several circuits that an employer may discriminate among groups of disabled employees without offending the ADA. “The gravamen of a disability-based discrimination claim is that an individual has been treated less favorably because of her disability...the plan appears prima facie to distinguish among beneficiaries on a basis that constitutes a form of discrimination contravening...the ADA.”

Current employees

DeVito v. Chicago Park District, 270 F.3d 532 (7th Cir. 2001). The ADA is designed to provide relief to “persons who are capable, with or without an accommodation that would make it possible for them to work despite a disability, to perform the essential functions of their job.” In the case of a full time job, not only must an employee be able to perform all the tasks required by the position, the employee must also be able to work the mandated number of hours. The court in *DeVito* determined that the plaintiff was not eligible to sue under the ADA because he was not capable of performing the essential functions of his job. Thirteen years after his injury, the plaintiff was still, *on a daily basis*, leaving his eight-hour light duty shift after putting in only two or three hours. While a gradual return to full-time work is a reasonable accommodation, “the ADA does not require permanent assignment to a temporary light-duty job...and regular attendance is an essential requirement of a job.”

Brown v. Lucky Stores, 246 F.3d 1182 (9th Cir. 2001). Under the ADA’s safe harbor provision, an employee “currently engaging in the use of illegal drugs” is not covered by the Act, but an employee or applicant who has “successfully completed a supervised drug

rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use” or who participates “in a supervised rehabilitation program and...no longer engag[es] in” the illegal use of drugs may seek ADA coverage. The Ninth Circuit held that this safe harbor applies only to employees “who have refrained from using drugs for a significant time.”

Tate v. Farmland Industries, Inc., 268 F.3d 989 (10th Cir. 2001). When Farmland Industries discovered that the plaintiff was taking the antiseizure medication Dilantin to control focal seizures, it fired him from his position as a commercial truck driver. Department of Transportation regulations state that a person is physically qualified to drive a commercial vehicle only “if that person has no clinical diagnosis of a condition likely to cause ‘loss of ability to control’” a commercial vehicle. The Tenth Circuit held that although the plaintiff’s condition might be defined as a disability within the meaning of the ADA, he was not a “qualified employee” because he did not meet his employer’s requirement that all drivers comply with DOT certification criteria. “Because plaintiff cannot meet the necessary job-related physical requirements to perform as a CMV operator in defendant’s employ, he is not a ‘qualified individual with a disability’ as defined in 42 U.S.C. §12111(8).”

12.2.2 Substantial Limitation in a Major Life Activity

An employee is disabled under the ADA if, as a result of a physical or mental illness, he or she is substantially limited in a major life activity. Over the past several years, courts have recognized several major life activities for the purposes of the ADA, establishing mechanisms by which an employee must prove that he or she suffers from a substantial impairment. A few recognized major life activities are working, walking, eating, lifting, and reproducing. In 2001, the courts struggled not only with these recognized categories, but also with a few new ones—and in January of 2002 the Supreme Court rendered a decision in this area that created quite a stir.

The major life activity of performing manual tasks: Is the ADA dead?

Following the much-anticipated January 2002 release of the Supreme Court’s opinion in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* __ U.S. __ (2002), a flurry of articles and media hype declared the ADA all but dead. While employers and employees alike must be aware of *Williams*, the opinion does not seem to justify the amount of teeth gnashing and hair pulling it has generated, because it does not greatly alter prior case law regarding the definition of “disability” under the Americans with Disabilities Act.

Williams, a Toyota employee with severe carpal tunnel syndrome, alleged a new type of disability—a substantial limitation in the major life activity of performing manual tasks. The Supreme Court chose to recognize this new limitation, but it refused to define the scope as broadly as the plaintiff desired. The Court held that “to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives. The impairment’s impact must also be permanent or long term.” Williams was extremely limited in her ability to perform certain tasks at work, but she was able to perform other tasks without accommodation. She was also able to perform many personal tasks unhindered by her carpal tunnel. Under these circumstances, the Court did not accept Williams’ argument that her condition was, per se, a disability. Instead, the Court ruled that

a fact finder (a judge or jury) should have the chance to hear all the evidence and decide whether Williams' condition constituted a disability under the ADA.

The Court carefully qualified its analysis throughout the opinion, stating each time that the substantial limitation at issue was the ability to perform manual tasks. This clarification indicates that prior decisions regarding other limitations, particularly limitations in the major life activity of working, may be unaffected by *Williams*:

Thornton v. McClatchy Newspapers, 261 F.3d 789 (9th Cir. 2001). Plaintiff suffered from arm, shoulder, and wrist injuries and was restricted in how long she could write or type. She claimed she required accommodation because she was substantially limited in the major life activity of "manual tasks." Evidence showed that Thornton could perform many manual tasks without accommodation, although the court was less than enlightened in its examination of this issue. The court's discussion focused on tasks stereotypically associated with women: cooking, self-care, grocery shopping, and light housework. The Ninth Circuit held that Thornton's "inability to write and type for extended periods of time is not sufficient to outweigh the large number of manual tasks that she can perform," but the court did not expressly preclude a plaintiff from asserting that handwriting and keyboarding are major life activities in and of themselves. In response to Thornton's argument that her employer regarded her as disabled because it accommodated her injuries, the court clarified that "when an employer takes steps to accommodate an employee's restrictions, it is not thereby conceding that the employee is disabled under the ADA or that it regards the employee as disabled."

The major life activity of working: courts discuss a plaintiff's evidentiary burden

EEOC v. Rockwell International Corp., 243 F.3d 1012 (7th Cir. 2001). Rockwell International Corp. required all applicants to undergo a nerve conduction test to determine who might be susceptible to "cumulative trauma disorders" such as carpal tunnel syndrome. Because Rockwell used the test results to make hiring decisions, the EEOC claimed that the hiring practices were discriminatory. According to the EEOC, the company regarded those showing susceptibility to carpal tunnel as disabled, foreclosing them from an "entire class of jobs" or "a broad range of jobs in various classes." The court held that for a plaintiff to establish that an employer regarded him as substantially limited in the major life activity of working, a plaintiff must provide some evidence of the number of jobs within the relevant geographical area from which he is excluded. Such evidence includes general employment demographics or recognized occupational classifications indicating the approximate number of jobs from which the individual is excluded as a result of the perceived impairment. A plaintiff is not, however, per se required to submit quantitative evidence of the relevant market.

EEOC v. Woodbridge Corp., 263 F.3d 812 (8th Cir. 2001). An employer gave applicants for a specific line production position a test designed to detect applicants susceptible to carpal tunnel syndrome. Applicants who were denied positions due to the results of this test sued, alleging that the employer regarded them as substantially limited in the major life activity of working. The court disagreed, stating that precluding employees from a specific job at a specific location does not demonstrate discrimination. "One must be precluded from more than one type of job, a specialized job, or a particular job of choice."

McKenzie v. Dovala, 242 F.3d 967 (10th Cir. 2001). After 10 years of excellent service as a police officer, McKenzie resigned to seek extensive treatment for a series of

psychological illnesses. Following several months of rehabilitation, she reapplied for a job with her former employer, but the department refused to consider McKenzie for *any* open position. The police department stated that based on what it knew about her, McKenzie would be “better off in some other field.” She sued, alleging that she was discriminated against because the police department regarded her as disabled in the major life activity of working. The court held that McKenzie could proceed to trial because she presented facts demonstrating that she was precluded from a class of jobs—law enforcement—not just the position of police officer.

Duncan v. Washington Metropolitan Area Transit, 240 F.3d 1110 (DC Cir. 2001). The court held that in order to demonstrate that an impairment “substantially limits” a plaintiff’s ability to work, a plaintiff must “produce some evidence of the number and types of jobs in the local employment market in order to show he is disqualified from a substantial class or a broad range of such jobs; that is, the total number of such jobs that remain available to the plaintiff in such a class or range in the relevant market must be sufficiently low that he is effectively precluded from working in the class or range.” The dissent disagreed with this standard, noting that it imposes a higher evidentiary burden when the major life activity at issue is working. “Duncan is forced to show that he is unable to work in a broad class of jobs or a broad range of jobs in various classes in order to claim relief, whereas [a hypothetical employee with only one leg claiming impairment in the ability to walk] need only show an inability to perform a single job.”

The major life activity of eating

Lawson v. CSX Transportation, 245 F.3d 916 (7th Cir. 2001). Lawson, diagnosed with Type I diabetes, alleged that he suffered a substantial limitation in the major life activity of eating. As a result of his disease, Lawson had to inject himself with insulin several times a day, perform blood tests several times a day, and maintain constant vigilance over the content and timing of his meals. CSX contended that these requirements were “simple dietary restrictions,” but the court disagreed, holding that eating can indeed be a major life activity: “The ability to eat is integral to one’s daily existence, as much or more so than the activities listed in the implementing regulations.” The court noted that the severity of the limitations placed on Lawson distinguished him from those whose medical conditions require simple dietary restrictions.

The major life activity of lifting

Lusk v. Ryder Integrated Logistics, 238 F.3d 1237 (10th Cir. 2001). The ADA expressly recognizes lifting as a “major life activity.” The question at issue in this case was whether Lusk’s forty-pound lifting restriction placed a substantial limitation on the major life activity of lifting. Joining the Fourth, Eighth, and Ninth Circuits, the Tenth Circuit held that comparative evidence is not required as a matter of law to survive summary judgment “where the impairment appears substantially limiting on its face.” Because Lusk’s impairment was not substantially limiting on its face, however, he was required to provide evidence comparing his lifting restrictions to the lifting capabilities of the general population.

Conant v. Hibbing, 271 F.3d 782 (8th Cir. 2001). The Eighth Circuit held that an individual who was denied employment because he was under a lifting restriction was not “disabled” or “regarded as disabled” for purposes of the ADA. Noting that other courts have refused to call this type of work restriction an ADA disability, the court stated, “There is a distinction between being regarded as an individual unqualified for a particular job because

of a limiting physical impairment and being regarded as ‘disabled’ within the meaning of the ADA.”

Major life activities courts refused to recognize in 2001

Liver Function: Furnish v. SVI Systems Inc., 270 F.3d 495 (7th Cir. 2001). The plaintiff suffered from chronic Hepatitis B and was placed on medication that caused him to experience fatigue, nausea, achiness, mood swings, and irritability. When he was terminated seven months after disclosing this condition to his employer, the plaintiff sued, claiming a disability in the major life activity of “liver function.” The Seventh Circuit determined that liver function is not a major life activity under the ADA and that the plaintiff’s liver function was a merely characteristic of his medical condition, Hepatitis B. “The activities that have been held to be major life activities under the ADA (e.g. eating, working, reproducing) are not the impairment’s characteristics—they are activities that have been impacted because of the plaintiff’s impairments.” The court also noted that even if liver function were a major life activity, the facts did not show that the plaintiff’s liver function was substantially limited. He missed only 12 hours of work in the year he was terminated, and a month before his discharge, a doctor determined his liver function was adequate.

Driving: Chenoweth v. Hillsborough County, 250 F.3d 1328 (11th Cir. 2001). Although the ADA includes a non-exhaustive list of “major life activities,” the Eleventh Circuit noted that “driving is not only absent from this list but is conspicuously different in character from the activities that are listed. It would be at least an oddity that a major life activity should require a license from the state, revocable for a variety of reasons including failure to insure.” (But see *Lovejoy-Wilson v. Noco Motor Fuel*, 263 F.3d 208 (2nd Cir. 2001), discussed below.)

Preliminary issues in alleging a disability

Illnesses With Intermittent Manifestations: In EEOC v. Sara Lee, 237 F.3d 349 (4th Cir. 2001), the Fourth Circuit held that employees afflicted with a disease that manifests itself only intermittently should not be evaluated under a different standard than the one articulated above. The court concluded that to constitute a disability, intermittent manifestations of an illness must substantially limit an employee in a major life activity to the same extent a constant illness would.

Timing: In Swanson v. University of Cincinnati, 268 F.3d 307 (6th Cir. 2001), the plaintiff argued that Supreme Court precedent required “the court to determine whether he was substantially limited [in a major life activity] at the time of his termination only.” The Sixth Circuit disagreed, concluding that courts can examine evidence arising subsequent to the employer’s alleged discriminatory act to determine whether an employee is disabled.

Complaint Procedure: Must a plaintiff identify in his complaint the major life activity in which he is substantially limited? In EEOC v. J.H. Routh Packing, 246 F.3d 850 (6th Cir. 2001), the Sixth Circuit noted that the answer to this question is unclear, especially in those circuits that have tried to address it. The court held that “so long as the complaint notifies the defendant of the claimed impairment, the substantially limited major life activity need not be specifically identified in the pleading.” The court stated that although a wise defendant *would* mention a specific limited activity, failure to do so is not fatal.

12.2.3 Employer Duties to Reasonably Accommodate and Engage in the Interactive Process

On certiorari: US Airways v. Barnett, argued before the US Supreme Court in December 2001, addresses a question the circuit courts have struggled with several times. In *Barnett*, a baggage handler with a back injury requested reassignment to the mailroom. His employer doubted Barnett's injury, but it also wondered if it was required to bump senior mailroom employees in order to accommodate him. The Ninth Circuit held that if no undue hardship exists, "a disabled employee who seeks reassignment as a reasonable accommodation, if otherwise qualified for a position, should receive the position rather than merely have an opportunity to compete with non-disabled employees." This decision is potentially at odds with another Ninth Circuit case, *Wills v. Pacific Maritime Ass'n*, 244 F.3d 675 (9th Cir. 2001). In *Wills*, the Ninth Circuit joined eight other circuits to hold that if an accommodation violates a provision in a collective bargaining agreement, is per se unreasonable. The Fourth Circuit took this line of decisions one step further in *EEOC v. Sara Lee*, 237 F.3d 349 (4th Cir. 2001), holding that an accommodation that violates a seniority system, whether or not established by a collective bargaining agreement, is unreasonable.

Reasonable/unreasonable accommodations

Lovejoy-Wilson v. Noco Motor Fuel, 263 F.3d 208 (2nd Cir. 2001). Noco Motor declined to promote an epileptic employee to assistant manager at a particular location, alleging the position required the manager to possess a driver's license and car in order to make bank runs. (Lovejoy-Wilson's disability prohibited her from obtaining a driver's license.) The employer instead promoted Lovejoy-Wilson to assistant manager at another location where a driver's license was not necessary. She asserted that this was not a reasonable accommodation, and the Ninth Circuit agreed. The court held that if employees without disabilities are entitled to compete for positions at desired locations or on desired shifts, disabled employees must be able to compete equally for those positions.

Williams v. United Insurance Company of America, 253 F.3d 280 (7th Cir. 2001). After a series of injuries, a door-to-door salesman became unable to walk long distances. She requested not only a promotion to sales manager, a position that would not require her to travel on foot, but also special training because she was not otherwise qualified for the position. According to the Seventh Circuit, the employee's request was too much: "The duty of reasonable accommodation may require the employer to reconfigure the workplace to enable the disabled worker to cope with her disability, but it does not require the employer to reconfigure the worker."

Morton v. United Parcel Service, 272 F.3d 1249 (9th Cir. 2001). When a hearing impaired driver suggested an accommodation that would allow her to hold a package delivery position, UPS flatly refused to implement it. In the subsequent suit, UPS argued that denying Morton the package delivery position did not violate the ADA because no reasonable accommodation would have made it possible for Morton to perform the job. The Ninth Circuit held that because UPS did not even attempt to engage in the interactive process with Morton, it bore the burden of proving that no reasonable accommodation existed. "The question whether this failure should be excused because there would in any event have been no reasonable accommodation available is one as to which the employer, not the employee, should bear the burden of persuasion throughout the litigation."

Humphrey v. Memorial Hospitals Ass'n, 239 F.3d 1128 (9th Cir. 2001). Humphrey, afflicted with Obsessive Compulsive Disorder, often spent several hours getting ready for work each day. While her performance at work was satisfactory once she arrived, her disability resulted in attendance problems and tardiness. When a flexible schedule did not remedy the situation, Humphrey's employer offered her a leave of absence. She refused and requested to work at home, an accommodation the employer did not approve because of Humphrey's attendance record. When Humphrey learned that she was being terminated for tardiness and absenteeism, she then requested a leave of absence; it was denied because she "had her chance at accommodation." The Ninth Circuit held that Humphrey's employer failed to accommodate her disability by refusing to reconsider offering her a leave of absence. "The employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed."

12.2.4 Employer Defenses to a Claim of Disability Discrimination

Employee cannot perform essential functions of job

Phelps v. Optima Health, 251 F.3d 21 (1st Cir. 2001). Phelps, a nurse, could not lift fifty pounds, but a series of informal arrangements with her coworkers and her employer provided her assistance with lifting activities. She argued that as a result of these agreements, lifting was no longer an essential function of her job. Agreeing with several other circuits, the First Circuit held that while an employer and employee may make special arrangements to facilitate an employee's disability, courts must evaluate essential job functions without considering the effects of such arrangements. Accommodations that are made to help an employee avoid a particular task "merely show the job could be restructured, not that [the function] was non-essential."

Nonpretextual reason for terminating employee

Pickens v. Soo Line R.R. Co., 264 F.3d 773 (8th Cir. 2001). In a decision creating a split in the Eighth Circuit, *Pickens* held that a high absentee rate is a sufficiently nondiscriminatory reason to justify termination. An injured railroad conductor found the regular schedule required by his position (four twelve hour days each week) too strenuous, and asked his doctor to grant him a medical restriction limiting the hours he could work. The doctor refused: Pickens had previously asked the same doctor to lift a similar restriction when it resulted in his transfer from a conductor position to a switchman's position. Relying on falsified medical status reports and a union policy allowing conductors to withdraw their names from job assignment lists to take vacation, sick leave, or personal time, Pickens created his own accommodation. The railroad terminated him, and a panel of Eighth Circuit judges determined that firing an employee for accumulating 29 absences within a 10-month period is not pretextual. "Even though the railroad's system of scheduling appears quite flexible, the railroad's policy requires regular, reliable attendance, and Pickens' conductor's job was full time. Pickens' decision to lay off twenty-nine times from October 1995 to August 1996 is excessive and eviscerates any regularity in his attendance." The court was also persuaded by an additional piece of evidence: Pickens had sent the company claims representative, president, and chief medical officer a letter stating "I had my medical

restrictions removed to get back to work before and I will do it again if this is required. I will totally disregard safety and common sense if this is required.”

Walls v. Floe International, Inc., No. Civ. 00-1371 (D. Minn. Sept. 18, 2001). After a developmentally disabled employee was laid off, he sent the company president a letter that threatened a lawsuit if he was not rehired and demanded an increase in hourly wages. The company terminated him, determining that the letter was threatening and inappropriate. The court agreed because the letter “on its face is reasonably read as a threat.”

Kinzer v. Fabyanske, Westra, & Hart, PA, No. Civ. 00-855 (D. Minn. Sept. 19, 2001). Kinzer, a diabetic associate who was denied shareholder status, forwarded a draft EEOC charge of disability discrimination to his employer. The employer retained an independent investigator to review the situation and it also attempted to mediate the dispute. When all attempts to settle the matter failed, the firm terminated Kinzer because “Kinzer no longer trusted the firm shareholders...Kinzer considered some of the shareholders to be liars...Kinzer had a warped view of his own strengths and weaknesses, and...Kinzer generally lacked judgment in assessing...his own situation *vis a vis* the deferment of his promotion to shareholder status.” Though the court hinted that it believed these non-pretextual justifications for Kinzer’s termination, it denied summary judgment because “the facts presented are susceptible to multiple interpretations—ranging from a purely retaliatory reason for Kinzer’s termination to a purely legitimate reason for his termination, and every combination of motives in between.”

Direct threat defense

Morton v. United Parcel Service, 272 F.3d 1249 (9th Cir. 2001). An employee with a severe hearing impairment sued UPS when it refused to hire her as a package delivery driver. Even though some of UPS’ vehicles do not require DOT certified drivers, the company requires all its package delivery drivers to be DOT certified, a status Morton could not achieve due to her hearing loss. UPS claimed that this qualification was motivated by safety concerns; the company asserted that allowing Morton to drive per her request would constitute a direct threat to the safety of others. Although the EEOC has argued that all safety-related qualification standards should be analyzed under the “direct threat” rationale, the Ninth Circuit disagreed. The court held that direct threat analysis should only be used when there is a threat to others in the workplace that does not involve actual job performance. “In this case, not only is the alleged danger upon which UPS relies to the public in general, but UPS’ concerns about safe driving do centrally involve the performance of the driving job to which Morton aspires.”

Lowe v. Alabama Power Company, 244 F.3d 1305 (11th Cir. 2001). According to the Supreme Court’s decision in *Bragdon v. Abbott*, if an employer dismisses an employee on a good faith belief that he poses a direct threat to the safety of others, that belief must be grounded in medical or other objective scientific evidence. The Eleventh Circuit determined that an employer’s decision to deny an employee a position as a tool-room mechanic based on the conclusions of a cursory medical exam and a doctor’s report from two years prior “was not based on particularized facts using the best available objective evidence required by the regulations.”

Waddell v. Valley Forge Dental Associates, ___ F.3d ___ (11th Cir. 2001). Upon learning that dental hygienist Waddell was HIV positive, Valley Forge studied dental journals and consulted with the Centers for Disease Control and Prevention to determine whether or not he posed a risk to patients. Concluding that such a risk existed, Valley Forge

removed Waddell from his hygienist's position and offered him a clerical job instead. Waddell refused to take the clerical position for salary reasons and resigned. The Eleventh Circuit held that Valley Forge successfully established its direct threat defense and was justified in removing Waddell from his position. When an employee has a transmittable disease that inevitably results in death, a direct threat is demonstrated when it is proven "1) that a certain event can occur and 2) that according to reliable medical opinion the event can transmit the disease." Waddell posed a direct threat under this inquiry because dental patients commonly bleed during dental procedures and a hygienist using sharp tools may stab himself, pierce his protective glove, and bleed into a patient's oral cuts or abrasions.

Business necessity

Tice v. Centre Area Transportation Authority, 247 F.3d 506 (3rd Cir. 2001). The Third Circuit noted that while ADA provisions regarding employer-mandated medical exams "are not a model of legislative clarity," an employer can require an employee to undergo a medical examination or inquiry if it is job related and consistent with business necessity. A request that meets these requirements, "will never, absent other evidence, be sufficient to demonstrate that an employer 'regarded' an employee as substantially limited in a major life activity."

Morton v. United Parcel Service, 272 F.3d 1249 (9th Cir. 2001). The business necessity defense appears in both Title VII cases and ADA cases, but its applicability is different under the two statutes. In ADA cases, the business necessity defense can be applied to qualification standards regardless of whether they are facially neutral. In Title VII cases, however, only facially neutral provisions may be evaluated under a business necessity standard; facially discriminatory policies must be evaluated under a more stringent "BFOQ" standard. The court held that when an ADA case involves facially discriminatory safety-related qualification standards, some of the more stringent inquiries of the Title VII analysis are instructive. "The traditional understanding that the BFOQ defense is more stringent than the Title VII business necessity standard should be of little relevance in assessing the validity of safety standards under the ADA business necessity defense. Essentially the same considerations—the nature of the risk, the adequacy of the connection shown between the employer's qualification standard and alleviation of the risk, and the showing of the necessity of across-the-board rather than individualized determinations—are likely to be relevant in both instances, and to the same extent."

Cripe v. City of San Jose, 261 F.3d 877 (9th Cir. 2001). Several disabled police officers sought eligibility for specialized assignments, but the police department refused—the department allowed only currently serving patrol officers to apply for special assignments. The disabled officers were not patrol officers because they were unable to make forcible arrests, an action the department argued was essential to the patrol officer position. At trial, the department took the argument a step further, asserting not only that the ability to make forcible arrests was an essential function of patrol duty, but also that it was an essential function of *all* specialized duty assignments (a position that clearly caused the court to raise its collective eyebrow). The City then contended the policy was a business necessity and that waiving it would constitute an undue hardship. The court noted (repeatedly) that the City framed this argument incorrectly: "The undue hardship standard is used to determine whether it is too onerous for a particular employer to make a specific accommodation sought by a specific employee... This test, while strict, is less stringent than the 'business necessity' standard, which requires employers to demonstrate that qualification standards that

discriminate against a class of disabled employees are nevertheless permissible because it is necessary for the operation of the employer's business.”

12.2.5 Damages

A showing of harm is required

Tice v. Centre Area Transportation Authority, 247 F.3d 506 (3rd Cir. 2001). In order to bring suit alleging a violation of the ADA's record keeping and examination requirements, a plaintiff must show actual damages. With this holding, the Third Circuit joins the Fifth, Eighth, and Tenth Circuits.

Griffin v. Steeltek, 261 F.3d 1026 (10th Cir. 2001). While filling out a job application, Griffin came across the following questions: “Have you received Worker's Compensation or Disability Income payments? If yes, describe,” and “Have you physical defects which preclude you from performing certain jobs?” The employer decided to hire another applicant for reasons unrelated to the improper questions—Mr. Griffin did not have enough experience for the job. According to the Tenth Circuit, no harm, no foul. To be entitled to damages under the ADA, a claimant must not only establish that an employer technically violated the act by asking improper questions, but also that the applicant suffered a tangible injury as a result.

Punitive damages

Webner v. Titan Distribution, Inc., 267 F.3d 828 (8th Cir. 2001). While researching a worker's compensation claim, an injured employee requested permission to videotape his workstation. His employer refused. Less than a week after the employee filed a motion to compel, his supervisor informed him that he was being terminated “due to his disability.” (This statement ranks quite high on the list of statements an employer should *not* make when terminating an employee.) The Eighth Circuit determined that while a reasonable jury could have found that the employer acted in a discriminatory manner, the district court's award of punitive damages was improper. “Punitive damages are warranted where the plaintiff shows that the defendant engaged in a discriminatory practice ‘with malice or with reckless indifference’ to the plaintiff's federally protected rights.” Because no evidence established that the employer acted with malice or reckless indifference, the court voided the award of punitive damages.

12.2.6 The ADA's Relationship to Other Statutes, Regulations, and Legal Principles

ADA and Title VII

Fox v. General Motors Corp., 247 F.3d 169 (4th Cir. 2001). The ADA, like Title VII, prohibits discrimination in the terms, conditions, and privileges of employment. The ADA was enacted after the Supreme Court recognized the existence of a hostile work environment claim under Title VII. The Fourth Circuit held “we can assume that Congress was aware of the Court's interpretation of ‘terms, conditions, or privileges of employment’ when it chose to parallel language in the ADA.”

Flowers v. Southern Regional Physician Services, 247 F.3d 229 (5th Cir. 2001). In *Flowers*, the court held that the analysis used to determine the existence of disability-related harassment is the same as that used to evaluate harassment claims under Title VII. A plaintiff must prove that she belongs to a protected class, that she was the subject of unwelcome harassment, that the harassment was based on her disabilities, that the harassment affected a term, condition, or privilege of employment, and that the employer knew of the harassment and failed to take prompt action to remedy it.

ADA and SSDI

Lee v. City of Salem, 259 F.3d 667 (7th Cir. 2001). Lee was terminated as cemetery sexton when the city council determined he was unable to perform what it considered the essential functions of the job. Lee successfully obtained SSDI benefits by claiming complete disability, but he later filed an ADA claim stating that he was wrongfully terminated and could perform essential job functions with or without reasonable accommodation. According to a prior Supreme Court decision, this seeming contradiction is permissible because the ADA and the SSA do not use the same criteria to determine an individual's ability to work. In such circumstances, a plaintiff must reconcile the apparent discrepancy by referring to the divergent definitions for support. Lee argued he only made the SSDI claim that he "couldn't do the work anymore" because his disability had been "hammered into his head" by his employer. The Eleventh Circuit held that merely disavowing the contradictory SSDI statement was not sufficient to satisfy the explanatory burden established by the Supreme Court.

ADA and the doctrine of estoppel

DeVito v. Chicago Park District, 270 F.3d 532 (7th Cir. 2001). While the doctrine of estoppel "prevents a litigant from repudiating a representation that has reasonably, foreseeably induced reliance by the person to whom he made it," judicial estoppel prevents a winning party in a lawsuit from repudiating the grounds on which he won in a subsequent case. Judicial estoppel has been applied to ADA cases, but it was not available in *DeVito* because the plaintiff received benefits from his employer without having to sue for them. The court allowed the application of the doctrine of estoppel to prevent the plaintiff from making inconsistent representations to his employer to obtain benefits.

12.2.7 Miscellaneous

Direct Evidence of Discrimination: Hoffman v. Caterpillar, 256 F.3d 568 (7th Cir. 2001). Hoffman sought training on two high-speed optical scanners; her employer refused the request because Hoffman had but one hand and her employer believed the scanners required two hands to operate. The employer's refusal to train Hoffman on the machines did not affect her pay, hours, chances for promotion, or any other term or condition of employment. The Seventh Circuit held that employees who have direct evidence of an employer's discriminatory intent need not prove the existence of an adverse employment action when claiming disparate treatment in the provision of training.

ADA's 15-employee Requirement: *Wells v. Clackamas Gastroenterology Assoc.*, 271 F.3d 903 (9th Cir. 2001). There are competing views about how to determine whether a shareholder in a professional corporation qualifies as an employee and can be counted toward the 15-employee threshold that subjects an employer to the ADA. The Seventh Circuit

promulgated the “economic realities” test, which holds that “a shareholder in a professional services corporation is far more analogous to a partner...than...[a] shareholder” and should therefore not be considered an “employee” for purposes of the ADA. The Second Circuit holds the view that a corporate form “precludes any examination designed to determine whether the entity is in fact a partnership.” Thus, anyone who establishes a business entity should not later be able to claim that it is really a partnership in order to avoid the ADA. The *Wells* court adopted the latter position: “There is no reason to permit a professional corporation to secure the ‘best of both worlds’ by allowing it both to assert its corporate status in order to reap the tax and civil liability advantages and to avoid liability for unlawful employment discrimination.”

12.3 Title VII

12.3.1 What Constitutes an Adverse Employment Action?

Ultimate employment actions

In *Von Gunten v. State of Maryland*, 243 F.3d 858 (4th Cir. 2001), the Fourth Circuit held that conduct that does not constitute an “ultimate employment decision,” i.e. a decision to hire, fire, or promote, may still be actionable if it adversely affects the terms, conditions, or benefits of employment. This decision places the Fourth Circuit in agreement with the majority of other circuits, although the court notes that those ostensibly clinging to the “ultimate employment action” requirement often employ a broader standard in practice.

The Fifth Circuit is one such court giving lip service to a narrow standard while applying a broader one. *Fierros v. Texas Dep’t. of Health*, ___ F.3d ___ (5th Cir. 2001). In the Fifth Circuit, only “ultimate employment decisions” like hiring, firing, granting leave, promoting, and compensating satisfy this prong of a plaintiff’s prima facie case of retaliation. Here, the court examined the language of Title VII’s anti-discrimination provision and noted that “this language clearly contemplates that the denial of a pay increase can be an act of discrimination against an employee” and that, as a result, “the denial of a pay increase can be an ‘ultimate employment action’ actionable under Title VII’s anti-retaliation provision.”

Adverse employment actions generally

Russell v. Board of Trustees of the University of Illinois, 243 F.3d 336 (7th Cir. 2001). Russell attended a daylong seminar for work, but missed the afternoon segment when her car got a flat tire during the lunch break. Her time card, which she had filled out in advance, incorrectly reflected that she had worked the entire day, and Russell did not remember to fix this error prior to turning in the information. Russell’s supervisor, who had engaged in harassing behavior toward Russell from the time he joined UIC, did not allow Russell to correct her timecard. He put the matter before a disciplinary committee, and Russell received a five-day suspension. The Seventh Circuit held that this was enough to constitute an adverse employment action under Title VII. In addition to losing five days of pay, the plaintiff’s record, spotless for 30 years, “now includes a formal finding that she ‘falsified’ her timesheet and committed ‘theft of services.’”

Grube v. Lau Industries, 257 F.3d 723 (7th Cir. 2001). When she was transferred from first shift to second shift, Grube resigned. She alleged that the transfer was “deliberately designed to make her working conditions intolerable because she could no longer be a dedicated wife and caregiver for her husband.” Astutely noting that Grube’s argument reinforced stereotypes about women in the workplace to a greater extent than *any* of the behavior alleged on the part of her employer, the court rejected her claim. Merely transferring an employee to a different shift, absent any significant change in the employee’s pay, benefits, or responsibilities, is not enough to establish an adverse employment action. “Indeed, were we to accept Grube’s position, any transfer of a married female employee to a less desirable work assignment could serve as the basis of a Title VII claim.”

Davis v. Town of Lake Park, 245 F.3d 1232 (11th Cir. 2001). The Eleventh Circuit held that “to prove an adverse employment action in a case under Title VII’s anti-discrimination clause, an employee must show a “serious and material” change in the terms, conditions, or privileges of employment. Moreover, an employee’s subjective view of the significance and adversity of an employer’s action is not controlling; the employment action must be “materially adverse as viewed by a reasonable person in the circumstances.”

Russell v. Principi, 257 F.3d 815 (D.C. Cir. 2001). Russell sued her employer because she received an “excellent” performance review rather than an “outstanding” review, allegedly resulting in a lower bonus and an increased vulnerability to layoffs. The court held that an unfavorable performance review is not generally an adverse employment action in and of itself; however, the loss or reduction of a bonus may be an adverse action because “a bonus is a tangible, quantifiable award, more analogous to one’s salary or to a benefit of one’s employment than to a performance evaluation.” The court did not favor Russell’s claim that the performance evaluation made her more vulnerable to layoffs because “such an unrealized risk of future action...is too ephemeral to constitute an adverse employment action.”

12.3.2 Protected Activities Under Title VII

Clark County School District v. Breeden, 532 U.S. 268 (2001). The circuit courts disagree whether Title VII protects only an employee’s opposition to acts violative of Title VII or whether it also protects an employee’s opposition to practices that the employee *reasonably believes* violate Title VII. In *Clark County*, the Supreme Court did not settle this controversy. Rather, the Court held that no reasonable person could believe that the behavior at issue in the case was unlawful. The case involved a single incident in which a co-worker made an off-color comment in front of the plaintiff, causing the speaker and another co-worker to chuckle. The Supreme Court also rejected the plaintiff’s retaliation claim because she did not establish a causal connection between her complaint about the comment and the alleged retaliation. “Action taken (as here) 20 months later suggests, by itself, no causality at all.”

McMenemy v. City of Rochester, 241 F.3d 279 (2nd Cir. 2001). McMenemy A firefighter, alleged he was passed over for promotions because he played a role in investigating a sexual harassment complaint made by the secretary of the local firefighter’s union against the union president. The district court held that McMenemy’s participation in the investigation was not a protected activity because he acted in opposition to the unlawful employment practices of the union, not his employer the City. The court of appeals disagreed, noting that the plain language of Title VII “prohibits discrimination by an

employer against an employee who ‘has opposed any practice made an unlawful employment practice’ by Title VII or who has ‘participated in any manner in an investigation, proceeding or hearing’ under Title VII.” The court was persuaded by the EEOC’s reading of these provisions: “Title VII protects an employee from any employer, present or future, who retaliates against him because of his prior or ongoing opposition to an unlawful employment practice or participation in Title VII proceedings.”

O’Neal v. Ferguson Construction Co., 237 F.3d 1248 (10th Cir. 2001). An employee has the right to make an informal complaint of discrimination to his or her superior without fear of retaliation. The Tenth Circuit determined that this right also encompasses informal complaints made to an employer by an employee’s attorney.

12.3.3 The Courts’ Struggle With “Because of Sex or Gender”

Same-sex harassment

Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206 (9th Cir. 2001). Rene’s coworkers repeatedly harassed him about his homosexuality, but his supervisors refused to intervene. Although the Ninth Circuit noted “there is no doubt that the harassment that Rene alleged was so objectively offensive that it created a hostile work environment,” the court nonetheless held that Title VII does not prohibit harassment based on sexual orientation. The court cited as authority a Supreme Court decision that illustrated three methods of proving same-sex sexual harassment: show the harassment was motivated by sexual desire, show the harassment was motivated by general hostility to a particular gender in the workplace, or show comparative evidence regarding the treatment of different genders in a mixed-sex workplace. Giving no reason why the Supreme Court’s examples should constitute an exclusive list or why proof of sexual desire raises an actionable claim but proof of sexual aversion does not, the court concluded, “The degrading and humiliating treatment Rene contends that he received from his fellow workers is appalling, and it is conduct that is most disturbing to this court. However, this type of discrimination, based on sexual orientation, does not fall within the prohibitions of Title VII.”

Sanchez v. Azteca Restaurant Enterprises, 256 F.3d 864 (9th Cir. 2001). A male server, Sanchez, was subject to repeated verbal harassment by his co-workers because “he was effeminate and did not meet their views of a male stereotype.” Sanchez was frequently referred to as “she” and “her;” co-workers used crude slang to call Sanchez a homosexual and a prostitute. The Ninth Circuit held that this harassment occurred “because of sex,” because he was harassed for his nonconformity with a male stereotype. The Supreme Court decision in “*Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes. That rule squarely applies to preclude harassment here.”

Failed workplace romance

Pipkins v. City of Temple Terrace, 267 F.3d 1197 (11th Cir. 2001). Pipkins began to receive negative evaluations after terminating a relationship with the Assistant City Manager, Daniel Klein. Pipkins’ immediate supervisor, not Klein, made the resulting negative evaluations, but Pipkins alleged that the supervisor was motivated by her friendship with Klein’s wife. The court held that the supervisor’s action did not constitute sexual harassment because she was motivated by personal animosity, not sex or gender. “The same reasoning applies to any alleged harassment committed directly by Klein. Even if we construe

[plaintiff's] allegations in the light most favorable to her, she merely portrays any action by Klein to have been taken because of his disappointment in their failed relationship. Again, such a motivation is not 'because of sex.'"

Lipphardt v. Durango Steakhouse of Brandon, 267 F.3d 1183 (11th Cir. 2001). Lipphardt had a brief intimate relationship with her supervisor. When she tried to end the relationship, he refused to stop pursuing her. Lipphardt's employer argued that she had no sexual harassment claim because the supervisor's behavior was "based on plaintiff's status as [the supervisor's] former lover and not on her status as a female." The court was not persuaded. "A review of our case law makes it clear that, while a prior intimate relationship is an important factor to consider, it is not determinative of a sexual harassment claim... The fact that Knuth and Lipphardt has a prior intimate relationship does not give Knuth a free pass to harass Lipphardt at work. And while we recognize that 'personal animosity is not the equivalent of sex discrimination and is not proscribed by Title VII, there is a point where inappropriate behavior crosses the line into Title VII harassment.'"

12.3.4 Establishing a Triable Case

Proving harassment

Ferris v. Delta Air Lines, Inc., ___ F.3d ___ (2nd Cir. 2001). If a person is harassed by a co-worker who does not have supervisory authority, the employer will be liable under Title VII if it is negligent, "that is, if it either provided no avenue for complaint or knew of the harassment but did nothing about it." The Second Circuit held Delta Airlines liable for Ferris' rape by co-worker Michael Young because it had sufficient knowledge of Young's past violence toward other women employees. In 1993 and 1995, two female flight attendants told Delta supervisors that they had been raped and threatened by Young; Delta took no action to investigate the allegations. In 1997, a third female flight attendant told her supervisor that Young had verbally assaulted her in an airport. The supervisor (erroneously) told the employee that Delta could do nothing unless she made a written report, but the employee refused to do so. In 1998, Young raped Ferris, prompting this lawsuit. The Second Circuit concluded that a reasonable factfinder could find Delta liable for Young's actions because "Delta had knowledge of Young's proclivity to rape co-workers. The fact that Young's prior rapes were not of Ferris but of other co-workers is not preclusive. If an employer is on notice of a likelihood that a particular employee's proclivities place other employees at unreasonable risk of rape, the employer does not escape responsibility to warn or protect likely future victims merely because the abusive employee has not previously abused those particular employees."

Frederick v. Sprint, 246 F.3d 1305 (2nd Cir. 2001). Frederick alleged that her supervisor's statement that she "needed to do more things" in order to get a promotion, when combined with the fact that he stared at her, blew kisses at her, rubbed his hair on her cheek while leaning over her work station, kissed her cheek, and touched her breasts, demonstrated that he wanted sex in exchange for a promotion. The court took the "opportunity to reaffirm the longstanding rule in this Circuit, that a victim need not provide evidence of a direct and express sexual demand to make a claim" of quid pro quo sexual harassment. To hold otherwise would ignore the "long line of cases showing that sexual asides and insinuations are the well-worn tools of a sexual harasser." The court nonetheless determined that Frederick did not present enough evidence to establish that her lack of a promotion was tied

to her supervisor's comments; testimony demonstrated that she was not immediately qualified for a promotion and that she had a history of attendance problems.

Gregory v. Daly, 243 F.3d 687 (2nd Cir. 2001). A plaintiff alleging sexual harassment under Title VII also raised independent claims of a hostile work environment and quid pro quo harassment. The court did not agree with the plaintiff's argument that Title VII creates separate causes of action for sex-based discrimination depending on the motivation behind an employer's action. A quid pro quo allegation is nothing more than a factual claim about the way in which a plaintiff's sex became the basis of an adverse employment action. The court concluded "the law does not create separate causes of action for sex discrimination depending on the reason the employer denies a woman a job or a job benefit."

Little v. BP Exploration & Oil Co., 265 F.3d 357 (6th Cir. 2001). Little filed an EEOC complaint in February 1996; he filed a second complaint in October of that year. On January 9, 1997, Little was suspended, and on the 24th of that month he was terminated. He sued, alleging that he was terminated in retaliation for filing the two complaints. BP argued that the proximity of the events did not establish the requisite causal connection necessary to prove retaliation. The Sixth Circuit disagreed, holding that "this case presents just such a circumstance where the temporal proximity, considered with other evidence of retaliatory conduct, is sufficient to create a genuine issue of material fact as to the existence of a causal connection between Plaintiff's filing of the two EEOC complaints and his suspension and termination..."

Kidd v. Illinois State Police, 2001 WL 1663995 (7th Cir. 2001) (unpublished). Kidd was discharged from his trainee position with the Illinois State Police due to poor report writing skills. Kidd alleged race bias because the department provided a struggling Caucasian trainee with support long before it made the same efforts on behalf of Kidd, an African American. In support of this argument, Kidd submitted statistics showing that the discharge rates of African American and Caucasian police officer trainees were markedly disproportionate. The court held that this evidence did not support Kidd's race-bias claim. "The statistical proof, although it reflects a striking disparity in the discharge rate for African American candidates, does not necessarily reveal whether discrimination was at work in the discharge of Kidd."

Olsen v. Marshall & Ilsley Corp., 267 F.3d 597 (7th Cir. 2001). Olsen, a bank manager, alleged that he was terminated because he reported to the company's employment representative that he suspected his supervisor was engaging in quid pro quo sex with a female employee. The Bank responded to this allegation with an impressive amount of evidence that Olsen was terminated because he was just a bad employee. Olsen disputed this evidence, claiming that although most of his two year record was pretty awful, he had shown improvement in his last month. The court held that Olsen's positive opinion of himself and his work was insufficient to prove that the employer's allegations regarding his performance were without any basis in fact. "An employee's perception of his own performance...cannot tell a reasonable factfinder something about what the employer believed about the employee's ability."

Atonio v. Wards Cove Packing Company, ___ F.3d ___ (9th Cir. 2001). The Ninth Circuit dismissed the "last shreds" of a case that has been lingering in the judicial system for *twenty-seven years*. Although the procedural history reads like a Tolstoy novel, the facts are relatively simple: Alaskan Native and Filipino cannery employees alleged bias in cannery hiring, firing, and promotion practices and asserted that the cannery's racially segregated

housing and dining facilities were discriminatory. In disposing of the case, the Ninth Circuit held that while the cannery maintained separate hiring channels for different job classifications, segregated employee housing, and engaged in “race-labeling” to describe groups of employees, no evidence showed that the practices hindered employee advancement or created a disparate impact on nonwhite employees. Supreme Court appeal anyone?

Little v. Windermere Relocation Inc., 265 F.3d 903 (9th Cir. 2001). Little was raped by a client three times in one evening. When she notified Windermere’s Vice President of Operations about the client’s actions, she was told to “put it behind her” and seek therapy. Little requested that she be removed from the client’s account, but her request was not honored. Upon telling the president about the incident two months later, her salary was reduced, and she was ultimately terminated. The Ninth Circuit noted that even if the three rapes were considered a single incident of harassment, a single incident “can support a claim of hostile work environment because the ‘frequency of the discriminatory conduct’ is only one factor in the analysis.” Citing the Supreme Court’s statement that an isolated incident can create a discriminatory change in the terms and conditions of employment if severe enough, the court held that rape is “unquestionably among the most severe forms of sexual harassment”

Continuing violation doctrine

On certiorari: In fall of 2001, the Supreme Court heard argument in *National Railroad Passenger Corp. v. Morgan*, a case involving the validity of the continuing violation doctrine. Under this doctrine, a court will consider conduct that would otherwise be time-barred “as long as the untimely incidents represent an ongoing unlawful employment practice.” This is significant because Title VII liability generally only implicates conduct that has occurred within 300 days of an individual’s EEOC complaint. In *Morgan*, the plaintiff claimed that his employer engaged in discriminatory behavior from 1990 to 1994, but he did not file an EEOC claim until February 1995. Thus, the traditional statutory of limitations period cut off liability for employer actions occurring before May 1994. While the trial court employed the traditional statute of limitations analysis, the court of appeals applied the continuing violation theory, holding that “pre-limitations conduct should have been presented to the jury not merely as background information, but also for the purposes of liability.”

Cardenas v. Massey, 269 F.3d 251 (3rd Cir. 2001). Cardenas sued his employer alleging that due to his ethnicity, he was hired at a low wage rate and that he was underpaid until the time of his termination. Although Cardenas asserted that each paycheck constituted a separate act of discrimination for the purpose of determining the statute of limitations, the district court disagreed and ruled that the statute of limitations barred his action because he did not file within 300 days of his first allegedly discriminatory paycheck. The Third Circuit reversed, holding that the statute of limitations began to run on the day the plaintiff received his last paycheck because “certainly, in this circuit, discriminatory wage payments constitute a continuing violation.”

12.3.5 Employer Defenses

Prompt correction of harassing behavior/employee did not use available reporting procedure

Spriggs v. Diamond Auto Glass, Inc., 242 F.3d 179 (4th Cir. 2001). If a supervisor, acting within the scope of his authority, causes an employee to suffer a tangible employment action, an employer may be vicariously liable. If, however, an employee suffers no tangible employment action, an employer can bring an affirmative defense by demonstrating 1) it exercised reasonable care to prevent and correct harassment and 2) the plaintiff did not take advantage of preventative or corrective measures provided by the employer. The *Spriggs* court joined the Fifth, Sixth, and Tenth circuits in holding that this affirmative defense is also available in cases involving claims of racial harassment.

Matvia v. Bald Head Island Management, Inc., 259 F.3d 261 (4th Cir. 2001). An employee waited to report a supervisor's behavior until she was sure he was a predator and not "merely an interested man who could be politely rebuffed." From September to December of 1997, Christina Matvia's supervisor described sexual fantasies to her, placed pornographic material on her desk, placed his arm around her and hugged her, and told her he loved her and had a crush on her. Although her employer had an established sexual harassment policy, Matvia did not notify anyone of her supervisor's actions. On December 15, Matvia's supervisor embraced her and tried to kiss her; she had to struggle to escape. The next day, the supervisor confessed his actions to management and, after an investigation, was terminated. The Fourth Circuit held that Matvia could not bring a Title VII action because she failed to use her company's sexual harassment complaint procedure. Although she claimed she delayed because she was trying to determine the intent of her supervisor, "[s]o long as the conduct is unwelcome, based on the employee's gender, and sufficiently pervasive or severe to alter the conditions of employment, the label given to the harasser is immaterial."

Gawley v. Indiana University, ___ F.3d ___ (7th Cir. 2001). Seven months after being harassed by her supervisor, Gawley lodged a complaint with the University. Though the complaint documented several comments the supervisor made regarding her weight, her breast size, and the fit of her pants, Gawley did not mention the fact that her supervisor fondled her breast because the incident embarrassed her. The University investigated the charge and issued the offending supervisor a counseling memorandum; the harassment stopped immediately afterward. Gawley's delay in using the University's complaint procedure motivated the Seventh Circuit to approve the University's affirmative defense against her claims of sexual harassment and retaliation. "Gawley's neglect of the university's formal procedures during seven months of escalating harassment, in combination with the insufficiency of her repeated informal efforts to stop the harasser constitute an unreasonable failure to take advantage of the University's corrective procedures."

Beard v. Flying J, Inc., 266 F.3d 792 (8th Cir. 2001). Over a three-week period in 1998, the general manager of a restaurant engaged in sexually harassing behavior toward Ms. Beard, an assistant manager. Mr. Krout "frequently brushed his body against [Beard's] breasts, once rubbed a pair of cooking tongs across her breasts, and once flicked a pen across her nipples." When Ms. Beard complained, the Division Manager initiated an investigation that consisted of an interview with Beard and Krout, but involved no other employees. Krout was given a warning letter, which Beard signed to signify that she was satisfied with the

result. Krout continued to make crude comments toward Beard, and five additional female employees came forward to complain about his harassing behavior. After a second, more extensive investigation, the Division Manager placed Krout on a brief suspension with pay; Flying J management disagreed with this action and reinstated Krout. The Eighth Circuit held that Flying J's discipline of Krout was not sufficient to demonstrate that it promptly corrected his harassing behavior.

Rheineck v. Hutchinson Technology, 261 F.3d 751 (8th Cir. 2001). A supervisor confiscated from an employee a pornographic picture that bore a striking resemblance to the plaintiff, also a manufacturing supervisor at the plant. In response to this incident, the supervisor held a management meeting to discuss the procedure for investigating the matter and the methods for destroying any copies of the photograph still circulating at the plant. Within days, Hutchinson identified nine employees who had either circulated the picture or who had copies of it. All nine employees were required to undergo sexual harassment training, and all received various disciplinary measures that were more severe than the company's usual corrective action. In evaluating these measures, the Eight Circuit held that "no reasonable juror could find Hutchinson's remedial actions to be anything but prompt and reasonably designed to end the harassment."

Sanchez v. Azteca Restaurant Enterprises, 256 F.3d 864 (9th Cir. 2001). Despite the restaurant's detailed sexual harassment policy, Sanchez did not use the established procedures to register a complaint. Instead, he told both his assigned and general manager and later, the company's director of human resources. The latter performed a few "spot checks" to evaluate the situation and told Sanchez to contact him if further harassment occurred. The court held that this was insufficient corrective action because "the company made no effort to investigate Sanchez's complaint; it did not discuss his allegations with the perpetrators; it did not demand that the unwelcome conduct cease; and it did not threaten more serious discipline in the event the harassment continued." The court concluded that although the existence of a sexual harassment program proved the restaurant exercised reasonable care to prevent harassment generally, the restaurant did not exercise reasonable care to correct the harassment suffered by Sanchez and could not escape liability.

Swinton v. Potomac Corporation, 270 F.3d 794 (9th Cir 2001). Swinton, the only African-American at a 140-employee plant, was constantly subjected to racial jokes by his co-workers and a company supervisor. Swinton's own supervisor witnessed the jokes, and although he never told any himself, he frequently laughed along. Swinton did not use the company's harassment reporting procedures and resigned after five months of employment. The Ninth Circuit first determined that Potomac Corporation was not eligible for the affirmative defense that Swinton failed to take advantage of corrective or preventative opportunities. The court held that the defense is only available in a negligence claim if the harasser is the employer's supervisor, and here the primary offender was not Swinton's direct supervisor. Denying Potomac the ability to raise this defense was not entirely unfair—as part of his prima facie case, Swinton had to establish that Potomac failed to adequately respond to the harassment. The court held that this burden of proof was "substantively similar" to the affirmative defense. Potomac was also prohibited from alleging it made good faith efforts to comply with Title VII, a defense that would have precluded the jury's award of \$1 million in punitive damages. The Ninth Circuit held that the actions of the harasser were properly imputed to Potomac because the harasser was designated by the company as a person responsible for acting on complaints of harassment.

Sheikh v. Independent School Dist. 535, No. 00-1896 (D. Minn. October 18, 2001). Because the school district responded quickly to Mustaf Sheikh's requests to wear a religious head covering, pray during breaks, and combine his Friday breaks to attend services at a local mosque, the district court dismissed Sheikh's claim that the school district failed to accommodate his religious needs. Although Sheikh was ostracized by his co-workers for his religious beliefs, the court concluded that this created an unpleasant working environment, not actionable harassment.

Mixed motive defense in retaliation cases

Speedy v. Rexnord Corp., 243 F.3d 397 (7th Cir. 2001). The plaintiff claimed that in order to prove a mixed-motive defense, an employer must present evidence that similarly situated employees not engaging in a protected activity were treated in a manner similar to employees engaging in a protected activity. The court disagreed that comparative evidence was required and held that the well-documented record of the plaintiff's excessive absenteeism was enough to establish the defense.

Costa v. Desert Palace, 268 F.3d 882 (9th Cir. 2001). In *Costa*, the Ninth Circuit held that a plaintiff must "provide direct and substantial evidence of discriminatory animus" in order to receive a mixed-motive jury instruction. The court further clarified this position in a footnote, stating that "the use of terms such as 'direct' evidence should not be read as limiting the type of evidence a plaintiff such as *Costa* must present in order to receive a mixed-motive instruction. Rather, it is directed at the greater quantum of evidence required to establish a mixed-motive case. The reason for the distinction is that in a mixed-motive case the burden of proof shifts to the defendant once the plaintiff has produced sufficient evidence, while in a pretext case the burden always remains with the plaintiff."

Pennington v. City of Huntsville, 261 F.3d 1262 (11th Cir. 2001). The Civil Rights Act of 1991 precludes employers from using a mixed motive defenses in cases involving charges of discrimination based on race, color, religion, sex, or national origin. The Eleventh Circuit joined the First, Second, Third, Fourth, and Eighth Circuits in holding that a mixed-motive defense may still be used in the limited context of retaliation cases.

Other defenses

Elmenayer v. ABF Freight Sys., 2001 WL 1152815 (E.D.N.Y. Sept. 20, 2001). Elmenayer, a practicing Muslim, requested longer lunch breaks on Fridays to enable him to attend prayer services. He offered to make up the additional time by coming in earlier or working later. His employer denied the request, stating its preference that he instead bid for shifts that would not create a schedule conflict. ABF feared that Elmenayer's proposed accommodation would not only adversely affect the morale of the other employees, but would also violate a union collective bargaining agreement. The district court determined that the employer's request that Elmenayer bid for non-conflicting shifts was reasonable because "an employer has no duty to accommodate an employee if the accommodation would violate an otherwise valid collective bargaining agreement.... The relevant inquiry is not whether an employee's proposal is better, or more to his liking, but whether the employer's is reasonable."

12.3.6 Damages

Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001). Reversing the Sixth Circuit, the Supreme Court held that Title VII front pay (money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement) does not constitute compensatory damages and is therefore not subject to the statutory cap imposed on such damages by 42 U.S.C. § 1981a(b)(3).

Cush-Crawford v. Adchem Corp., 271 F.3d 352 (2nd Cir. 2001). In response to an issue of first impression, the Second Circuit held that nominal damages are not a necessary prerequisite to an award of punitive damages in a Title VII case. The court stressed that the statutory cap on punitive damages limits the potential for abuse. It also emphasized that an employer who acts with malice or reckless indifference to an employee's rights should not be able to escape a punitive damages award just because the employee did not suffer actual harm.

Hertzberg v. SRAM Corp., 261 F.3d 651 (7th Cir. 2001). Joining the Eighth and Tenth Circuits, The Seventh Circuit held that in order to receive equitable remedies such as reinstatement, back pay, or front pay, a plaintiff alleging discrimination must prove actual or constructive discharge.

Winarto v. Toshiba, ___ F.3d ___ (9th Cir. 2001). *Winarto* was the subject of many forms of harassment at work: co-workers verbally harassed her about her ethnicity, imitated her accent, mocked her back injury, and taunted her about her gender. One co-worker had a particularly egregious habit—he kicked *Winarto* in the shins on a regular basis. *Winarto* complained to a supervisor about the behavior several times, but it did not cease. She then began to receive lower employee evaluation scores. When Toshiba decided to lay off a portion of its workforce, *Winarto* was let go; Toshiba claimed the layoffs were determined solely on the basis of evaluation scores and nothing else. *Winarto* sued Toshiba for retaliation and won, but the district court reversed the jury's verdict. The Ninth Circuit reinstated the jury verdict—as well as a \$93,000 compensatory damage award. Given that Toshiba relied on evaluation scores to make layoff decisions and given that *Winarto* provided evidence that her last two evaluations were low because she complained about harassment, the court concluded that the record supported the jury's verdict in favor of *Winarto*.

12.3.7 Miscellaneous

On certiorari: In *Edelman v. Lynchburg College*, the Supreme Court will decide whether an EEOC charge must be verified within Title VII's 300-day statute of limitations or whether a late verification relates back to an earlier verified charge.

Claims Not Alleged in EEOC Documents: *Clockedile v. New Hampshire Dept. of Corrections*, 245 F.3d 1 (1st Cir. 2001). The court considered whether a plaintiff who did not make a claim of retaliation when filing a preliminary complaint with the EEOC might nonetheless make a retaliation claim in a subsequent Title VII suit. The district court noted that not only do most circuits permit retaliation claims when a plaintiff has neglected to assert them in EEOC filings, disallowing the practice creates a danger of "mouse-trapping complainants, who often file their agency complaints without counsel." The First Circuit agreed that some deference should be given to plaintiffs; its chief concern was where to draw the line. Although five circuits have gone so far as to permit a plaintiff to bring *any* claim "reasonably related" to those raised in its EEOC complaint, the First Circuit ruled only with

regard to retaliation claims. “On balance, we think the cleanest rule is this: retaliation claims are preserved so long as the retaliation is reasonably related to and grows out of the discrimination complained of to the agency—e.g. the retaliation is for filing the agency complaint itself.”

State Employees do not Have a Right to Proselytize: *Knight v. Connecticut Deaf & Hearing Impaired*, ___ F.3d ___ (2nd Cir. 2001). The Second Circuit upheld the State’s decision to discipline a nurse and a sign language interpreter for proselytizing to clients about their Christian beliefs while on duty. The court held that not only was the disciplinary action permissible under both Title VII and the First Amendment, but also that allowing state employees to proselytize is not an available accommodation of religious needs under Title VII.

Don’t Have to Use “Pattern or Practice” Method of Proof: *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343 (5th Cir. 2001). In this case, the plaintiff argued that the lower court should not have employed the *McDonnell-Douglas* burden-shifting model of proof, asserting that the “pattern and practice” method should have been used instead. The “pattern and practice” method is typically used in cases brought by a class action or the government, and seeks to prove “that unlawful discrimination has been a regular procedure or policy followed by an employer or a group of employees.” The Fifth Circuit noted that although the plaintiff claimed otherwise, “a pattern or practice case is not a separate and free-standing cause of action...but it is really ‘merely another method by which disparate treatment can be shown.’” While the Supreme Court has not explicitly forbidden the use of the pattern or practice method of proof in private non-class suits, the Fifth Circuit has never employed it outside of those situations. Other circuits have flatly refused to do so. As a result, the Fifth Circuit concluded “given the nature and purpose of the pattern and practice method of proof, this Court’s precedents, and the precedents of other circuits, the district court did not err in refusing to apply the [pattern or practice] method of proof.”

Standing to Challenge an Affirmative Action Program: *Yeager v. General Motors Corp.*, 265 F.3d 389 (6th Cir. 2001). In order to bring a claim that an affirmative action program discriminates against non-minorities, a plaintiff must show that “but for the program, he would have been considered for the job.” The Ninth Circuit held that a white male applicant to GM’s apprenticeship program did not meet this standard; the facts showed that even if the affirmative action program at issue did not exist, Yeager’s scores on the preliminary tests would not have qualified him for an apprenticeship.

Constructive Discharge: *Logan v. Denny’s*, 259 F.3d 558 (6th Cir. 2001). Logan alleged she was a victim of constructive discharge, a claim requiring proof that “the working conditions under which she labored were so difficult that a reasonable person standing in her shoes would have felt compelled to resign and that defendant intended to cause plaintiff to resign or and that her resignation was a reasonably foreseeable consequence of defendant’s actions.” The Sixth Circuit expressly adopted the approach of the Fifth Circuit, employing a set of non-exclusive factors to determine whether a plaintiff has established that a reasonable person would have felt compelled to resign. “Whether a reasonable person would have felt compelled to resign depends on the facts of each case, but we consider the following factors relevant, singly or in combination: 1) demotion; 2) reduction in salary; 3) reduction in job responsibilities; 4) reassignment to menial or degrading work; 5) reassignment to work under a younger supervisor; 6) badgering, harassment, or humiliation by the employer calculated to encourage the employee’s

resignation; or 7) offers of early retirement or continued employment on terms less favorable than the employee's former status."

Tolling the statute of limitations: *Frazier v. Delco Electronics Corp.*, 263 F.3d 663 (7th Cir. 2001). If an employee has made a prompt complaint to an employer about a Title VII violation, the statute of limitations is tolled if "the victim of harassment is reasonably induced by the defendant or others to believe that the situation has been or is in the reasonable course of being resolved."

Integrated Enterprise Test Rejected: *Worth v. Tyer*, ___ F.3d ___ (7th Cir. 2001). The integrated enterprise test evaluates whether nominally different business entities are, in reality, so integrated that they should be treated as a single employer. The test balances four factors: interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control. The Seventh Circuit, holding that this inquiry is "too amorphous to be applied consistently," clarified that it will no longer apply it in Title VII cases.

EEOC can issue early right to sue letters: *Walker v. United Parcel Service*, 240 F.3d 1268 (10th Cir. 2001). There is a split of authority regarding the EEOC's practice of issuing early right to sue letters—the Eleventh and Ninth Circuits have held the practice valid, while the D.C. Circuit has determined that it is impermissible. 42 U.S.C.e-5(f)(1) permits a Title VII plaintiff to commence a lawsuit either after the EEOC dismisses the plaintiff's charge or after 180 days if the EEOC has not yet filed suit or entered into a conciliation agreement. Under the regulation, if it is likely that the EEOC will be unable to complete an investigation within 180 days, it is authorized to issue a right to sue letter upon request prior to the expiration of the 180-day period. Siding with the Eleventh and Ninth circuits, the Tenth Circuit held that this regulation is valid because it was brought to the attention of Congress and the public, and although Congress amended the regulation in other respects, it left this particular provision alone.

12.4 Age Discrimination

12.4.1 Plaintiff's proof

Prima facie case

To establish a prima facie case of age discrimination, an employee must demonstrate 1) that he was within a protected age group, 2) that he was qualified for his position, 3) that he was the victim of an adverse employment action, and 4) that the circumstances give rise to an inference of discrimination. As the cases below indicate, although these prima facie elements are well established, the methods of proving them are not.

Abdu-Brisson v. Delta Air Lines, 239 F.3d 456 (2nd Cir. 2001). According to the Second Circuit, the fourth element of a prima facie claim of age discrimination does not require a plaintiff to prove that he or she was treated differently from similarly situated employees. In *Abdu-Brisson*, 488 Pan-Am pilots hired by Delta as part of an asset purchase agreement alleged age discrimination. The Pan-Am pilots were not similarly situated to pilots employed by Delta at the time of the asset purchase, leaving the Pan-Am pilots "with

no appropriate point of comparison with which to show disparate treatment.” The court held that if plaintiffs are required to prove disparate treatment when there are no similarly situated employees, it “presents the grotesque scenario where an employer can effectively immunize itself from suit if it is so thorough in its discrimination that all similarly situated employees are victimized.”

Slattery v. Swiss Reinsurance America Corp., 248 F.3d 87 (2nd Cir. 2001). In *Slattery*, the Second Circuit clarified that although the circuit has used “qualified for the position” interchangeably with the phrase “performing satisfactorily,” the evidentiary threshold for this element is met if an employee can demonstrate eligibility for the position. “The qualification prong must not...be interpreted in such a way as to shift onto the plaintiff an obligation to anticipate and disprove, in his prima facie case, the employer’s proffer of a legitimate, non-discriminatory basis for its decision.” The court then discussed the plaintiff’s evidence of an inference of discrimination: statements made by a company executive in *Information Strategy* magazine indicating that he wanted the company to have a younger image and that the average age of the company’s employees dropped significantly during his tenure. The district court dismissed this evidence because the plaintiff did not show that the speaker was personally involved in the plaintiff’s termination or that those who were involved were aware of the statements. The Second Circuit nonetheless found the interview significant: “statements about changing the corporate culture made by top executives surely have probative value as to possibly discriminatory acts on the part of the lower level supervisors...We hold that such a statement from a top executive in the corporate hierarchy can be enough to establish a prima facie case.” The court then proceeded to rule in favor of Swiss Reinsurance, noting that Slattery did not sufficiently rebut Swiss Reinsurance’s extensively documented claim that he was terminated due to job-performance problems.

Kadas v. MCI Systemhouse, 255 F.3d 359 (7th Cir. 2001). While the court made quick work of dismissing the case at hand, it could not resist the opportunity to engage in a little old fashioned dicta. First, the court opined that the fact that a terminating supervisor is older than a terminated employee is not enough to establish a lack of discrimination. “For it is altogether common and natural for older people, first, to exempt themselves from what they believe to be the characteristic decline of energy and ability with age; second, to want to surround themselves with younger people; third, to want to protect their own jobs by making sure that the workforce is not too old, which might, if ‘ageist’ prejudice is rampant, lead to RIFs of which they themselves might be the victims; and fourth, to be oblivious to the prejudices they hold, especially perhaps prejudices against the group to which they belong.” The court also expounded upon the use of statistical evidence in an age discrimination suit. While many courts require statistical evidence to show at least a 5% probability of a correlation between an adverse employment action and the age of the affected individuals, this admissibility threshold is arbitrary. “The question of whether a study is responsible and therefore admissible under the *Daubert* standard is different from the weight to be accorded to the significance of a particular correlation found by the study.” The court concluded that theoretically, statistical evidence alone *could* prove discrimination, but the likelihood of this occurring is minuscule.

Adverse employment actions

Cooney v. Union Pacific Railroad, 258 F.3d 731 (8th Cir. 2001). When Union Pacific Railroad and Southern Pacific Railroad merged, Union Pacific reduced its workforce by offering certain employees a voluntary severance package based on location and seniority.

Cooney and his co-plaintiffs, who ranged in age from 58 to 62, were not offered voluntary severance; they continued to work in their original positions without any change in the terms and conditions of their employment. The Eighth Circuit determined that denying an employee the opportunity to take voluntary severance, when the package is awarded based on seniority and location and not retirement eligibility, does not constitute an adverse employment action.

Proving pretext

Genung v. Northwest Radiology Network, P.C., No. IP99-0863-C-H/G (S. D. Ind. Sept. 21, 2001). The district court held that Genung successfully established a genuine issue of material fact as to whether Northwest Radiology's purported reasons for reducing her wages and hours were mere pretext. Genung began working for Northwest Radiology in 1968; by 1995, her title was Chief Operations Officer. In 1996, citing a need to restructure, the CEO and Chief Administrative Officer took duties from Genung, reduced her annual salary from \$60,000 to \$20,000, and reduced her hours from 40 a week to 20 a week. "The evidence [shows] an older worker who was doing good work and who was the only employee to suffer any adverse action as part of the corporate restructuring." This evidence, considered in light of the CEO's stated belief that "time had passed [Genung] by," and the CAO's statement that if he were Genung's age he would retire, provided proof of pretext sufficient to survive summary judgment.

12.4.2 Employer Defenses

Mixed motive defense

Donovan v. Milk Marketing, Inc., 243 F.3d 584 (2nd Cir. 2001). If a plaintiff presents credible evidence that illegal discrimination factored into his dismissal but his employer demonstrates a valid, non-discriminatory reason for the adverse employment action, a judge should instruct the jury on *Price Waterhouse's* mixed-motive burden shifting analysis. Under this analysis, a plaintiff has the initial burden of proving that discrimination motivated his adverse employment action. If the plaintiff satisfies this burden, it shifts to his employer, who must then persuade the jury that it would have taken the same action against the employee absent any discrimination. In *Donovan*, the plaintiff claimed that his employer was barred from demonstrating non-discriminatory reasons for its decision to terminate him because the employer did not raise this argument as an affirmative defense in the pleadings pursuant to Federal Rule of Civil Procedure 8(c). The court was not persuaded by this assertion. "Our references to the mixed-motive analysis as an 'affirmative defense' signified that the burden of persuasion on the relevant question shifts to the defendant if the jury finds that the plaintiff has shown the presence of the prohibited motivation; they were not intended to impose any special pleading requirements on the defendants."

Employer knowledge of ADEA requirements

Mathis v. Phillips Chevrolet, 269 F.3d 771 (7th Cir. 2001). Phillips Chevrolet argued that its discrimination against a 59-year-old applicant was not willful. The Seventh Circuit disagreed, pointing out that one manager not only indicated that he was unaware that it was illegal to consider age in making hiring decisions, he also noted the age of applicants in a section of the application reserved for information relevant to making hiring decisions. In an

attempt to defend itself, Phillips indicated that its applications clearly state that the ADEA prohibits age discrimination in hiring practices. The court batted this assertion aside: “the jury could easily have concluded that printing this statement on the application but then making no effort to train hiring managers about the ADEA shows that Phillips knew what the law required but was indifferent to whether its managers followed that law.” Accordingly, “leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an ‘extraordinary mistake’ for a company to make, and a jury can find that such an extraordinary mistake amounts to reckless indifference.”

12.4.3 Miscellaneous

Applicability of ADEA to Indian Tribes: *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (9th Cir. 2001). In the Ninth Circuit, if a federal law of general applicability does not state its applicability to Indian tribes, the law does not have force over tribes if it touches “exclusive rights of self governance in purely intramural matters.” Here, the court determined that the ADEA did not apply to the plaintiff’s employment relationship with the Karuk tribe’s Housing Authority because “the Housing Authority...functions as an arm of the tribal government and in a government role. It is not simply a business entity that happens to be run by a tribe or its members, but, rather, occupies a role quintessentially related to self-governance.” The court also determined that the employment dispute was “entirely intramural,” because it did not concern non-Karuks or non-Indians as employers, employees, customers, or anything else.

12.5 Wage and Hour Issues

12.5.1 Who is Exempt from the FLSA?

Ale v. Tennessee Valley Authority, 269 F.3d 680 (6th Cir. 2001). The TVA claimed that certain security workers at its nuclear facilities were administrative and executive employees exempt from FLSA overtime requirements. In support of this argument, the TVA offered resumes, job descriptions, and performance evaluations. The Sixth Circuit shunned this evidence because the employees’ actual duties did not support exemption from the FLSA. “When titles and vague job descriptions are not born out by more specific evidence they are not entitled to any special weight...The DOL regulations indicate that courts must look to the specific facts when determining whether an employee is exempt from the FLSA overtime provisions.” The court concluded that even though the district court held that TVA shift supervisors were “in charge of their shifts,” this did not mean that management was the employees’ primary duty. “The words ‘in charge’ are not a magical incantation that render an employee a bona fide executive regardless of his actual duties.”

Baldwin v. Trailer Inns, 266 F.3d 1104 (9th Cir. 2001). A husband and wife employed by Trailer Inns trailer park contended management was not the “primary duty” of their positions as...managers. The Baldwins argued that because they spent 90% of each workweek performing non-managerial tasks, they were entitled to 2,151 hours of overtime pay. The Ninth Circuit held that while the percentage amount of time spent performing

non-managerial tasks is a factor in determining whether or not an employee is eligible for overtime, it is not a dispositive factor in and of itself. “We do not presume that the executive exemption fails merely because the proportion of time spent on exempt managerial tasks is less than fifty percent, where, as here, managerial tasks are packaged in employment with non-managerial tasks, and the management function cannot readily and economically be separated from the nonexempt tasks.” The court did look at the amount of time the Baldwins spent on nonexempt tasks, but it also considered the relative importance of the Baldwins’ managerial duties, the frequency with which they exercised discretionary powers, their freedom from supervision, and the relationship between the Baldwins’ salary and that of other Trailer Inns employees. The court ultimately concluded that although the Baldwins may have spent less than 50% of their time performing exempt tasks, they were not eligible for overtime compensation.

Gieg v. Howarth, 244 F.3d 775 (9th Cir. 2001). In *Gieg*, the Ninth Circuit held that a “finance writer” employed by an auto dealership did not qualify as a vehicle salesman or serviceman within the FLSA overtime exemption of 29 U.S.C. § 213(b)(10). The plaintiff’s primary duties as a finance writer included “securing the customers’ signatures on the final sales order, determining the appropriate type of financing for the customer, preparing the necessary paperwork to secure the financing, selling credit-life insurance and selling other products to the customer, such as service contracts.” The court noted that the statutory exemption applies only to the sales and servicing of automobiles, and that “the language does not apply to commissions based on insurance sales or the procurement of financing.”

12.5.2 Window of Corrections

Under the FLSA, an employee is considered “salaried” if he or she receives “a predetermined amount of compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.” This definition prevents employers from reducing employee pay based on partial day absences *unless the reduction is inadvertent or was made for reasons other than lack of work*. This exception is often referred to as the “window of corrections” or the “exception to the no-docking rule.”

Whetsel v. Network Property, 246 F.3d 897 (7th Cir. 2001). Determining that the statutory definition of “salaried employee” is ambiguous, the Seventh Circuit deferred to the meaning proffered by the Secretary of Labor. Under that interpretation, the exception to the no-docking rule arises only if an employer can objectively demonstrate that it intended to pay its employees on a salary basis; evidence of a policy or practice of improper deductions establishes that an employer lacked the requisite intent. The Seventh Circuit held that an employer who engages in a policy or practice of impermissible deductions cannot use the good faith exception to the no-docking rule. In *Takacs v. Hahn Automotive Corp.*, 246 F.3d 776 (6th Cir. 2001), the Sixth Circuit wholeheartedly endorsed the Seventh Circuit’s analysis.

Block v. City of Los Angeles, 253 F.3d 410 (9th Cir. 2001). An employee will still be considered “salaried” if he or she is subject to “penalties imposed in good faith for infractions of safety rules of major significance.” Additionally, because an employee need only be paid for workweeks in which he or she performed work, full week suspensions without pay are also permitted. Unpaid suspensions of less than one week, however, raise FLSA concerns. If employers have an actual practice of making partial-week deductions or a policy that creates a significant likelihood of such deductions, the employees affected probably will not be considered “salaried” under the FLSA. The Ninth Circuit affirmed a

trial court holding that thirteen incidents of impermissible deductions by the City of Los Angeles constituted an actual practice of making partial week deductions. The court then concluded that because the City engaged in this actual practice, it did not qualify for the good faith exception to the no-docking rule. Turning to the question of 1½ week suspensions, the court determined that they are improper; suspensions must occur in whole, not fractional, workweeks if an employee is to be considered “salaried” under the FLSA

12.5.3 Miscellaneous

FLSA Claim Subject to Six Month Limitations Period: *Martin v. Lake County Sewer*, 269 F.3d 673 (6th Cir. 2001). Martin brought a “hybrid § 301/ fair representation claim,” which arises when an employee sues his employer for breach of a collective bargaining agreement and his union for violating its duty of fair representation. Such claims generally have a six-month statute of limitations. In *Martin*, the matter was complicated by the fact that the plaintiff also asserted a FLSA claim against his employer for unpaid wages, a claim that carries a two-year statute of limitations. The Sixth Circuit held that Martin’s FLSA claim relied on an interpretation of the collective bargaining agreement; therefore, the hybrid §301/ fair representation claim was not distinct from Martin’s FLSA claim and the six-month statute of limitations applied.

No Private Right to Injunctive Relief: *Howard v. City of Springfield*, ___ F.3d ___ (7th Cir. 2001). While the FLSA provides for a right to seek injunctive relief for FLSA violations, the Seventh Circuit held that this right is exclusively reserved to the Secretary of Labor and is not available to private parties.

Fugitive from Justice can Proceed with FLSA Claim: *Barnett v. Young Men’s Christian Assoc.*, 268 F.3d 614 (8th Cir. 2001). As an inmate with the Missouri Department of Corrections, Barnett participated in a work-release program with the YMCA. He filed a lawsuit shortly thereafter, alleging that his pay of \$1 an hour violated the FLSA. While the claim worked its way through the court system, Barnett was paroled; soon after, he disappeared for several months. The district court dismissed Barnett’s FLSA suit, designating him a “fugitive from justice.” The Eighth Circuit, joining the Eleventh and First Circuits, held that where a fugitive is a plaintiff in a civil action, the action may be dismissed only if the fugitive status has a connection to the civil action and the dismissal “animates the concerns underlying the fugitive disentitlement doctrine, i.e. delay, the risk that a judgment will be unenforceable, the need to deter flight, the indignity flight places on the court, and the risk of compromising the fugitive’s criminal prosecution.”

Retaliation: *Hinsdale v. Liberal*, 2001 WL 980781 (10th Cir. 2001). When Grace Hinsdale filed a FLSA suit against the City of Liberal, she asked her husband to testify on her behalf. Tom Hinsdale, a police chief who was also employed by the City, agreed. In May of 1994, the City Commission discovered that Mr. Hinsdale intended to testify in support of his wife’s claim; in July of that year, the City Commission gave him the option of resigning or accepting a demotion. He chose the latter and was demoted to Court Administrator, suffering a \$6,000 pay cut. In August, Hinsdale testified in his wife’s FLSA suit by deposition and at trial. Early the following year, he was given another choice regarding his employment: resign or be fired. In the subsequent lawsuit, the trial court dismissed Hinsdale’s claim that the City retaliated against him for testifying in support of his wife because Hinsdale was demoted *before* he testified. The Tenth Circuit disagreed, holding that “the plain language of [the FLSA] protects a person whose testimony is impending or anticipated.”

12.6 Family and Medical Leave Act

In 2001, many circuit courts were forced to address the tensions not only between the FMLA and its companion regulations, but also between different provisions of the FMLA itself. In *Ragsdale v. Wolverine Worldwide*, the Supreme Court will hopefully take the opportunity to settle the controversy that currently surrounds three particular FMLA regulations. The first disputed provision requires employers to designate leave as FMLA qualifying or non-qualifying and then notify employees of this designation. The second provision requires employers to designate leave as FMLA leave prospectively rather than retroactively. Finally, the court will evaluate a regulation that prevents an employer from counting any leave taken before an employee is notified of its qualifying status as FMLA leave. The Eighth Circuit decision in *Ragsdale* invalidated all three regulations, holding that each was an impermissible interpretation of the FLSA. Other circuits have come to varying conclusions, as the cases below illustrate.

12.6.1 Is Notice Required?

Bachelder v. America West Airlines, 259 F.3d 1112 (9th Cir. 2001). Plaintiff, terminated because of poor attendance, filed suit alleging that America West improperly considered her use of FMLA leave in its decision to terminate her. America West disagreed, claiming that because it used the retroactive “rolling” year method to calculate employee leave, Bachelder had exhausted her allotment of FMLA leave and as a result, none of her recent absences were covered by the Act. The Ninth Circuit first clarified that the regulatory prohibition on counting an employee’s decision to take FMLA leave as a negative factor in employment actions and counting FMLA leave under ‘no fault’ attendance policies “is a reasonable interpretation of the statute’s prohibition on ‘interference with’ and ‘restraint of employee[s]’ rights under the FMLA.” It then held that although the FMLA regulations provide an employer with flexibility in calculating a “leave year” and although they do not explicitly require employers to notify employees of the calculating method, “we...conclude that an initial selection of a method for calculating the leave year must be an open—not a secret—one before it can be applied to an employee’s disadvantage.” If an employer fails to notify an employee of its selected calculation method, “the option that provides the most beneficial outcome for the employee” must be used.

Rowe v. Laidlaw Transit, Inc., 244 F.3d 1115 (9th Cir. 2001). Rowe was a salaried employee exempt from the overtime requirements of the FLSA. When she suffered a serious ankle injury that prompted her to request a part time schedule, however, she was paid on an hourly basis. Rowe did not request that her reduced schedule qualify as FMLA leave, and her employer did not discuss designation of the leave with her. Once Rowe was fully rehabilitated, she returned to full-time employment on a salaried basis. She later claimed that because she was an hourly employee for the duration of her part-time employment, the reduced work schedule changed her work status under the FLSA from exempt to non-exempt. The Ninth Circuit disagreed, holding that Rowe’s reduction in hours was protected under the FMLA and, as a result, her status did not change from exempt to non-exempt during that period. According to the court, Laidlaw was not required to notify Rowe of its decision to designate her reduced schedule as FMLA leave; Rowe’s injury qualified her for FMLA leave and her injury was the basis of her request for a part-time

schedule. “Thus, Rowe’s unpaid leave, granted in the form of a reduced schedule, qualified as FMLA leave, and under the FMLA, providing unpaid FMLA-qualifying leave does not affect an employee’s exempt status.”

12.6.2 Qualifying Leave and Eligible Employees

Questions of qualifying leave

Navarro v. Pfizer Corp., 261 F.3d 90 (1st Cir. 2001). Navarro requested FMLA leave to care for her adult daughter, who, as a result of pregnancy-related high blood pressure, was bedridden and unable to care for herself or her other children. Pfizer denied her request. Navarro asked the company to reconsider, and hearing no response, departed on leave. Pfizer subsequently terminated her. The FMLA permits leave for the care of a child “who is 18 years of age or older and incapable of self-care because of a mental or physical disability;” disability is defined as an “impairment that substantially limits one or more of the major life activities of an individual.” The First Circuit, joining the majority of circuits who have decided this issue, held that pregnancy is not, in and of itself, an impairment, but that complications arising from pregnancy may be. Looking to decisions regarding the definition of “disability” under the ADA, the First Circuit pointed out that many courts have recognized that reproduction constitutes a major life activity. Finding no reason to differentiate between the ADA and the FMLA on this point, the court determined that Navarro successfully established her daughter’s impairment in a major life activity.

Miller v. AT&T Corp., 250 F.3d 820 (4th Cir. 2001). AT&T refused to grant an employee’s request for FMLA leave in response to her diagnosis with the flu. To support its position that the flu is not a “serious health condition,” AT&T pointed to 29 C.F.R. § 825.114(c), which states “Ordinarily, unless complications arise, the common cold, *the flu*, ear aches [...etc.], are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.” The Fourth Circuit noted that there is tension between this provision and subsection (a) of the same statute, which lists objective criteria for evaluating whether or not a condition is a serious illness—a person could potentially meet all the subsection (a) criteria for a serious illness but suffer from one of the ordinarily non-serious maladies listed in (c). Noting that a court must reconcile apparently conflicting provisions whenever possible, the Fourth Circuit determined that subsection (c) “is properly interpreted as indicating merely that common ailments such as the flu normally will not qualify for FMLA leave because they generally will not satisfy the regulatory criteria for a serious health condition.” AT&T next argued that in one of the (a) criteria, “continuing treatment of a health care provider,” the term “treatment” is overly broad because it includes examinations to consider whether a serious health condition exists and evaluations of a patient’s condition. The court rejected this position. “There is nothing upon which to base a conclusion that the regulatory definition of treatment, which allows for situation in which a health care provider determines that an illness requires continued monitoring but not aggressive treatment, is contrary to congressional intent.”

Employees eligible for protection and privileges of the act

Woodford v. Community Action of Greene County, 268 F.3d 51 (2nd Cir. 2001). For an employee to be eligible for leave under the FMLA, he or she must have worked a minimum of 1,250 hours in the 12 months prior to the request. In *Woodford*, an employee

who worked 816.5 hours over the previous 12 months requested leave; her employer granted it but refused to reinstate her at the end of her leave. The plaintiff sued, relying on a regulation that requires an employer to determine an employee's eligibility for FMLA leave and states that "If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility." Joining the Seventh and Eleventh Circuits, the Second Circuit struck down the regulation because it "would permit, under certain circumstances, employees who have not worked the statutorily defined minimum required hours to become eligible for the Act's benefits." The court did not completely close the door on employee recovery, however, noting "equitable estoppel may apply where an employer who has initially provided notice of eligibility for leave later seeks to challenge that eligibility."

Woodford should be compared to *Kosakow v. New Rochelle Radiology Associates*, ___ F.3d ___ (2nd Cir. 2001), where the same circuit allowed a part time employee 63.5 hours short of the 1,250 hour requirement to proceed to trial. The court ruled that a jury should be allowed to determine whether or not *Kosakow* should be credited with additional time not recorded on her timesheets. *Kosakow* asserted that because she was expected to arrive fifteen minutes before her shift began and was required to attend continuing education seminars, this time should be counted toward satisfying the FMLA minimum hour threshold.

Hatchett v. Philander Smith College, 251 F.3d 670 (8th Cir. 2001). In *Hatchett*, the Eighth Circuit held that an employee who is unable to perform the essential functions of his or her job is not entitled to intermittent or reduced schedule leave under the FMLA. While visiting a Sheraton Hotel on business, *Hatchett* was struck in the head by a falling skylight. Following this injury, she was unable to perform all of the tasks required by her position. She requested that the College allow her to work a reduced schedule for several weeks and gradually increase her hours to full time over the course of several months. The College refused, asking her instead to take full time leave. According to the court, the College's position was justified because "the legislative history of the FMLA and the statute's restoration provisions demonstrate that an employee who could not otherwise perform the essential functions of her job, apart from the inability to work a full-time schedule, is not entitled to intermittent or reduced schedule leave."

Smith v. BellSouth Telecommunications, 273 F.3d 1303 (11th Cir. 2001). When a former BellSouth employee reapplied for a position with the company, the staffing manager pulled his file and noted it was labeled "not eligible for rehire." She called the ex-employee's former manager, and her notes of the conversation state "per manager: Took a lot of FMLA, attendance bad, work ethic bad, abusive, temperamental. Do not rehire." The former employee sued, alleging BellSouth's decision not to hire him violated the FMLA. The Eleventh Circuit allowed the suit to continue because the definition of "employee" encompasses both past *and* present employees.

12.6.3 Damages

Knussman v. Maryland, 272 F.3d 625 (4th Cir. 2001). A Maryland statute allows "primary caregivers" to take 30 days of leave to care for a new child. When a state trooper sought leave to care for his newborn when his wife remained ill after delivery, his employer denied the request and asserted that only a child's mother could qualify as a primary caregiver. *Knussman* sued, alleging violations of the FMLA and the Civil Rights Act. He was awarded \$375,000, which a divided Fourth Circuit overturned as excessive. The

majority indicated that *Knussman* did not suffer income loss as a result of his employer's decision, nor was his emotional distress level commensurate with the amount of the award. The dissent disagreed; it chastised the majority for minimizing the violation of *Knussman's* constitutional rights and noted that *Knussman's* stress level was significant enough to warrant medical treatment.

Walker v. United Parcel Service, 240 F.3d 1268 (10th Cir. 2001). Walker was given a five-day suspension for excessive absenteeism and job abandonment. Under an agreement between UPS and Walker's union, she was able to serve her suspension concurrently with her pregnancy-related FMLA leave. Walker later brought an FMLA claim, alleging that the suspension was an FMLA violation but acknowledging that she suffered no loss of wages or benefits as a result. The Tenth Circuit denied her request for nominal damages, stating that the statutory remedy is "unambiguously limited to actual monetary losses." This holding is consistent with other court decisions that deny recovery for FMLA claims for consequential damages or emotional distress damages.

12.6.4 Miscellaneous

Shift Change is not an Adverse Employment Action: *Hunt v. Rapides Healthcare System*, ___ F.3d ___ (5th Cir. 2001). Hunt, a registered nurse in the defendant's Critical Care Unit, went on medical leave to recuperate from a car accident. While Hunt was away, the medical center assigned her full-time day shift to another nurse, offering Hunt a night shift position when she returned from leave. Hunt alleged that this reassignment was made in retaliation for her decision to take medical leave, a claim that the Fifth Circuit did not favor. The court stated that while the day shift position was probably not equivalent to the night shift position, the reassignment in and of itself was not an adverse employment action entitling Hunt to relief. The transfer "was not a demotion in duties or title; was not a job termination; did not affect compensation; and did not impose discipline."

McDonnell Douglas Does not Apply: *Rankin v. Seagate Technology*, 246 F.3d 1145 (8th Cir. 2001). Due to a lingering viral illness, Rankin was absent from work for nearly a month. Her employer fired her for excessive absenteeism, and a lawsuit followed. On motion for summary judgment, Seagate employed the *McDonnell Douglas* burden-shifting scheme and provided evidence of Rankin's prior attendance problems. The Eighth Circuit rejected Seagate's analysis. While some Circuits have employed *McDonnell Douglas* in FMLA cases, it declined to do so. Citing the Seventh Circuit, the court noted "although a burden-shifting approach can be useful in discrimination cases as a heuristic, claims under the FMLA do not depend on discrimination." The court instead applied an objective test, requiring Rankin to establish "1) that she had a 'period of incapacity requiring absence from work,' 2) that this period of incapacity exceeded three days, and 3) that she received 'continuing treatment by...a health care provider' within the period." The court did not address whether or not *McDonnell Douglas* should apply when a claim is brought under the anti-retaliation provision of the FMLA.

Employer's Good Faith Belief: *Medley v. Polk Company*, 260 F.3d 1202 (10th Cir. 2001). The Tenth Circuit held that an employer who discharges an employee due to an honest belief that the employee has abandoned her job and is otherwise not using FMLA leave for its intended purpose does not violate the FMLA, even if the employer's conclusion is erroneous.:

12.7 Arbitration

12.7.1 From the Desk of the Supreme Court

In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Supreme Court settled a long-standing dispute regarding the Federal Arbitration Act's applicability to employment contracts. Section 2 of the Act provides that the statute does not apply "to contracts of employed seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The Ninth Circuit, in a move characteristically divergent from the practices of every other circuit, held that § 2 excludes *all* employment contracts from FAA coverage. The Supreme Court, in a move characteristically congruent with its own recent actions, rejected this interpretation by a vote of 5-4. The majority held that the proper construction of the disputed provision is far narrower, exempting only contracts involving transportation workers.

The Court also upheld the broad authority of arbitrators, restricting the role of courts in reviewing arbitration decisions. *Major League Baseball Players Assoc. v. Garvey*, 532 U.S. 504 (2001). Even when a court finds that an arbitrator's actions are "inexplicable" and "bordering on irrational," it should not attempt to decide the merits of the underlying case. According to an earlier decision, *Paperworkers v. Misco, Inc.*, a judge in such a situation should vacate the award and remand the matter for further arbitration proceedings. In *Major League Baseball Players Assoc.*, the Supreme Court clarified that the restriction of judicial action is not limited to cases where an arbitrator's errors are procedural. "*Misco* did involve procedural issues, but our discussion regarding the appropriate remedy was not so limited. If a remand is appropriate even when the arbitrator's award has been set aside for 'procedural aberrations' that constitute 'affirmative misconduct,' it follows that a remand ordinarily will be appropriate when the arbitrator simply made factual findings that the reviewing court perceives as 'irrational.'"

Squeaking in just under the press deadline for this article, the Supreme Court issued its decision in *EEOC v. Waffle House*, ___ U.S. ___ (2002), rejecting an attempt to limit the EEOC's enforcement authority based on an arbitration agreement signed by an employee. Waffle House argued (and the Fourth Circuit agreed) that, since all its employees signed enforceable arbitration agreement, the EEOC could only seek injunctive relief, not victim-specific relief. The Court rejected the Waffle House position. The 1991 amendments to Title VII expressly gave the EEOC the right to seek victim-specific relief, and nothing in the statute or in the Court's earlier rulings supported the limitation Waffle House wished to impose. While the FAA indicates a clear preference for arbitration, nothing in the FAA suggests that entities who are not parties to the arbitration contract should be bound by such a contract.

12.7.2 Enforceability of Arbitration Agreements

Hightower v. GMRI Inc., 272 F.3d 239 (4th Cir. 2001). When Hightower sued his employer, GMRI asserted the suit should be dismissed because the plaintiff had previously agreed to binding arbitration. Although Hightower never signed a written arbitration agreement, he attended a staff meeting outlining the arbitration process, signed an attendance

form indicating that he received materials outlining the arbitration process, and remained employed with GMRI for three months after the meeting. The Fourth Circuit determined that this was sufficient to demonstrate the existence of an arbitration agreement between GMRI and Hightower.

Penn v. Ryan's Family Steak Houses, 269 F.3d 753 (7th Cir. 2001). Ryan's required all applicants to execute a contract with Employment Dispute Services, Inc., obligating the signor to use EDS' services to arbitrate any employment disputes the employee might have with the restaurant. Although Ryan's was not itself a party to the contract, it was mentioned as a third party beneficiary. The district court held that Penn was not bound by this agreement because 1) he did not knowingly and voluntarily waive his right to a judicial forum, and 2) the arbitration agreement created a panel that was biased in favor of Ryan's. The Seventh Circuit voided the agreement on different grounds, looking to contract law rather than the Federal Arbitration Act. The court found that the agreement lacked consideration because EDS' obligations were unascertainable and illusory. While the agreement was clear regarding Penn's obligations, "nothing in the contract provides any details about the nature of the forum that EDS will provide or sets standards with which EDS must comply; EDS could fulfill its promise by providing Penn and Ryan's with a coin toss."

12.7.3 Procedural Concerns

Providence Journal v. Providence Newspaper, 271 F.3d 16 (1st Cir. 2001). In a previous decision, *Hart Surgical, Inc. v. Ultracision, Inc.*, the First Circuit fashioned a test to determine whether an arbitration award in a bifurcated proceeding is final and therefore reviewable in court. According to *Hart*, a court must consider whether both parties intended to bifurcate the procedure and whether the arbitrator and the parties understood the determination of liability to be final. Although *Hart* involved a formal agreement to bifurcate, the First Circuit clarified in *Providence Journal* that "we see no reason to fashion a different rule when the bifurcation has been informally agreed upon."

Microstrategy Inc. v. Lauricia, 268 F.3d 244 (4th Cir. 2001). A party waives its right to insist on arbitration if it "so substantially utilizes the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay." In this case, the plaintiff asserted that her employer waived its right to arbitration because it engaged in discovery over the course of three lawsuits against her. The Fourth Circuit disagreed, holding that Lauricia did not demonstrate that arbitrating the matter would cause her actual prejudice. The court noted that most of the employer's litigation efforts were directed at its state law claims of trade secret misappropriation; these claims were not legally or factually related to the plaintiff's federal Title VII and FLSA claims. Additionally, the arbitration agreement provided that the arbitrator could order discovery, so it is possible that plaintiff's employer could have obtained the same information in an arbitration proceeding.

Armco Employees Indep. Fed. v. AK Steel Corp., 252 F.3d 854 (6th Cir. 2001). The Sixth Circuit took this opportunity to state that the distinction between substantive and procedural arbitrability is still very much alive. As a result, it found that courts are limited to evaluating substantive arbitrability alone—"that is, which subjects the parties have agreed to arbitrate, according to the terms of their CBA." Once a court finds that a given matter is arbitrable, that matter, as well as any procedural bars to arbitration that may exist, is within the purview of the arbitrator alone. The court noted that timeliness in particular is a matter of procedural arbitrability.

12.8 Miscellaneous Cases

12.8.1 On Certiorari to the Supreme Court

Recovery of Paid Out ERISA Benefits: In *Grea-West Life Ins. v. Knudson*, the Supreme Court will determine whether an ERISA-regulated employee benefit plan can sue a beneficiary to recoup paid-out benefits from the winnings of a beneficiary's personal injury settlement. ERISA allows a plan administrator to sue for monetary relief in federal court when its claims are combined with a request for equitable relief. The Ninth Circuit held that suits to enforce subrogation provisions do not constitute actions for equitable relief, therefore, federal courts do not have jurisdiction over these claims

12.8.2 Damage Awards

Tax treatment

United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001). The Supreme Court held that back wages are subject to FICA and FUTA taxes according to the rates in effect in the year back wages were actually paid, not the year the wages should have been paid.

Kenseth v. Commissioner of Internal Revenue, 259 F.3d 881 (7th Cir. 2001). When *Kenseth's* attorney settled an age discrimination suit on behalf of his client, the attorney retained 40% of the settlement to cover his fees and remitted the remainder to *Kenseth*. The tax court held that the entire amount of the settlement, including the amount deducted by *Kenseth's* attorney, constituted gross income to *Kenseth*. The Seventh Circuit agreed, joining the Fourth and Ninth Circuits. This position is presently opposed by the Fifth, Sixth and Eleventh Circuits.

Sinyard v. Commissioner of Internal Revenue, 268 F.3d 756 (9th Cir. 2001). James Sinyard was victorious in two age discrimination suits against his employer, taking home a substantial damage award. Pursuant to a contingent fee arrangement with his attorneys, however, a third of *Sinyard's* award went to satisfy his legal bills. The Ninth Circuit held that this portion of the award was taxable income to *Sinyard*; "that [he] never laid hands on the money paid the lawyers does not obliterate [his] constructive receipt." The court indicated that ordinarily this holding won't increase an individual's tax liability because miscellaneous deductions will balance the increase in income. Unfortunately, Sinyard was not eligible for deductions because his income was subject to the Alternative Minimum Tax.

General issues

Punitive Damages in State Law Retaliation Claim: *Zimmerman v. Direct Federal Credit Union*, 262 F.3d 70 (1st Cir. 2001). The Tenth Circuit upheld a punitive damages award of \$400,000 against an employer who committed sex and pregnancy discrimination in violation of Massachusetts law. The court examined three factors: the reprehensibility of the defendant's conduct, the ratio of the compensatory damage amount to the punitive damage amount, and the difference between the punitive damage award and the civil penalties imposed for comparable conduct. The court found that all factors weighed in favor of

Zimmerman because the jury “rationally could have found that [defendants] mounted a deliberate, systematic campaign to punish the plaintiff as a reprisal for her effrontery in lodging a discrimination claim. The campaign involved abasing her, isolating her from her colleagues, and degrading her professionally.”

Rejection of Settlement Offers: *NAACP v. Town of East Haven*, 259 F.3d 113 (2nd Cir. 2001). In *Ortiz v. Regan*, the Second Circuit held that unless a party acts in bad faith, its decision to decline a settlement offer should not result in the reduction of an appropriate award. The Second Circuit provided another gloss on this position in *East Haven*, holding that “informal negotiations alone cannot establish bad faith for purposes of *Ortiz*. Otherwise, in attempting to limit fee awards, defendants could argue that informal negotiations in the run up to litigation show that the litigation was unnecessary and therefore in bad faith. Permitting such an argument to prevail would be precisely contrary to the purpose of *Ortiz*...”

Reduction of Damages for Contempt: *Rodriguez v. IBP Inc.*, 243 F.3d 1221 (10th Cir. 2001). Although Rodriguez mentioned nothing throughout discovery, immediately prior to trial on his ADA claim, he revealed that he was receiving Social Security disability benefits. IBP requested that Rodriguez provide information regarding this disability, but he disclosed only a social security statement, withholding anything indicating the nature or extent of his injury. The jury found for Rodriguez, prompting IBP to file a motion for judgment as a matter of law (which was denied) and a motion requesting Rodriguez to sign a release allowing access to his social security records (which was granted). Rodriguez continued to withhold information, resulting in a contempt charge. The trial judge incrementally reduced his \$411,000 recovery each day he failed to comply with the order to sign a release. The Tenth Circuit held that this was not an abuse of discretion. “Rodriguez’s belief that the discovery order was invalid did not excuse him from compliance. While the ultimate sanction negated Rodriguez’s money judgment, that did not render the sanction Draconian. The object of the sanction was to protect the truth-seeking procedures of discovery, and the plaintiff himself eschewed all opportunities to avoid the sanction.”

12.8.3 Miscellaneous Miscellany

Anthrax exposure guidelines

Proving that it can respond rapidly to surprising and unexpected new safety issues, the Department of Labor issued a set of guidelines to help employers deal with the unprecedented anthrax threat of last fall. Still wondering how to comply? The Department’s Risk reduction matrix (<http://www.osha.gov/bioterrorism/anthrax/matrix/index.html>) and mail handling guidelines (<http://www.osha.gov/bioterrorism/anthrax/index.html>) are still available online.

Equal Pay Act

Lavin-McEleney v. Marist College, 239 F.3d 476 (2nd Cir. 2001). To establish an Equal Pay Act violation, a plaintiff must show 1) that an employer paid different wages to employees of different genders, 2) that the employees worked to the same extent in jobs requiring the same skill, effort and responsibility, and 3) that the jobs were performed under similar working conditions. In *Lavin-McEleney*, the plaintiff presented evidence regarding the pay and duties of a male colleague, but she also provided evidence regarding a statistical

composite of all male faculty members. Marist College cried foul, citing a Fourth Circuit case that requires an EPA plaintiff to present evidence of an actual male comparator not a hypothetical employee comprised of statistics. The Second Circuit did not discuss whether or not this case is flawed; it simply read the decision to prohibit a plaintiff from substituting a statistical comparator of the opposite sex for an actual one. Under the court's reading, statistical evidence provided *in addition to* a comparison to an actual coworker is allowable and appropriate. "The problem with comparing plaintiff's pay only to that of a single male employee is that it may create the impression of an Equal Pay Act violation where no widespread gender discrimination exists. Moreover, in the calculation of damages, such a comparison may either grant the plaintiff a windfall where the male comparator is paid particularly well, or improperly limit her recovery where the male comparator, though a better compensated than she, is paid less than the typical man of substantially equal skill, effort, and responsibility."

H1-B Program

Yano Enterprises v. USDOL, ALJ No. 2001-LCA-0001 (September 6, 2001). The H1-B program allows those who work in "specialty occupations" (and as "fashion models of distinguished merit and ability") to enter the United States on a temporary basis for employment purposes. Yoshikazu Yano filed an H1-B application on behalf of his old college roommate, Araque, after offering his Venezuelan friend a job at his company, Yano Enterprises. Although Yano stated on the H1-B application that Araque would be paid an annual salary of \$30,000, he orally offered to pay Araque \$5.00 an hour. Araque worked for Yano Enterprises as a Personnel Manager for six years, living with Yano the entire time. When Araque was fired, he filed a claim for unpaid labor with the Department of Labor. The DOL determined that Araque had been underpaid and assessed total back wages of \$102,797, less a credit of \$10,500.00 to reflect the value of the housing Yano provided to Araque. On appeal, the ALJ upheld the back pay award but disallowed the housing credit because the applicable regulations allow such a deduction "only if made in accordance with a voluntary, written authorization from the employee." Because Araque never authorized a pay deduction to compensate Yano for housing, Yano was not entitled to credit any amount to the back pay award.

NLRB expands right to nonunion employees

Epilepsy Found. of N.E. Ohio v. NLRB, 268 F.3d 1095 (D.C. Cir. 2001). In 1975, the Supreme Court upheld the NLRB's ruling that a union employee has the right to request the presence of a union representative at an investigatory interview if the employee reasonably believes the interview might result in disciplinary action. The NLRB has since expanded that right to nonunion workers (1982), and revoked it from nonunion workers (1985). In this case, the Epilepsy Foundation sued to enjoin the NLRB from reverting to its 1982 position, allowing nonunion employees to request the presence of a coworker in investigatory interviews that might result in disciplinary action. The D.C. Circuit upheld the NLRB's decision: "It is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board. Because the Board's new interpretation is reasonable under the Act, it is entitled to deference." The court did not, however, agree with the Board's assertion that its new interpretation of the NLRA should be retroactive.

OSHA Jurisdiction

Chao v. Mallard Bay Drilling, 534 U.S. __ (2002). A drilling barge on a waterway within the territorial waters of Louisiana suffered extensive damage from a natural gas explosion; four employees died in the blast and two were severely injured. A Coast Guard investigation indicated that officials on the barge did not follow proper emergency procedures, but as the agency did not itself have regulations governing the situation, it referred the matter to the Occupational Safety and Health Administration. OSHA levied a \$13,230 fine, which Mallard Bay appealed on the grounds that OSHA regulations do not apply to the working conditions of seamen. The Fifth Circuit, recognizing that the Department of Transportation vested the Coast Guard with the exclusive authority to supervise the working environment of seamen, held that OSHA did not have jurisdiction over the matter. The Supreme Court concluded that OSHA did have jurisdiction because the Coast Guard did not choose to exercise any regulatory authority over the working conditions of the drilling barge and has never chosen to assert comprehensive regulatory jurisdiction over uninspected vessels. The Court held that a federal agency's mere possession of unexercised authority is insufficient to displace OSHA jurisdiction.

Psychotherapist-patient privilege and EAP

Oleszko v. State Compensation Insurance Fund, 243 F.3d 1154 (9th Cir. 2001). The Ninth Circuit extended the psychotherapist-patient privilege to EAP counselors, reasoning that the justifications behind granting a privilege to psychiatrists and social workers "apply equally to EAP's." Noting that EAP counselors increase employee access to mental health treatment and provide low cost or free services to those who otherwise could not afford them, the Court chose to agree with those states that have extended a privilege of confidential communication to these counselors.

Reductions in Force

Windham v. Time Warner, __ F.3d __ (2nd Cir. 2001). When three African American employees in Time Warner's accounting department were laid off, they alleged bias because none of the department's Caucasian employees were let go. The department supervisor asserted that she evaluated each position individually to determine whom to lay off, and the white employees were retained because they had "unique and irreplaceable job responsibilities." Noting that this justification was in fact a legitimate business reason for terminating the plaintiffs, the Second Circuit nonetheless held that a reasonable juror could find that it was mere pretext. Evidence indicated that after she knew the department was overstaffed, the department supervisor gave the white employees additional responsibilities in order to render them indispensable.

Same sex benefits do not violate the Constitution

Irizarry v. Board of Education of the City of Chicago, 251 F.3d 604 (7th Cir. 2001). In *Irizarry*, the plaintiff challenged her employer's policy of providing health benefits to same-sex domestic partners of employees but not to opposite-sex domestic partners. Although she had lived with the same man for over twenty years and although the couple had raised two children together, under the Board of Education's benefit plan, Irizarry's boyfriend did not qualify as a domestic partner and was not eligible for benefits. The Seventh Circuit upheld the plan because the employer was able to demonstrate a rational

basis for providing benefits only to same-sex partners of employees. First, the Board of Education noted that because homosexual couples cannot marry, “the recognition of a domestic-partnership surrogate is more important for homosexual than for heterosexual couples, who can obtain the benefits simply by marrying.” Second, the Board of Education cited its desire to attract homosexual teachers in order to provide support for homosexual students.

Stock options of terminated employees

Sprague v. Qualcomm settlement. In a settlement agreement reached in February of 2001, Qualcomm agreed to pay \$11 million to settle a class action brought by over 800 former employees. In 1999, the employees’ positions, and consequently their unvested Qualcomm stock options, were eliminated when Qualcomm sold one of its divisions to Swedish telecommunications giant Ericsson. “Taking away the employees’ unvested stock options, after making Qualcomm millions, if not billions, of dollars was a cruel joke,” said one attorney for the employees. “This settlement finally provides justice to these employees who had hundreds of thousands of dollars taken from them illegally.”

Scully v. US Wats, 238 F.3d 497 (3rd Cir. 2001). Although Scully succeeded in increasing the profitability of US Wats during his tenure as president of the company, he was terminated after eighteen months—two months before 600,000 of his 850,000 stock options could vest. The company apparently terminated Scully because it had granted more stock options than it could fulfill; unless some stock options “disappeared” before the end of the year, SEC filings would disclose this fact. The Third Circuit approved of the District Court’s method of calculating damages, valuing Scully’s options as of the date he attempted to exercise them, even though, pursuant to his employment contract, he would not have been allowed to sell any purchased stock for a full year. The court measured Scully’s damages by subtracting the exercise price of \$.75 a share from the market price on the day in question, and applied the resulting amount to all 850,000 options, “reasoning that absent his wrongful termination, Scully would have fully exercised his option after all shares had vested.”

Suing private employers acting under the color of federal law

Correctional Services Corp. v. Malesko, 534 U.S. __ (2001). An inmate injured by a correctional facility employee asked the Court to recognize his claim against the facility, effectively extending the holding of *Bivens v. Six Unknown Federal Narcotics Agents* to private entities acting under the color of federal law. The Court refused, noting “if a corporate defendant is available for suit, claimants will focus their collections efforts on it, and not the individual directly responsible for the alleged injury.” This would undermine the intended effect of *Bivens*, the deterrence of unconstitutional acts, because given a choice, plaintiffs would opt to sue an offender’s employer rather than the actual offender.

WARN

Pearson v. Component Technology Corp., 247 F.3d 471 (3rd Cir. 2001). In certain situations, the Department of Labor endorses imposing WARN Act liability on the parent of a defunct corporation. 20 CFR § 639.3(a)(2) contains a non-exclusive list of factors that can be used to determine whether this action is appropriate, but it does not indicate how wide the potential liability ranges. *Pearson* involved a lawsuit by former employees of CompTech, a defunct company, against its lender. Because this area of the law is murky and unsettled, the Third Circuit attempted to strike a blow for clarity by advocating the use of the DOL

multi-factor test to determine whether a lender should be liable for the acts of its debtor. The court then struck a blow for obfuscation: “We also observe that the regulation indicates that the listed factors are not an exhaustive list, which we interpret as a reminder that test is one of balancing, and that, as with any balancing test, a number of circumstances not specifically enumerated may be relevant.”

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