

***EMPLOYMENT DISCRIMINATION LAW UPDATE***

**By**

**Paul Grossman**

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This is a supplement to Lindemann & Grossman, *Employment Discrimination Law* (4th ed. 2007) (C. Geoffrey Weirich, Editor-in-Chief), and the 2010 Supplement (Debra A. Millenson, Richard J. Gonzalez, and Laurie E. Leader, Executive Editors). It is organized by book chapters. The 2010 Supplement includes court of appeals decisions through mid-2009. This update begins with cases decided after January 1, 2009. It focuses almost exclusively on court of appeals and Supreme Court decisions.

**Disparate Treatment – Summary Judgment Standards (Ch. 2)**

*Harris v. Warrick Cnty. Sheriff's Dep't*, \_\_\_ F.3d \_\_\_, 114 FEP 266 (7th Cir. 2012) – Summary judgment affirmed against discharged black probationary – whites who were retained despite misconduct were not similarly situated because their misconduct was not comparable to the plaintiff's – plaintiff contended his mistakes were less serious than those of the comparators – court noted it has repeatedly said “[W]e do not sit as a super personnel department to determine which employment infractions deserve greater punishment,” (114 FEP at 269) – plaintiff's conduct was sufficiently distinct to render the proposed comparators not similarly situated – plaintiff claimed racial harassment because the employer showed the movie *Blazing Saddles* in his presence – argument not taken seriously because *Blazing Saddles* satirized stereotypes and makes racism ridiculous.

*Baird v. Gotbaum*, 662 F.3d 1246, 114 FEP 11 (D.C. Cir. 2011) – In *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006), the D.C. Circuit held that when the FBI-agent plaintiff received credible death threats and the FBI out of discriminatory and retaliatory motives

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failed to investigate or to take steps to protect him, this was actionable – *Rochon* principle stated in a form most favorable to plaintiff is “a claim of discriminatory or retaliatory failure to remediate may be sufficient if the uncorrected action would (if it were discriminatory or retaliatory) be of enough significance to qualify as an adverse action (under the relevant standard)” (662 F.3d at 1249) – here the four episodes that she wanted investigated did not rise to the level of actionable tangible harm – at worst they are akin to the sort of public humiliation or loss of reputation that falls below the requirements for an adverse action – some fellow workers called plaintiff “psychotic,” outside litigation counsel advised employees not to speak out loud in the vicinity of her office, and a deponent in a case she was handling pounded the table at her – this is insufficient to qualify as adverse action.

*Abuelyaman v. Illinois State Univ.*, \_\_\_ F.3d \_\_\_, 2011 WL 6188446, 114 FEP 1 (7th Cir. Dec. 13, 2011) – Summary judgment against Arab Muslim associate professor affirmed – alleged comparators were higher ranked and improper for him to compare himself to them – other non-tenured professors with similarly poor records were also terminated – no triable issue raised beyond supervisor’s comments about foreign-born professors being difficult to understand – one retaliation claim rejected because decisionmaker unaware of his involvement – participation in investigation of second colleague’s complaint not protected since underlying complaint did not allege discrimination.

*Rojas v. Roman Catholic Diocese of Rochester*, 660 F.3d 98, 113 FEP 708 (2d Cir. 2011) – Plaintiff alleged sexual harassment by her supervisor and discharge in retaliation for complaining about it – summary judgment affirmed on the basis of “sham evidence” presented by plaintiff – on multiple occasions she contradicted herself which would prevent a reasonable jury from finding liability – sham evidence would prevent a jury from finding that the alleged harasser was her supervisor – if he was her coworker she failed to establish liability because of her conflicting testimony about whether she ever complained to the diocese.

*Barber v. CI Truck Driver Training LLC*, 656 F.3d 782, 113 FEP 507 (8th Cir. 2011) – African-American plaintiff was instructor at truck driving school and was denied promotion to school director – he was later terminated – summary judgment on promotion and retaliation claim – promotion decision based on employee’s weaker performance in the interview process, comparative lack of experience and government connections, perceived abrasiveness, and an apparent unwillingness to work the required hours – employee did not show he possessed objectively superior qualifications – discharge based on insubordination – employee violated direct prohibition against driving students to church – alleged comparators engaged in less serious or different misconduct.

*Diaz v. Tyson Fresh Meats, Inc.*, 643 F.3d 1149, 24 A.D. Cas. 1409 (8th Cir. 2011) – Summary judgment affirmed despite cat’s paw theory – even assuming plaintiff’s supervisor lied, the purpose of the lies was intended to protect himself from discipline, not to dupe a neutral decisionmaker into making a discriminatory decision – no showing the supervisor had any retaliatory animus.

*Torgerson v. City of Rochester*, 643 F.3d 1031, 112 FEP 613 (8th Cir. 2011) (*en banc*) – Summary judgment in sex and national origin failure-to-hire case affirmed – at best plaintiffs have relatively similar qualifications to the hired candidates which does not create an inference of discrimination – use of comparative evaluations based on subjective interviews cannot by itself prove pretext or discrimination – plaintiffs cite panel opinions to the effect that summary judgment should be seldom granted in discrimination cases – “The panel statements asserting a different standard of review for summary judgment in employment discrimination cases are contrary to Supreme Court precedent. The Court has reiterated that district courts should not ‘treat discrimination differently from other ultimate questions of fact.’” (citing *Reeves*, which quoted *Hicks*, which quoted earlier cases (643 F.3d at 1043) – “There is no ‘discrimination case exception’ to the application of summary judgment, which is a useful pretrial tool to determine whether any case, including one alleging discrimination, merits a trial.” (*id.*) (citation omitted).

*Silverman v. Bd. of Educ. of Chicago*, 637 F.3d 729, 111 FEP 1461 (7th Cir. 2011) – Summary judgment affirmed – one probationary special education teacher had to be dismissed, and plaintiff was chosen based on subjective evaluations of teacher performance by the principal – teacher’s contention that principal’s negative evaluations mischaracterized her teaching skills held insufficient to avoid summary judgment – mere disagreement with evaluations did not raise any issue as to the principal’s honesty or whether the evaluations were the basis for the termination decision.

*Sarkar v. McCallin*, 636 F.3d 572, 111 FEP 999 (10th Cir. 2011) – Employee in charge of managing contract for new computer system terminated after two years – reasons were poor work performance and blame for problems that arose with computer system – employee’s arguments for pretext boiled down to a disagreement with his employer’s assessment of his work performance and his employer’s assessment of his share of the blame for the computer problems – none of this raises a factual dispute as to whether the decisionmakers honestly believed their assessment – retaliation claim rejected because discharge decision made before complaint of discrimination – checking with former employers to verify employment history not actionable as a materially adverse employment decision.

*Vatel v. Alliance of Auto. Mfrs.*, 627 F.3d 1245, 111 FEP 389 (D.C. Cir. 2011) – Summary judgment affirmed against black female former assistant to head of trade association fired for incompatible working styles – reason is “highly subjective” which makes it difficult for plaintiff to rebut – such explanations must be treated “with caution” – however, “evidence overwhelmingly shows that [the decisionmaker] honestly and reasonably believed that their working styles were incompatible” (627 F.3d at 1247-48) - decisionmaker hired assistant less than a year before he fired her – “[W]hen the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute . . . an invidious motivation . . .” (*id.* at 1247) (citation and internal quotation marks omitted) – plaintiff’s opinion that they had a positive working relationship insufficient to avoid summary judgment.

*Norman-Nunnery v. Madison Area Tech. Coll.*, 625 F.3d 432, 111 FEP 1121 (7th Cir. 2010) – Summary judgment affirmed against unsuccessful black applicant – she claimed not selected for final interviews because of race and because of marriage to an attorney who had previously represented a plaintiff who had filed a frivolous discrimination lawsuit against the institution – plaintiff failed to produce evidence to show that the college’s reason for not selecting her (her low qualification scores during the interview screening process) was a pretext for discrimination – showing that hiring officials were aware of her marriage to an attorney who had sued them is insufficient to show that they were motivated by this knowledge.

*Naik v. Boehringer Ingelheim Pharms., Inc.*, 627 F.3d 596, 110 FEP 1443 (7th Cir. 2010) – Age and national origin suit – pharmaceutical sales rep terminated for falsifying sales calls – summary judgment affirmed – two reasons – not meeting employer’s legitimate expectations – separately, misconduct is legitimate nondiscriminatory reason – not entitled to trial on whether actually falsified call reports – only issue is whether employer reasonably believed it – employer investigated, and no evidence to dispute reasonable belief.

*EEOC v. Con-Way Freight*, 622 F.3d 933, 110 FEP 481 (8th Cir. 2010) – Summary judgment affirmed – Con-Way Freight had an unwritten policy of refusing to hire anyone who had a dishonesty-related conviction – EEOC contended that existence of the policy was a jury issue because it was not in writing – Eighth Circuit found, based on 28 disqualifications solely because of theft-related convictions in a span of 18 months, there was no jury question – hiring official’s boss had suggested that he think twice about hiring black applicant because he would be “opening up a can of worms” and “just asking for the NAACP” – hiring official nevertheless proceeded and sent two candidates out for drug testing – hiring official then terminated – company hired someone else – no violation since policy clear – EEOC argued at a minimum mixed-motive section of

Title VII involved, and allows injunction and attorney's fees – mixed-motive is “inapplicable in a single-motive case such as this one,” (*id.* at 937).

*Jackson v. Watkins*, 619 F.3d 463, 110 FEP 257 (5th Cir. 2010) – newly elected black district attorney fired white longtime head of organized crime division – summary judgment affirmed on race claim – DA offered four reasons for termination – one was not rebutted – issue on appeal was whether plaintiff had to rebut all of the proffered reasons to preclude summary judgment – “[O]ur precedent is clear that a plaintiff . . . must rebut each of the defendant’s nondiscriminatory reasons in order to survive summary judgment [so] Jackson’s contention that he is required to rebut only some of [the] reasons is without merit.” (619 F.3d at 467) – “Where a plaintiff falls short of his burden of presenting evidence rebutting *each* of the legitimate nondiscriminatory reasons produced by the employer, summary judgment is appropriate.” (*id.*) (citations, internal quotation marks and alterations omitted) – plaintiff failed to rebut DA’s contention that his own experiences with plaintiff were “overwhelmingly negative” – plaintiff put forward no evidence “to refute th[e] specific nondiscriminatory reason articulated [by the DA].” (*id.* at 468).

*Chism v. Curtner*, 619 F.3d 979, 110 FEP 292 (8th Cir. 2010) – African-American firefighter was discharged after he was arrested (not convicted) on federal felony charges of receiving stolen merchandise – summary judgment affirmed – alleged comparators not similarly situated: (1) white arrested for drunk driving was not similarly situated because his arrest occurred under a different fire chief; (2) white police officer who had accident while driving drunk not similarly situated because he was not a member of the fire department – plaintiff could not identify any firefighter who had been arrested for a felony under the current fire chief – lack of comparators and lack of evidence showing discriminatory animus warranted summary judgment.

*Weber v. Univ. Research Ass’n*, 621 F.3d 589, 110 FEP 138 (7th Cir. 2010) – Summary judgment affirmed in sex discrimination and retaliation case – supervisor noticed that employee spent a great deal of time on her computer but still did not finish all the work assigned to her – the company traced her Internet usage for five workdays – she spent more than 16 hours in one week on the Internet visiting websites unrelated to her job, including personal email accounts dealing with her dog training business – the company investigated further and discovered a number of advertisements for Weber’s dog training business which listed her two personal email accounts – Weber identified eight men who she alleges conducted outside business at the company, including two men who viewed pornography who were not fired – the men were not similarly situated – she did not present evidence that any of the men had trouble finishing their work because of their computer usage – no evidence that comparators spent anywhere near the amount of time

on non-business websites that Weber spent – using company resources for an outside business is more offensive than simply wasting time.

*Medlock v. United Parcel Serv., Inc.*, 608 F.3d 1185, 109 FEP 1010 (10th Cir. 2010) – Summary judgment affirmed against UPS driver discharged after work-related accident – alleged younger comparators had shown remorse for their misconduct, whereas the plaintiff did not – even though no formal policy of reinstating remorseful violators legitimate business decisions can be made without reference to formal policies – manager had right to make judgment regarding disciplinary relevance of an employee’s acceptance of responsibilities – this is a classic case of business judgment which courts will not second-guess.

*Everroad v. Scott Truck Sys., Inc.*, 604 F.3d 471, 109 FEP 353 (7th Cir. 2010) – 51-year-old employee who had been subject of complaints from co-workers complained about a co-worker’s job performance – company owners met with plaintiff and co-worker – voices were raised, accusations exchanged, eyes were rolled, and tears were shed – the co-owners, who had hired plaintiff, decided to terminate her for insubordination – when so informed, plaintiff told the co-owners they were “nuts, crazy, insane” and “sick” and called the female co-owner a “f\_\_\_ing bitch” – the Seventh Circuit affirmed summary judgment, finding that the insubordination undermined the discrimination claims in two ways: first, insubordination prevented the plaintiff from proving that she “met her employer’s legitimate job expectations” which is part of the prima facie case; and, second, it was a nondiscriminatory reason for termination – allegations that she was treated differently from similarly situated male/younger employees were rejected since she could not show that the comparators had been similarly insubordinate.

*Egonmwan v. Cook Cnty. Sheriff’s Dep’t*, 602 F.3d 845, 109 FEP 83 (7th Cir. 2010) – African-American male correctional officer was terminated for having sex with two female inmates – in a criminal proceeding, he was acquitted when it was found that inmates had motivations to lie in exchange for reduced sentences – in support of his sex discrimination claim he claimed that his supervisor stated she wanted to remove all men from the women’s division of the jail – he also established that a white officer who had sex with an inmate was only suspended – supervisor’s statement was made long before the termination and time lapse was too great – comparative evidence not comparable since white officer’s conduct was with a former inmate, not a current inmate – improper to rely on acquittal in criminal case because burden of proof in criminal case is higher.

*Stockwell v. City of Harvey*, 597 F.3d 895, 108 FEP 1153 (7th Cir. 2010) – Reverse discrimination race case – summary judgment for employer affirmed – as to one plaintiff, he indicated an intention to retire in the near future, which was a legitimate nondiscriminatory reason for denying him a promotion.

*Johnson v. Weld Cnty. Colo.*, 594 F.3d 1202, 108 FEP 681 (10th Cir. 2010) – Female plaintiff had to train newly hired male who was hired for job to which she applied – alleged direct evidence was inadmissible hearsay – employer’s nondiscriminatory reason – that he was better qualified and had the requisite academic qualifications – was not rebutted by her allegations that she effectively did his job for him while she was training him – the issue is how his qualifications appeared at the time he was hired, not how he performed after hire.

*Windross v. Barton Protective Servs.*, 586 F.3d 98, 107 FEP 1352 (1st Cir. 2009) – Switching shifts with a fellow security guard without permission and then twice refusing to meet with HR representatives to discuss the matter are legitimate grounds for discharge.

*Dixon v. Pulaski Cnty. Special Sch. Dist.*, 578 F.3d 862, 107 FEP 25 (8th Cir. 2009) – Summary judgment affirmed – lack of minimum qualifications was legitimate nondiscriminatory reason for school district to reject black applicant – even if she actually met the minimum qualifications and school district misjudged her qualifications, she barely met them, and there is no evidence her qualifications were comparable to the successful applicant – school district’s violation of its own hiring policy does not create genuine issue of fact.

*Upshaw v. Ford Motor Co.*, 576 F.3d 576, 106 FEP 1697 (6th Cir. 2009) – Summary judgment affirmed on race discrimination claim – explanation for not promoting plaintiff was that she did not have the highest level of evaluation – three persons were promoted (two were white) who did not have the highest level of evaluation – employer established that those promotions were a “mistake” in that the supervisor who had to approve was not informed that the employees did not have the highest rating – summary judgment reversed on retaliation claim of discharge in response to filing EEOC charge – employee, in addition to EEOC charge, filed two additional charges and filed lawsuit only four months before termination, and was subjected to heightened scrutiny soon after she filed initial charge – reasonable jury could find that employer’s reasons for termination were pretextual.

*Hendricks v. Geithner*, 568 F.3d 1008, 106 FEP 843 (D.C. Cir. 2009) – Summary judgment affirmed against black Treasury employee denied promotion allegedly because of her race and sex – alleged comparator had received higher performance review scores – plaintiff claimed that she was graded incorrectly – undisputed that under any scenario she would not have been “significantly” or “markedly” more qualified – plaintiff presented evidence of biased statements made by decisionmaker to other women [“It was the downfall of Inspection when they hired women.” (568 F.3d at 1011)] – assume without deciding that under *Sprint v. Mendelson* this type of evidence would be

admissible – plaintiff’s “case relies almost exclusively on circumstantial evidence that one manager . . . is difficult and prone to misogynist comments.” (*id.* at 1014) – “[T]his is not sufficient evidence from which a reasonable jury could conclude that [the] asserted reason for selecting [the other candidate] was not the actual reason, much less that [plaintiff] was not selected because of her sex.” (*id.*) – 2-1 decision with Janice Brown dissenting.

*Qamhiyah v. Iowa State Univ. of Sci. & Tech.*, 566 F.3d 733, 106 FEP 609 (8th Cir. 2009) – Summary judgment affirmed, rejecting “cat’s paw” argument – denial of tenure – multi-level review process – upper-level reviews were independent, and there is no evidence of discriminatory animus with respect to the members of the upper-level board – plaintiff failed to meet University’s scholarship, funding and publication standards – evidence of procedural irregularities and allegedly shifting reasons failed to show pretext.

*Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1136, 106 FEP 113 (10th Cir. 2009) – Summary judgment affirmed – applicant for allegedly male-dominated jobs rejected because of poor performance in an interview – plaintiff contended this was “excessively subjective” – court says interviewers asking predetermined questions to gauge applicant’s possession of “competencies” would not lead a reasonable jury to infer unlawful bias – allegation of male-dominated jobs unconvincing since company offered such jobs to at least four women.

## **Disparate Treatment – General (Ch. 2)**

*Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 111 FEP 993 (2011) – Case under USERRA which with its “motivating factor” burden of proof is “very similar to Title VII” – biased supervisors desired plaintiff’s discharge and allegedly submitted false information to the concededly unbiased decisionmaker – the decisionmaker “relied on [the biased supervisor’s] accusation . . . and after reviewing Staub’s personnel file, she decided to fire him,” (131 S. Ct. at 1189) – unbiased decisionmaker ignored contention in grievance procedure that the allegations were biased and fabricated – Seventh Circuit decision overturning jury verdict for plaintiff because biased decisionmakers did not have a “singular influence” over the decision reversed – plaintiff contended the mere fact that an unfavorable entry was put in the personnel record by biased decisionmakers is sufficient – this position rejected unless dismissal was the object of the biased supervisors – employer contended no liability unless the technical decisionmaker motivated by discriminatory animus – this is rejected since as long as the biased supervisor “intends, for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable . . . . And it is axiomatic under tort law that the exercise of

judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm. Proximate cause requires only some direct relation between the injury asserted and the injurious conduct alleged and excludes only those links that are too remote, purely contingent, or indirect. We do not think that the ultimate decisionmaker's exercise of judgment automatically renders the link to the supervisor's bias remote or contingent. The decisionmaker's exercise of judgment is *also* a proximate cause . . . but it is common for injuries to have multiple proximate causes . . . . Nor can the ultimate decisionmaker's judgment be deemed a superseding cause of the harm. A cause can be thought superseding only if it is a cause of independent origin that was not foreseeable." (*id.* at 1192) (citations and internal quotation marks omitted; emphasis in original) – the employer's position would have the improbable consequences of shielding the employer as long as it set up a system where ultimate decisionmakers did no more than review the personnel file – the employer suggests "at least the decisionmaker's independent investigation (and rejection) of the employee's allegations of discriminatory animus ought to [negate the effect of discrimination]. We decline to adopt such a hard-and-fast rule. As we have already acknowledged, the requirement that the biased supervisor's action be a causal factor of the ultimate employment action incorporates the traditional tort-law concept of proximate cause." (*id.* at 1193) – "[I]f the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action . . . then the employer will not be liable. But the supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified. We are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect. Nor do we think that the independent investigation somehow relieves the employer of 'fault.' The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision." (*id.*) – "[I]f the independent investigation relies on facts provided by the biased supervisor – as is necessary in any case of cat's paw liability – then the employer (either directly or through the ultimate decisionmaker) will have effectively delegated the fact finding portion of the investigation to the biased supervisor." (*id.*) – "We therefore hold that if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable . . . ." (*id.* at 1194) (emphasis in original; footnote omitted) – opinion leaves it up to the Seventh Circuit whether there should be a new trial since the jury instruction required only that the jury find "motivating factor" – not clear whether "the variance between the instruction and our rule was harmless error" (*id.*) – Justices Alito and Thomas concurred, arguing for a "reasonable investigation" test.

*Czekalski v. LaHood*, 589 F.3d 449, 108 FEP 1 (D.C. Cir. 2009) – Transfer not adverse action – new trial properly denied – jury rejected claim that plaintiff upon transfer had “significantly different responsibilities.”

*Cervantez v. KMGP Servs. Co.*, 349 Fed. Appx. 4, 107 FEP 369 (5th Cir. Sept. 2009) (unpublished) – Protected-age employee terminated for violating employer’s computer-use policy by accessing pornographic web sites at work – this is a legitimate reason for termination – employee claimed the access was not while he was at work – actual innocence is irrelevant since employer reasonably believed the wrongdoing had occurred – comment three years earlier by non-decisionmaker that employer “was going to start hiring young people” was a stray remark.

*Browning v. United States*, 567 F.3d 1038, 106 FEP 521 (9th Cir. 2009) – Disparate treatment plaintiff requested jury instruction that if employer’s explanation is not worthy of belief the jury “may infer a discriminatory . . . motive from that fact” (567 F.3d at 1040) – this was not reversible error – the jury instructions as a whole set forth the essential elements of what plaintiff needed to prove, to wit, that her race was a motivating factor and/or that the actions were taken because she complained about discrimination – “[S]o long as the jury instructions set forth the essential elements that the plaintiff must prove, a district court does not abuse its discretion in declining to give an instruction explicitly addressing pretext.” (*id.* at 1039-40) – Ninth Circuit noted circuit split on the issue – since district court defined motivating factor as a factor that played a role in the decisions and instructed the jury to weight and evaluate the testimony and credibility of the witnesses and that it should consider both direct and circumstantial evidence, there was no error.

*Lucero v. Nettle Creek Sch. Corp.*, 566 F.3d 720, 106 FEP 513 (7th Cir. 2009) – Teacher’s reassignment from 12th grade honors/AP English to teaching 7th grade English was not an adverse employment action – it was not materially adverse – she continued to teach the same academic subject in the same building under the same conditions and her reassigned duties were the same she had performed in prior years – there was no cut in pay, benefits or privileges – argument that transfer damaged career prospects by making her less attractive to other school districts rejected.

*Dwyer v. Ethan Allen Retail, Inc.*, 325 Fed. Appx. 755, 21 A.D. Cas. 1652 (11th Cir. 2009) (unpublished) – Cat’s-paw theory of one-handed sales representative that disability bias of her supervisor should be imputed to decisionmaker rejected – decisionmaker independently investigated allegation that plaintiff violated specific company policy – plaintiff admitted she violated the policy so extensive factual investigation was unnecessary.

*Antonetti v. Abbott Labs.*, 563 F.3d 587, 106 FEP 17 (7th Cir. 2009) – During a Saturday overtime shift three white employees and an Hispanic employee left the workplace for a meal – the white employees told their group leader they did not take an unpaid meal break and were paid for the time away from work – during an investigation they did not admit going to the restaurant – they were fired – Hispanic coworker who went to the same breakfast and did not report it and was paid for the whole shift was not terminated – not similarly situated since he had not falsely reported that he had not taken a meal break and admitted it when asked.

*Sybrandt v. Home Depot, U.S.A., Inc.*, 560 F.3d 553, 105 FEP 1470 (6th Cir. 2009) – Employee discharged for violating employer’s policy against conducting personal transactions using their own password – employee’s claim did not technically violate policy irrelevant since employer had honest belief based on thorough investigation which was “reasonably informed and considered.”

*Douglas v. Donovan*, 559 F.3d 549, 105 FEP 1323 (D.C. Cir. 2009) – Plaintiff alleged he was not recommended for a Presidential Rank Award because of his race – no adverse action – President, who is not an employer, decides on Presidential Rank Awards – being recommended creates only a possibility of obtaining the award – no adverse action – dissent points out that this would mean even if there was direct evidence of race discrimination, that the supervisor would never recommend a black employee for the award, there would be no possibility of redress – majority replies that this is always true when there is a lawsuit about a matter that does not qualify as an adverse employment action.

### **Adverse Impact (Ch. 3)**

*Meditz v. Newark*, 658 F.3d 364, 113 FEP 727 (3d Cir. 2011) – White plaintiff alleged disparate impact discrimination because City of Newark had a residency requirement for non-uniformed employees – percentage of whites residing within the city far lower than percentage of whites in a reasonable commuting or employment area – summary judgment for City reversed – factual issue existed as to how to define the relevant labor market for purposes of statistical analysis of disparate impact.

### **Application of Adverse Impact to Employment Decisions (Ch. 4)**

*NAACP v. N. Hudson Reg’l Fire & Rescue*, 665 F.3d 464, 113 FEP 1633 (3d Cir. 2011) – Residency requirement disparately impacts black firefighters – proportion of blacks employed by neighboring counties in protective service positions is 37% and proportion of those employed by defendant is less than 1% - disparity suggests that defendants

should employ 65 African-American firefighters and it employs only two – argument that community is predominantly Hispanic and requirement increases number of Spanish-speaking firefighters rejected as a business necessity defense.

### **Race and Color (Ch. 6)**

*Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 109 FEP 1377 (7th Cir. 2010) – Healthcare patient insisted on white-only healthcare providers – employer acceded – this created a hostile environment for African-American employee who was directed to have no dealings with the racist patient – argument that patients allowed to insist on same-sex healthcare providers rejected as not analogous – law tolerates same-sex restrooms but not white-only restrooms.

*Floyd v. Amite County Sch. Dist.*, 581 F.3d 244, 107 FEP 147 (5th Cir. 2009) – Summary judgment affirmed against black principal at predominantly black high school who also served as track coach – he was discharged because he allowed white students to participate in the track program – he could not show he was terminated based on an interracial association with white students – there was no animosity toward him because of his relationship with them – the board simply did not want white students intermingle with black students – plaintiff’s attorney conceded at oral argument he would have lost his job whether he was white or black.

*Dear v. Shinseki*, 578 F.3d 605, 106 FEP 1802 (7th Cir. 2009) – Black nurse supervisor demoted – paper qualifications were superb, including a bachelor’s degree in nursing, a master’s in nursing administration, plaintiff had taught nursing to college students, and prepared combat medical personnel during the Iraq war – she had numerous clashes with her staff, physicians and supervisors – one of supervisors explained demotion by stating “You need to change your voice and you need to change your facial expressions” (578 F.3d at 608) – this is not a racial statement – “[T]his statement, even if it was delivered in a snippy or condescending way, has no plausible connection to [her] race. It could have been said to an employee of any race who was having trouble supervising staff . . . .” (*id.* at 609).

*Erps v. W. Va. Human Rights Comm’n*, 680 S.E.2d 371 106 FEP 976 (W. Va. 2009) – Issue was co-employee harassment – black instigated verbal altercation with Caucasian coworker by calling him “honky” and “white trash” – coworker responded with the “N” word – since plaintiff who is claiming hostile work environment solicited, incited, or participated in the offensive conduct, the Caucasian’s response was not unwelcome – black employee complained and then refused to resume working – discharge for refusal to return to work was not retaliation.

*Barrett v. Whirlpool Corp.*, 556 F.3d 502, 105 FEP 1097 (6th Cir. 2009) – Three white employees alleged a hostile work environment based on their association with black employees – trial court erred in granting summary judgment based on the theory that in order to claim discrimination based on association with protected individuals, the degree of association had to be more than casual workplace friendship – degree of association and some requirement that there be off-premises conduct erroneous – one employee has stated a claim for hostile work environment based on threats of physical harm after she complained about a coworker’s racist language and was criticized for her friendship with a black coworker – summary judgment affirmed for the other two employees because their allegations showed at most general expressions of racism that they overheard but were not directed at them.

### **National Origin and Citizenship (Ch. 7)**

*Hernandez v. Yellow Transp., Inc.*, 641 F.3d 118, 112 FEP 417 (5th Cir. 2011) – Hispanics claimed racially hostile work environment and attempted to use evidence of harassment against African Americans to support their claim – evidence of harassment toward black employees not probative of harassment toward Hispanics – cross-category evidence may be relevant when there is a sufficient correlation between the kinds of discrimination, but there needs to be evidence that the hostility toward a different racial group is in some way probative of hostility toward the claimant’s class – evidence does not show frequent, severe and pervasive hostility toward Hispanics so such hostility toward blacks is insufficient.

*Zeinali v. Raytheon Co.*, 636 F.3d 544, 111 FEP 1681 (9th Cir. 2011) – Iranian engineer terminated after being denied security clearance – summary judgment for employer reversed – cases holding that denial of security clearance is committed to broad discretion of executive branch not controlling – plaintiff contended security clearance was not a bona fide job requirement – contractor retained two similarly situated non-Iranian engineers whose security clearances were revoked.

*Rivera v. NIBCO, Inc.*, 372 Fed. Appx. 757, 108 FEP 1527 (9th Cir. 2010) (unpublished) – Ninth Circuit 2-1 (Reinhardt and Hawkins) overturns jury verdict for employer in national origin discrimination case – trial court erred in denying plaintiff’s challenge to the company’s use of peremptory strikes to remove three Hispanic jurors – although trial court found credible legitimate reasons offered by the employer’s attorney in making the strikes, the majority found that all of the reasons accepted by the trial court “either lack support in the record or are thoroughly undermined by a comparative juror analysis” (375 Fed. Appx. at 760) – dissenting Judge Siler asserted the trial court was in a better position to judge the demeanor and credibility of the employer’s attorney in

making the challenged strikes – the majority relied on the employer’s explanations for striking one of the Hispanic jurors – that she had filed a workers’ compensation claim and had previous jury experience – the Ninth Circuit found that several white jurors had filed such claims or had served on juries before and were not struck – the dissent pointed out that four non-Hispanic jurors had filed workers’ compensation claims, but they did not have the overall mixture of criteria relied upon by the employer – according to the dissent, “The majority’s comparative juror analysis is an exercise in comparing apples to oranges.” (*id.* at 761).

### **Religion (Ch. 9)**

*Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 114 FEP 129 (2012) – First Amendment’s establishment and free exercise clauses created a “ministerial exception” that barred a retaliatory discharge action on behalf of a “called” Lutheran elementary school teacher – does not matter that lay teachers perform the same duties – possible damages award would penalize the church for discharging a minister which is contrary to the church’s rights under the First Amendment.

*Kennedy v. St. Joseph’s Ministries, Inc.*, 657 F.3d 189, 113 FEP 374 (4th Cir. 2011) – Catholic nursing care facility – numerous religious exercises – plaintiff was member of Church of the Brethren that required modest garb, long dresses, and a cover for her hair – nursing home told her that this attire made residents and family members uncomfortable – she refused to change it and was terminated – religious organization exemption bars claim – plaintiff’s contention that meaning of the term employment is limited to hiring rejected – definition of term covers breadth of relationship between employer and employee.

*Adams v. University of North Carolina-Wilmington*, 640 F.3d 550, 111 FEP 1665 (4th Cir. 2011) – Summary judgment affirmed on claim of “Christian Conservative” associate professor who alleged religious discrimination in university’s failure to promote him to full professor – after a conversion to Christianity, plaintiff became extremely vocal about various conservative political and social issues – summary judgment affirmed on religious discrimination claim because of lack of direct or indirect evidence of religious discrimination – bias against conservatives is not religious discrimination – “his Title VII claim rests on evidence of religious discrimination rather than political or social ideology” (640 F.3d at 559) and his claim that he is the only conservative Christian is not evidence that he was the department’s only Christian – summary judgment on First Amendment claims reversed – plaintiff co-authored a book under consideration for publication entitled “IndoctriNation: How Universities Are Destroying America.”

*Harrell v. Donahue*, 658 F.3d 975, 111 FEP 1559 (8th Cir. 2011) – Discharge of Seventh-Day Adventist who was unwilling to work on Saturday affirmed – designating Saturday as one of plaintiff’s scheduled days off would have violated collective bargaining agreement as would allowing him to use accrued leave or leave without pay – employees senior to plaintiff would have had to relinquish their Saturdays off.

*Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 110 FEP 1441 (2d Cir. 2010) – Publicly-funded hospital required nurse with religious objections to assist in an abortion – the so-called “church amendment” that prohibited discrimination in employment because someone refused to assist in an abortion does not create a private right of action – no apparent Title VII claim – reference to preserved state claims.

*Xodus v. Wackenhut Corp.*, 619 F.3d 683, 110 FEP 1 (7th Cir. Aug. 27, 2010) – Security guard applicant who refused to cut his dreadlocks because it was “against my belief” did not sufficiently inform the employer that the belief was religious – Rastafarians believe dreadlocks symbolize a bond with God since the bible states that “no razor shall come upon his head . . . and he shall let the locks of hair of his head grow long” (619 F.3d at 684) – but most people are not familiar with this religious order, and simply stating it was “against my belief” was insufficient to put the employer on notice that a religious accommodation was requested.

*Spencer v. World Vision, Inc.*, 619 F.3d 1109, 109 FEP 1793 (9th Cir. 2010) – Christian humanitarian relief organization is a religious organization that is exempt from Title VII claims even though it is not affiliated with any particular Christian church.

*Patterson v. Ind. Newspapers, Inc.*, 589 F.3d 357, 107 FEP 1697 (7th Cir. 2009) – Summary judgment against editorial writers who contended they were the subject of adverse treatment because they are Christians who believe that homosexual conduct is sinful – writers contended a new editor published hordes of news articles designed to portray homosexuality in a positive light and sought to purge the paper of traditional Christians who opposed homosexual conduct – plaintiffs proceeded under the indirect method of proof – relying on prior precedent, court held plaintiffs may proceed by claiming that their supervisors did not like their brand of Christianity – thus, plaintiffs fall in a protected category – however, neither plaintiff was meeting the newspaper’s legitimate expectations – no showing there were persons who did not share their religious beliefs who were treated more favorably.

*EEOC v. Abercrombie & Fitch Stores, Inc.*, 107 FEP 1029 (E.D. Mo. 2009) – Store required its models/salespersons to wear store-type clothes in “California beach style” which is “a little revealing” – employee who had previously done so claimed religious conversion to a faith which “forbade her from wearing pants or skirts that fell above the

knee” – EEOC summary judgment motion denied because of serious question about bona fides of religious belief – defendants presented evidence that complainant “appeared at her deposition in this very case wearing [clothing] that was potentially inconsistent with her alleged faith.” (107 FEP at 1031).

*Webb v. City of Phila.*, 562 F.3d 256, 105 FEP 1665 (3d Cir. 2009) – Allowing Muslim policewoman to wear head scarf imposes undue burden – police department requires a “disciplined rank and file for efficient conduct of its affairs” (562 F.3d at 262) (citation omitted) – allowing plaintiff to wear head scarf would impact a perception of the department’s impartiality with respect to all races and religions.

### **Sex (Ch. 10)**

*Serednyj v. Beverly Healthcare LLC*, 656 F.3d 540, 113 FEP 104 (7th Cir. 2011) – Female employee alleged discriminatory discharge due in part to unavailability of medical leave and lack of accommodation to needs of pregnancy – no prima facie case – allegedly more favorably treated non-pregnant comparators included persons poorly identified or described as to accommodation sought and received, persons employed by different employer, or persons described only through hearsay evidence – some alleged comparators were so closely similar to plaintiff as to confirm that employer treated pregnant and non-pregnant employees identically.

*Wierman v. Casey’s General Stores*, 638 F.3d 984, 111 FEP 1547 (8th Cir. 2011) – Summary judgment against discharged pregnant employee affirmed – even though discharge occurred just days after she took time off for pregnancy-related reasons temporal proximity rebutted by legitimate nondiscriminatory reasons – convenience store manager ate stale food and did not ring up free fountain drinks as required – plaintiff alleged prior managers tolerated this – however, plaintiff did not identify any similarly situated individuals who did the same conduct and were not discharged by the present manager – minor discrepancies in facts between reasons offered for discharge and actual facts insufficient to raise triable issue of pretext – argument that eating stale food and failing to document free drinks are so trivial they raise an inference of pretext rejected – shortcomings in an investigation are not by themselves sufficient to support an inference of discrimination – contention of heightened surveillance to search for a reason for discharge rejected – summary judgment on claim of retaliation for exercising Family Medical Leave Act rights overturned.

*Elam v. Regions Fin. Corp.*, 601 F.3d 873, 108 FEP 1729 (8th Cir. 2010) – Summary judgment affirmed in discharge case brought by pregnant bank teller – plaintiff claimed one supervisor referred to her as “pregnant” and another supervisor used the phrase “pregnant girl teller” in a note to human resources – “Reference to protected status

‘without reflecting bias is not direct evidence of discrimination.’” (601 F.3d at 878) (citation omitted) – neither comment “indicat[ed] a negative attitude towards [her] pregnancy” (*id.*) –plaintiff engaged in multiple acts of misconduct and misconduct of two coworkers who were not terminated was not of comparable seriousness or the supervisors were not aware of it.

*Lewis v. Heartland Inns of Am. LLC*, 591 F.3d 1033, 108 FEP 449 (8th Cir. 2010) – Plaintiff alleged sex stereotyping, contending that she was terminated because she was not “pretty” and that she lacked the “Midwestern girl look” – summary judgment for employer reversed – plaintiff need not establish that she was treated differently from a similarly situated male – a reasonable fact finder could determine that the appearance requirement of “pretty” and “Midwestern girl look” by their nature applied only to women – she was also allowed to proceed on a retaliation claim in that she was terminated three days after she stated that the requirement to be “pretty” was illegal – she was terminated despite a history of good performance and the demand for another interview with her was based upon her “tomboyish” appearance.

*LaFary v. Rogers Group, Inc.*, 591 F.3d 903, 108 FEP 97 (7th Cir. 2010) – No prima facie case of pregnancy discrimination or retaliation for requesting extended leave when plaintiff terminated under policy requiring automatic discharge of any employee who did not return to work after 180 days of leave – exception made for male employee based on unique circumstances, including his status as a top producer.

*Coffman v. Indianapolis Fire Dep’t*, 578 F.3d 559, 106 FEP 1793 (7th Cir. 2009) – Plaintiff alleged “sex plus” theory of discrimination - that she was discriminated against because she was a short female – she was 5-feet tall – multiple firefighters complained that she was too short to drive the vehicles because she could not see other than through the steering wheel and had to contort her body to work the pedals – there were further complaints that she seemed to be having psychological problems – psychological exam concluded that she was overreacting to issues about her height in an immature fashion and deemed her unfit for duty – summary judgment affirmed – this circuit has not yet decided whether to recognize a “sex plus” theory of discrimination – issue irrelevant for this case since plaintiff must show that at a minimum defendants took an adverse employment action at least in part on account of sex – no causal connection between her sex and concerns about her driving – repeated psychological exams do not create a hostile environment.

*Farr v. St. Francis Hosp. and Health Ctrs.*, 570 F.3d 829, 106 FEP 1046 (7th Cir. 2009) – Reverse sex discrimination case – plaintiff contended that because he was the only male in the department, he was singled out for termination when it was discovered that the department computer was used to access pornography – “[H]e was fired because

the investigation convinced the employer that he was the one accessing the inappropriate Web sites. In fact, he admitted it.” (*id.* at 833) – in essence he contends that he was investigated only because he was a man, but he fails to show a woman accessing inappropriate websites who was not fired – it is not indicative of discrimination that the hospital’s investigation ended once plaintiff admitted he accessed the inappropriate sites – the bottom line is he was not fired because he was a male, he was fired for exactly the reason the hospital gave – he visited inappropriate websites.

*Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 105 FEP 1457 (1st Cir. 2009) – Mother of four young children treated adversely compared to mother of two young children – decisionmaker explained “[Y]ou have the kids and you just have a lot on your plate right now” (561 F.3d at 42) – while Title VII does not prohibit discrimination based on caregiving responsibilities, sex-based stereotyping is a form of sex discrimination, and it is a stereotype that mothers may have more difficulty working and the stereotype is arguably stronger for a mother of four children than for a mother of two children.

### **Sexual Orientation and Gender Identity (Ch. 11)**

*Dawson v. Entek Int’l*, 630 F.3d 928, 111 FEP 306 (9th Cir. 2011) – Gay employee claimed gay harassment and was fired two days later – he has no claim for sexual orientation discrimination under Title VII (although he does under Oregon law) because he is not alleging he was the victim of being perceived as different from a stereotypical male – he did not claim that he did not fit the male stereotype by acting too feminine – however, he has a claim for retaliation under Title VII – the causal link can be inferred from proximity in time and here it was just two days – the complaint to human resources was protected activity. [NOTE: No discussion of issue of whether a retaliation claim lies under Title VII for complaining about a type of discrimination not covered by Title VII.]

*Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 107 FEP 1 (3d Cir. 2009) – Summary judgment reversed on homosexual employee’s stereotyping claim – employee was harassed because he has a high voice, walks in an effeminate manner, crosses his legs and shakes his foot “the way a woman would sit” – it is up to the jury to decide whether this harassment was due to his homosexuality or because he did not fit the stereotypical view of how men should look, speak and act – religious harassment claim dismissed – plaintiff claimed he failed to conform to his employer’s religious beliefs, which were that a man should not lay with another man – that simply shows sexual orientation discrimination, which is not cognizable under Title VII.

**Age - Summary Judgment, Directed Verdict,  
JNOV, and Reversals of Jury Verdicts (Ch. 12)**

*Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806, 114 FEP 90 (6th Cir. 2011) – 33-year-old promoted over 50-year-old – 50-year-old had more experience and education – district court erred in finding no prima facie case – however, district court did not err in finding no evidence of pretext – plaintiff had received several warnings – promoted employee had a much stronger performance record – evidence that store was undertaking a new marketing campaign geared toward attracting a younger customer base is not probative of age discrimination – no evidence that store felt that employees’ ages needed to match the proposed customer base – summary judgment affirmed

*Rahlf v. Mo-Tech Corp.*, 642 F.3d 633, 112 FEP 787 (8th Cir. 2011) – Summary judgment affirmed in RIF case – does not matter that new employees were hired because they were hired to fill positions requiring less skill than the positions from which the layoffs came – claim of subjective evaluations of skills insufficient to create fact issue – employer used both objective and subjective criteria – failure to give weight to seniority as required by employee handbook not indicative of pretext – employer’s destruction of rankings used to determine which employees to lay off does not show pretext where the objective data used was easily reproducible and managers testified about their subjective judgments – nothing indicates evidence was destroyed to conceal truth – failure to consider past performance reviews does not create an issue of pretext – the company “was not required to base its RIF decision on positive performance reviews” (642 F.3d at 639).

*Simmons v. Sykes Enters., Inc.*, 647 F.3d 943, 112 FEP 596 (10th Cir. 2011) – Summary judgment affirmed – 10-year employee, 62 years old, terminated for revealing confidential medical information about an employee – no direct evidence of age bias – courts do not act as super personnel departments to second-guess employer’s business decisions – decisionmakers in good faith believed employee contradicted herself and did disclose the information – but the contention that subordinates of the decisionmakers harbored discriminatory animus and thus there is cat’s paw liability – cat’s paw decision in *Staub* does apply to Age Act but with a difference – ADEA does not provide that plaintiff may prevail by simply showing that age was “a motivating factor,” the operative phrase in *Staub* – under *Gross* plaintiff must prove age was but for – despite this distinction the underlying principles of agency upon which subordinate bias theories are based apply equally to all types of employment discrimination – “In age discrimination cases . . . the relationship between a subordinate’s animus and the ultimate employment decision must be more closely linked.” (647 F.3d at 949) – plaintiff must show that the subordinate’s animus was a “but for” cause of the adverse employment action, “it was the factor that made a difference,” (*id.* at 950) – examples are indicative of but for

causation – if the biased supervisor falsely reported violations which led to the termination, or wrote a series of unfavorable reviews that served as the basis for the disciplinary action, it would be a but for cause – “But where a violation of company policy was reported through channels independent from the biased supervisor, or the undisputed evidence in the record supports the employer’s assertion that it fired the employee for its own unbiased reasons that were sufficient in themselves to justify termination, the plaintiff’s age may very well have been in play – and could even bear some direct relationship to the termination if, for instance, the biased supervisor participated in the investigation or recommended termination – but age was not a determinative cause of the employer’s final decision.” (*id.*) – in this case neither of the biased subordinates caused the investigation to begin, which was instigated by an aggrieved unbiased employee – the allegedly biased supervisors did direct a full investigation, did interview witnesses, including the plaintiff, and did recommend termination – but the undisputed facts show the company would have fired the plaintiff in any event because from its perspective she violated company policy and could not be trusted with confidential information.

*Schechner v. KPIX-TV*, 2011 WL 109144 (N.D. Cal. Jan. 13, 2011) – Disparate impact discrimination must be shown by comparing over-40 and under-40, and not subgroups – five employees selected for layoff were between 47 and 66 years old – before layoff 31 employees over 40 and only six under 40 – plaintiff’s expert did a statistical analysis calculating the probability of layoff distribution of ages in an age-neutral environment and found statistical significance – defense expert found no statistical significance comparing over-40 and under-40 since if the over-40 employees were terminated at the overall termination rate there would have been 4.2 terminations and the actual termination rate of 5 did not yield statistical significance – moreover, the RIF lowered average age by only one or two years – the “overwhelming weight of authority” including every federal appeals court decision addressing the issue concluded that it is improper to distinguish between subgroups of employees over the age of 40 – disparate impact analysis must compare employees age 40 and over with those 39 and younger, citing *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 950-51 (8th Cir. 1999) – if disparate impact analysis was cognizable for subgroups an employer engaging in a RIF would have to attempt what might be impossible, achieving statistical parity among a virtually infinite number of age subgroups – decision by Judge Patel.

*Haigh v. Gelita USA, Inc.*, 632 F.3d 464, 111 FEP 614 (8th Cir. 2011) – Summary judgment affirmed – engineer hired at age 60 and discharged at age 66 – new supervisor gave him subpar ratings and sent memo describing deficiencies and stating improvement required – employee responded that it was impossible to meet the supervisor’s expectations and that he could not continue working for the supervisor – he was then

terminated – no inference of age discrimination – moreover, fact that he was hired at an age well over 40 creates a presumption against discrimination that he failed to rebut.

*Clark v. Matthews Int'l Corp.*, 628 F.3d 462, 111 FEP 33 (8th Cir. 2010) – Summary judgment in RIF case – 14 of 15 employees terminated during relevant time frame over the age of 40, decisionmaker suggested to older employee “he could always get a job at Wal-Mart as a greeter,” (628 F.3d at 466) and company sent older employees unsolicited mailings from AARP – disparate impact theory not applicable – pool of terminated employees is not the relevant pool – pool cannot be limited to just employees’ department – relevant pool consisted of all non-management employees at the facility – 35 of 43 were over 40 – percentage of employees over 40 dropped from 81% to 76% - to establish a RIF disparate impact there must have been a sufficiently substantial drop in the employment rate – we have previously held that a 4% drop is insufficient – with respect to disparate treatment, plaintiff failed to meet the “but for” test mandated by *Gross* – isolated inquiries into retirement plans, unsolicited mailings from the AARP insufficient – “isolated remarks regarding retirement and age generally are insufficient to prove age discrimination, especially when it is unclear what context the statements were made in” (*id.* at 471) – although decisionmaker made the remarks no showing made in reference to a termination decision and seemed to be joking.

*Reich v. Schering-Plough Corp.*, 2010 U.S. App. LEXIS 22478, 110 FEP 1035 (3d Cir. Oct. 29, 2010) – Summary judgment affirmed – plaintiff’s work as a principal scientist involved in-vivo (living) experiments – initial supervisor was not an expert in that area – initial supervisor gave her good reviews – plaintiff was 59 years old – she received a new 42-year-old supervisor who was an expert in-vivo biologist – her reviews declined and she was eventually terminated – she claimed the contrast between her previous good reviews and her most recent bad reviews was evidence of pretext – this is insufficient to allow a reasonable jury to find in her favor.

*Melendez v. Autogermana Inc.*, 622 F.3d 46, 110 FEP 832 (1st Cir. 2010) – summary judgment affirmed in discharge of car salesman – discharged for failing to meet quota during previous 18 months – failure to meet quota was legitimate nondiscriminatory reason – courts are not “super personnel departments” - no factual issue raised by good sales record over previous 10 years.

*Moss v. BMC Software Inc.*, 610 F.3d 917, 109 FEP 1173 (5th Cir. 2010) – Summary judgment affirmed against protected-age attorney who had far more experience than substantially younger lawyer who was hired – even though he had more experience and higher level experience generally than she did, she had been doing the very tasks called for by the position and he had not – he was required to prove that “but for” his age he would have been hired, and comparative résumés do not so prove – comment by

company's associate general counsel that she was searching for a lawyer of a "more junior" level than herself was not direct and unambiguous or even age-related.

*Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 108 FEP 1523 (5th Cir. 2010) – Following investigation by Chief Operating Officer and outside counsel, 69-year-old employee fired for sexual harassment – his denial that he committed sexual harassment is not a defense since issue is employer's reasonable belief following an investigation – fact that Chief Operating Officer referred to him as an "old, gray-haired fart" a year before the discharge decision does not affect analysis since no evidence it was related to his discharge.

*Schoonmaker v. Spartan Graphics Leasing LLC*, 595 F.3d 261, 108 FEP 695 (6th Cir. 2010) – Summary judgment affirmed in RIF case despite fact that employer RIF'd the two oldest employees (58 and 65) in the department – decisionmaker acknowledged he did not consider company's policies which stated that if qualifications were relatively equal, seniority would govern – decisionmaker chose 65-year-old employee (who is not a plaintiff) in part because she was retiring at the end of the year anyway – decisionmaker retained 29-year-old employee over plaintiff because coworkers agreed that younger employee would be the better team player – plaintiff was not replaced – plaintiff has shown nothing more than an age differential between a retained employee and herself – that is insufficient – she would have to show that she possessed superior qualities in order to establish a prima facie case in the context of a work force reduction – the fact that the two oldest employees in the department were let go is insufficient because of the small statistical base – failure to follow its own criteria is not additional evidence of discrimination.

*Harris v. Metro. Gov't of Nashville and Davidson Cnty.*, 594 F.3d 476, 108 FEP 925 (6th Cir. 2010) – summary judgment on age claim of basketball coach who was removed from coaching duties – coach did not rebut employer's legitimate reasons: (1) coach wanted to cut one of the team's top three players because of a conflict with the player's parents; (2) coach failed to "read [your] opponent's strategy and adjust" which led to several losses – no rational trier of fact could find that the proffered reasons for not continuing plaintiff as head basketball coach were a pretext for age discrimination.

*Senske v. Sybase, Inc.*, 588 F.3d 501, 107 FEP 1583 (7th Cir. 2009) – Summary judgment affirmed in an age discrimination case against salesperson fired in 2005 even though he was the employer's top earner for North America in 2004 – "The central premise of [plaintiff's] pretext argument is that no juror could believe that Sybase's top earner for North America in 2004 would be fired for performance deficiencies in 2005," (588 F.3d at 507) – but it is undisputed that he did not meet his revenue quota in any of the eight quarters preceding his fourth quarter of 2004 and his success in the fourth quarter of 2004

hinged entirely on two deals – at least one of those deals was in industry parlance a “bluebird” – a deal that just flies in the window with little or no work by the salesperson – based on his deficiencies in 2005 no reasonable jury could conclude that discrimination rather than performance deficiencies were the reason for his termination.

*Connolly v. Pepsi Bottling Grp., LLC*, 347 Fed. Appx. 757, 107 FEP 925 (3d Cir. 2009) (non-precedential) – Employer’s reason for terminating plaintiff with 32 years of service was powerful – he had entered into two contracts that had different terms with the same customer on the same day, giving the customer one copy and giving his employer the other copy – summary judgment affirmed despite comments by the decisionmaker as follows: called plaintiff “the old man in the group”; called plaintiff “old man”; called plaintiff a “legacy liability”; told plaintiff decisionmaker “could hire two or three people for what [plaintiff] made”; told plaintiff “the job has passed [you] by”; and stated “younger key account managers can work rings around you” (107 FEP at 926 n.2) – plaintiff’s age was shown on a computer-generated personnel profile prepared for a person involved in the termination decision – the decisionmaker’s “comments do not all suggest potential age-related bias, and those that might were made months before defendant’s decision to terminate plaintiff and outside the context of that decisionmaking process” (*id.* at 927) – “The age notation on plaintiff’s personnel profile indicates that individuals involved in the termination decision were aware of plaintiff’s age at the time of that decision. The notation does not, in itself, manifest discriminatory animus, though it may be relevant to such a showing when considered in light of other evidence.” (*id.*) – “[W]hen we view all the evidence in the light most favorable to plaintiff, we do not believe a reasonable factfinder could conclude that plaintiff . . . would not have been terminated but for his age” (*id.* at 928).

*Martino v. MCI Commc’ns Servs., Inc.*, 574 F.3d 447, 106 FEP 1489 (7th Cir. 2009) – No “cat’s paw” liability despite the fact that manager who recommended plaintiff for RIF consulted with presumably biased supervisor before making recommendation which was accepted by still higher-level actual decisionmaker – manager and decisionmaker separately considered numerous legitimate factors – plaintiff’s skill set had become obsolete – younger employees also included in RIF – plaintiff had lost confidence of core sales team – if any doubt summary judgment was appropriate, dissipated by Supreme Court decision in *Gross v. F.B.L. Financial Services, Inc.*, 129 S. Ct. 2343, 106 FEP 833 (2009), requiring proof of but-for causation – at absolute best employee has shown that his age possibly solidified decision to terminate him, but he would have been terminated had he been younger.

*Nagle v. Village of Calumet Park*, 554 F.3d 1106, 105 FEP 749 (7th Cir. 2009) – Summary judgment affirmed – black police chief repeatedly referred to white officer and his peers as “old white mother f\_\_\_\_ers” – chief also commented that plaintiff was getting

too old for the job – this was insufficient to avoid summary judgment because the remarks lacked any temporal proximity to any action taken against him – with respect to retaliation claims, suspension that was never served is not materially adverse action, nor was reassignment from patrol duty to a liaison position to a strip mall – changes did not affect pay, hours or prospects for advancement, and were not punitive.

### Age - General Issues (Ch. 12)

*Gross v. F.B.L. Fin. Servs., Inc.*, 557 U.S. 167, 106 FEP 833 (2009) – Standard of proof in ADEA disparate treatment cases is “but-for” – the burden of persuasion never shifts even when a plaintiff has produced some evidence that age was one motivating factor – Title VII and the ADEA are materially different – Title VII’s burden-shifting framework is not applicable to the ADEA – when Congress added the “mixed motive” amendments to Title VII, it did not do so to the ADEA – ordinary meaning of ADEA requirement that the employer took adverse action “because of” age is that age was the “reason” the employer decided to act – the plaintiff retains the burden of persuasion at all times under the “but-for” test – contention that *PriceWaterhouse* applies to ADEA rejected – mixed-motive jury instruction never proper in an ADEA case - not at all clear Court today would apply *PriceWaterhouse* to Title VII – its burden-shifting framework is difficult to apply – 5-4 decision – dissent contended that Supreme Court should not answer a question not presented by the petition for certiorari – whether a mixed-motive case is ever appropriate under the ADEA – dissent contended that “because of” is totally consistent with “motivating factor” – Court should have simply held that direct evidence was not necessary to obtain a mixed-motive instruction – dissent contended that in employment decisions, there will frequently be multiple motives, and the statute prescribes using age as one of the motives – burden should switch to employer to prove same result if plaintiff establishes that one of the motivations was age.

*Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 102 FEP 1057 (2008) – Tenth Circuit decision holding that “me-too” testimony in RIF case is per se admissible reversed – plaintiff in individual RIF case wanted to call five other older RIF’d employees who did not report to the same supervisor/decisionmaker – trial court rejected the testimony – “Rules 401 and 403 do not make such evidence *per se* admissible or *per se* inadmissible . . .” (552 U.S. at 388) – relevance under Rule 401 “depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case” (*id.*) - Rule 403 “also requires a fact-intensive, context-specific inquiry” (*id.*) – case remanded to trial court to clarify basis for its ruling.

*Shelley v. Geren*, 666 F.3d 599, 114 FEP 303 (9th Cir. 2012) – Summary judgment reversed 2-1 – district court relied on *Gross v. FBL Financial Services* and found insufficient facts that age was the “but for” cause of non-selection for promotion – district court declined to analyze the motion in accordance with *McDonnell Douglas v. Green* – prior to *Gross* Ninth Circuit applied *McDonnell Douglas* to motions for summary judgment on ADEA claims – district court’s belief that *Gross* changes this framework rejected – *Gross* involved a case that had already progressed to trial – other circuits since *Gross* have continued to utilize *McDonnell Douglas* and we join them – *McDonnell Douglas* shifts only the burden of production – at summary judgment plaintiff must demonstrate that there is a material genuine issue of fact as to whether the employer’s purported reason is a pretext – at trial must meet the “but for” test – triable issue of pretext raised because members of panel deciding on promotion inquired about projected retirement dates – factual dispute as to whether plaintiff was better qualified than successful candidate – conflicting explanations given for reasons of non-selection – reversed and remanded for trial – Fletcher and District Judge Wilken in majority.

*Mitchell-White v. Northwest Airlines, Inc.*, 2011 WL 520107, 113 FEP 1026 (2d Cir. Oct. 21, 2011) – Pension plan reduces retiree’s pension benefits to offset workers’ compensation benefits she received upon reaching age 65 – no ADEA violation.

*Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 113 FEP 353 (5th Cir. 2011) – ADEA covers harassment and hostile environment claims – conduct has to create “an objectively intimidating, hostile, or offensive work environment,” (*id.* at 441) – district court summary judgment reversed – plaintiff claimed manager called him names such as “old mother\_\_\_\_\_,” “old man,” and “Pops” half a dozen times daily and steered deals toward younger salespersons – reasonable jury could find that harassment was severe or pervasive and that a reasonable person would resign.

*Mora v. Jackson Mem’l Found., Inc.*, 597 F.3d 1201, 108 FEP 914 (11th Cir. 2010) – Summary judgment for employer reversed – district court relied on “same decision” affirmative defense, concluding that the employer would have terminated her regardless of age because of poor job performance – mixed-motive defense does not survive Supreme Court decision in *Gross v. F.B.L. Financial Services*, which held that the test is a “but for” test – since Supreme Court rejected mixed motive it also necessarily rejected the same decision defense – thus, there is a jury issue about whether age was a “but for” cause of termination. [Note: Seems clearly erroneous on its face – since the employee would have been terminated without regard to her age, age could not have been the “but for” cause of termination.]

*EEOC v. Kelley Drye & Warren, LLP*, No. 10-Civ. 0655 (S.D.N.Y. filed Jan. 28, 2010) – EEOC filed suit alleging age discrimination – alleges that partners must give up equity participation at age 70 and thereafter be compensated solely on the basis of a discretionary bonus.

*Smith v. City of Allentown*, 589 F.3d 684, 108 FEP 18 (3d Cir. 2009) – But-for causation standard mandated in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), does not conflict with the burden-shifting framework outlined in *McDonnell Douglas – Gross* prohibits shifting the burden of persuasion but *McDonnell Douglas* does not do that – the only burden on the employer is a burden of production – summary judgment affirmed with respect to plaintiff’s performance-related termination even though there was a reference to his age and three officials had recommended against terminating him – the three officials’ recommendation was not binding on the decisionmaker.

*EEOC v. Exxon Mobil Corp.*, 344 Fed. Appx. 868, 107 FEP 166 (5th Cir. 2009) (unpublished) – Exxon requires its pilots to retire at the same age as FAA regulations require commercial pilots to retire – trial court found BFOQ – appellate court remands for reconsideration – district court directed the parties to conduct discovery and present motions only on the issue of congruity – whether the job of piloting private aircraft was sufficiently similar to the commercial aircraft job that was the subject of the FAA regulation – the district court assumed that the rationale underlying the FAA regulation remained valid – this was error – case remanded to evaluate the continuing validity of the rationale underlying the FAA regulation.

*Mach v. Will Cnty. Sheriff*, 580 F.3d 495, 107 FEP 134 (7th Cir. 2009) – Sanction of five-sixths of employer’s attorney’s fees for preparing its opening summary judgment brief affirmed – plaintiff litigated in bad faith – ADEA does not preclude application of common-law rule that prevailing defendant may obtain attorney’s fees if plaintiff litigated in bad faith – five of six claims litigated had no chance of success and thus unnecessary costs were inflicted upon the employer.

*Thompson v. Weyerhaeuser Co.*, 582 F.3d 1125, 107 FEP 161 (10th Cir. 2009) – Pattern or practice framework established for Title VII in *Teamsters* case is applicable to ADEA – Tenth Circuit so held in *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001) – this is not altered by *Gross v. F.B.L. Financial Services, Inc.*, 129 S. Ct. 2343, 106 FEP 833 (2009) – *Gross* did not involve the *Teamsters* framework and thus does not overrule *Thiessen*.

*Neely v. Good Samaritan Hosp.*, 345 Fed. Appx. 39, 106 FEP 1741 (6th Cir. 2009) (unpublished) – Over-40 employee claimed race discrimination but never claimed age discrimination – district court dismissed all claims except race discrimination and

referred matter to mediation – parties reached a settlement which they confirmed on the record – parties never discussed age or right to revoke in mediation – defendant prepared settlement agreement which waived rights under the ADEA and contained a clause allowing employee 21 days to consider and seven days to revoke – employee signed agreement but revoked within seven days – district court rejected revocation on ground that there was a verbal settlement – court of appeals reversed, holding that it did not matter that there was no age issue – the written agreement expressly allowed revocation – employer clearly wanted to protect itself against any theoretical age claim since plaintiff was over 40 – does not matter that right to revoke was not bargained for – once there was an ADEA release right to revoke was required by law.

*O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 15 Wage & Hour Cas. 2d 225 (6th Cir. 2009) – FLSA is opt in – six named plaintiffs – employer immediately offered judgment in full amount of their claims – this mooted the action and opt-ins cannot proceed.

*Bova v. City of Medford*, 564 F.3d 1093, 106 FEP 206 (9th Cir. 2009) – Two current employees, eligible to retire, sued City under ADEA demanding that City restore health coverage for retirees – case dismissed because no standing – claims not yet ripe – individuals have not been injured because they have not retired – possible before retirement benefits could be restored or plaintiffs could die – argument that current policy may cause them to delay retirement insufficient to confer case or controversy standing.

*Ahlmeier v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051, 105 FEP 865 (9th Cir. 2009) – Plaintiff is barred from suing state employer under ADEA by Eleventh Amendment – plaintiff cannot sue for age discrimination under Section 1983 since the ADEA is the exclusive statute for attacking age discrimination – dismissal affirmed.

*EEOC v. Bd. of Supervisors for the Univ. of La. Sys.*, 559 F.3d 270, 105 FEP 746 (5th Cir. 2009) – Eleventh Amendment sovereign immunity does not protect state university from suit by EEOC – Supreme Court held in *Kimel v. Florida Board of Regents* (528 U.S. 62 (2000)) that Congress did not validly abrogate the state's sovereign immunity with respect to suits by private individuals under the ADEA – but *Kimel* does not suggest that ADEA claims brought by a federal agency are subject to sovereign immunity – the Eleventh Amendment protects states only from private lawsuits – this is true even though the individual on whose behalf the EEOC sued could not have individually brought suit.

### **Disability/Handicap - General (Ch. 13)**

*Griffin v. United Parcel Service, Inc.*, 661 F.3d 216, 25 A.D. Cas. 551 (5th Cir. 2011) – Diabetic plaintiff not disabled under ADA – diabetes does not substantially limit the

major life activity of eating – treatment regimen requires only modest dietary and lifestyle changes – employee requested accommodation of day shift only – his physician admitted he was unaware of any day-time only requirement to maintain his dietary regimen.

*Ramos-Echevarria v. Pichis, Inc.*, 659 F.3d 182, 25 A.D. Cas. 545 (1st Cir. 2011) – Epilepsy is an impairment but not a disability because it did not substantially limit the plaintiff in working or in a major life activity – he must temporarily stop working during a seizure and he is medically restricted from driving – employee was considered excellent employee and worked a second job and admitted that his work is not significantly affected by his condition – no expert testimony supported his position that he was substantially limited from working a broad range of jobs.

*Serednyj v. Beverly Healthcare LLC*, 656 F.3d 540, 25 A.D. Cas. 103 (7th Cir. 2011) – Pregnancy-related medical restrictions were temporary – to be considered a physical impairment plaintiff needs to show that her impairment substantially limited her ability to engage in a major life activity – but she was restricted only for four months and began a new job three months after delivery and had no complications in a later pregnancy – also not able to show she was regarded as disabled.

*Harden v. SSA*, EEOC Case No. 0720080002 (Aug. 12, 2011), *as reported in* 162 Daily Lab. Rep. (BNA) 1 (Aug. 22, 2011) – Fact finder may rely on evidence that was obtained during discovery to show that individual was not disabled, even though such evidence was not available at the time of the decisions – “We reject the . . . contention that a fact finder, when determining whether a complainant is an individual with a disability or a qualified individual with a disability, is limited to considering evidence related to the medical documents actually submitted . . . .” (162 D.L.R. at A-1) – EEOC then found charging party was disabled – Social Security Administration’s final decision against her reversed.

*Stansberry v. Air Wisconsin Airlines Corp.*, 651 F.3d 482, 24 A.D. Cas. 1544 (6th Cir. July 6, 2011) – Manager discharged for unsatisfactory performance claimed his unsatisfactory performance was due to his wife’s deteriorating physical condition and that thus this constituted association discrimination – law prohibiting association discrimination did not legally obligate the airline to provide the manager with a reasonable accommodation because of his wife’s illness, even if it caused his poor performance – his discharge was based on actual unsatisfactory job performance, not on employer concerns that his wife’s condition might prevent him from performing his job.

*Lewis v. Humboldt Acquisition Corp.*, 634 F.3d 879, 24 A.D. Cas. 517 (6th Cir. 2011) – Mobility-impaired nurse alleged discharge violated ADA – not entitled to a jury instruction that would have required her to show only that her disability was the “motivating” factor – jury instruction requiring proof that disability was the “sole” factor approved – Sixth Circuit acknowledged that most other circuits are to the contrary but that the Supreme Court has not yet ruled on the issue.

*Lee v. City of Columbus, Ohio*, 636 F.3d 245, 24 A.D. Cas. 257 (6th Cir. 2011) – Police department directive requiring employees returning from sick leave to submit doctor’s note disclosing “nature of illness” not unlawful disability-related inquiry in violation of the Rehabilitation Act.

*Lopez v. Pacific Maritime Ass’n*, 636 F.3d 1197, 24 A.D. Cas 385 (9th Cir. 2011) – At issue was the policy of PMA of banning for life any job applicant who tested positive for drugs – plaintiff was a drug addict who applied, tested positive for drugs, and then became clean and sober – his re-application was rejected because of the prior positive drug test – PMA did not know of his earlier addiction – he attempted to appeal but PMA never entertains appeals from drug disqualifications – with respect to plaintiff’s disparate treatment claim, *Raytheon v. Hernandez*, 540 U.S. 44 (2003), held that a no-rehire rule for persons who lost their jobs due to job-related misconduct was a neutral and legitimate reason for refusing to rehire – “The ADA prohibits employment decisions made because of a person’s qualifying disability, not decisions made because of factors merely related to a person’s disability” (636 F.3d at 1199) – lifetime ban adopted because of drug-related accidents – no evidence purpose was discriminatory – fact that plaintiff informed defendant of his recovery from addiction after disqualification is irrelevant, citing *Raytheon* for the proposition that if the employer was unaware of the disability it could not be disparate treatment – plaintiff’s disparate impact claim also fails – argument that the lifetime ban disparately affects recovering drug addicts is without evidence – it is not obvious that the rule necessarily screens out recovering drug addicts disproportionately – in any case the relevant pool is recovered drug addicts, not recovered drug addicts who previously applied and were rejected – we recognize it is hard to get statistics in a disability disparate impact claim, “but both logic and precedent requires him to produce *some* evidence that tends to show that the one-strike rule excludes recovering or recovered drug addicts disproportionately” (*id.* at 1201) (emphasis in original) – Judge Pregerson dissented on the disparate impact claim, citing *Lindemann & Grossman* for the proposition that in some ADA disparate impact cases no statistical comparisons can be made.

*Bates v. Dura Auto. Sys., Inc.*, 625 F.3d 283, 23 A.D. Cas. 1377 (6th Cir. 2010) – Concerned about factory’s accident rate, employer instituted policy prohibiting employees from using certain legal prescription drugs – several employees were

discharged pursuant to this policy – they sued under the ADA provision prohibiting employers from using qualification standards that screened out persons with disabilities absent proof of job-relatedness and business necessity – since the discharged individuals were not themselves disabled, they lacked standing – they were simply not covered by the provision.

*Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 23 A.D. Cas. 27 (3d Cir. 2010) – Plaintiff alleged that side effects of medicine prescribed for a condition which was itself not a disability under the ADA rendered him disabled – as a matter of law, a disabling impairment can be caused by a side effect of prescribed medicine if the treatment is required “in the prudent judgment of the medical profession” (602 F.3d at 187) and no equally effective alternative exists – here, plaintiff could not show that his prescription was “medically necessary” and so his condition was not covered by the ADA.

*Budde v. Kane Cnty. Forest Preserve*, 597 F.3d 860, 22 A.D. Cas. 1710 (7th Cir. 2010) – Police chief discharged after drunk driving accident – not eligible for ADA protection because driving while drunk violated workplace rules – not able to perform essential job function of operating a vehicle since he lost his driver’s license, rejecting contention that not having a valid driver’s license differed from ability to operate a vehicle – misconduct and not disability was basis for discharge.

*Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 22 A.D. Cas. 1379 (7th Cir. 2010) – Mixed-motive theory not cognizable under disability act – logic of Supreme Court’s decision in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009) (no mixed-motive under ADEA) compels the same conclusion with respect to the ADA – ADA contains no express language establishing employer liability in mixed-motive cases and does not cross-reference the 1991 Civil Rights Act provision dealing with mixed motive under Title VII.

*Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206, 22 A.D. Cas. 1281 (11th Cir. 2010) – Being disabled is not a required element of an ADA prohibited inquiry claim – protection is extended to applicants in general – ADA prohibits pre-offer medical examinations that are not related to job functions and disability-related medical inquiries.

*Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 22 A.D. Cas. 1172 (9th Cir. 2009) – Only equitable remedies (not compensatory or punitive damages) available for ADA retaliation and thus no jury trial - compensatory and punitive damages under the Civil Rights Act of 1991 did not reference the ADA’s separate retaliation provision – text of statute unambiguous.

*Becerril v. Pima Cnty. Assessor's Office*, 587 F.3d 1162, 22 A.D. Cas. 1025 (9th Cir. 2009) – Summary judgment against plaintiff affirmed – contention that employee transferred from original office to more stressful office because of her disability fails – her coworkers complained about her – does not matter whether the complaints were investigated – the complaints clearly revealed morale problems – alleged failure to engage in interactive process with respect to request for transfer back rejected since amendments to the ADA are not retroactive, and under the statute as originally drafted plaintiff's particular disability does not substantially limit major life activities.

*Indergard v. Georgia-Pacific Corp.*, 582 F.3d 1049, 22 A.D. Cas. 660 (9th Cir. 2009) – Employee off for 18 months after knee surgery – employer policy required a physical capacity evaluation (PCE) before returning to work from medical leave – job in question determined to have 65-pound or more lifting requirement – employee cleared by her doctor to return to work without restriction – PCE went well beyond knees – exam continued for two days – recommendation that employee should not return to work – PCE was a medical examination under the ADA – under the ADA an employer may not require a current employee to undergo a medical examination unless the examination “is shown to be job-related and consistent with business necessity” (582 F.3d at 1052 n.1) – this test went far beyond simply an inquiry as to whether the employee was capable of performing the job-related functions of the position to which she sought to return – four of seven factors in EEOC's enforcement guidance indicate that the PCE was a medical examination – trial necessary to determine whether PCE was job-related and consistent with business necessity – 2-1 decision – dissent noted that distinction between medical exam and physical fitness test is that the former is designed to reveal disability while the latter is designed to determine whether an employee can perform her job – portions of PCE that went beyond physical fitness were merely incidental and did not in any way cause the harm at issue.

*Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 22 A.D. Cas. 669 (3d Cir. 2009) – Employee denied leave to care for daughter with Down syndrome took leave anyway, and was discharged – no violation – ADA association discrimination does not apply – duty to accommodate does not extend to relatives of disabled individuals.

*Barrett v. Covington & Burling LLP*, 979 A.2d 1239, 22 A.D. Cas. 449 (D.C. Cir. 2009) – Timeliness issue under District of Columbia Human Rights Act – plaintiff alleged a series of failures to accommodate, some of which were before the relevant time frame, others after – plaintiff argued continuing violation doctrine should apply to failure to accommodate – “Unlike a hostile work environment claim, however, a reasonable accommodation claim is based on discrete acts, not on prolonged or repeated conduct,” (22 A.D. Cas. at 453) – denial of accommodation starts clock running on the day it occurs – position of EEOC that since an employer has an ongoing obligation to provide a

reasonable accommodation there is a new violation each time the employee needs the accommodation rejected – “[T]he statute of limitations bars any claim for relief based on denials of accommodation that [preceded the limitations period],” (*id.* at 454) – issue is whether plaintiff within the time frame “requested a new accommodation . . . or renewed a request previously denied. These distinctions are critical. A plaintiff cannot extend the limitations period by reiterating an identical request that was previously denied.” (*id.*) – however, revocation of a previously authorized accommodation during the relevant time frame is actionable, as is a denial of a new request made in light of changed circumstances – there is a genuine issue of material fact as to whether during the relevant time frame plaintiff was capable of performing the job in question with a reasonable accommodation – on remand the focus will be whether plaintiff was seeking a new accommodation or merely trying to revive a time-barred claim and whether a previously granted accommodation was revoked.

*Lytes v. DC Water & Sewer Auth.*, 572 F.3d 936, 22 A.D. Cas. 157 (D.C. Cir. 2009) – 2008 ADA amendments not retroactive – Congress passed the amendments on September 14, 2008, but delayed the effective date until January 1, 2009 – that clearly indicates an intent against retroactivity.

*Milholland v. Sumner Cnty. Bd. of Educ.*, 569 F.3d 562, 22 A.D. Cas. 6 (6th Cir. 2009) – 2008 ADA amendments are not retroactive – whether or not arthritic teacher was regarded as disabled is determined under prior law, since the allegedly discriminatory transfer preceded the effective date of the amendments – 2008 amendments became effective January 1, 2009.

*Lloyd v. Swifty Transp. Inc.*, 552 F.3d 594, 21 A.D. Cas. 675 (7th Cir. 2009) – Gasoline delivery truck driver had one leg amputated below the knee – contention of discrimination with respect to written reprimand rejected because written reprimand not actionable adverse job action – unpaid suspension claim rejected because alleged comparables not comparably situated – contention of constructive discharge because of ridicule rejected because alleged harassment and ridicule not so severe as to alter the conditions of his employment – denial of promotion to lead driver claim rejected since undisputed testimony established that positive attitude and ability to cooperate were essential job functions and his negative attitude resulted in complaints from coworkers.

*Kimmel v. Gallaudet Univ.*, 639 F. Supp. 2d 34, 22 A.D. Cas. 277 (D.D.C. 2009) – Former dean at school for deaf persons stated a cause of action by contending that she was discriminated against because she was not fully deaf – “not deaf enough” – she alleged harassment in part because she supported the selection of a president who was also considered “not deaf enough” – the trial court refused to dismiss the case, finding that the dean’s deafness was a disability – she did not allege she was discriminated

against because of her deafness, but rather the extent of her deafness – the trial court held that the District of Columbia Human Rights Act was intended to secure an end to discrimination for any reason other than individual merit, and relied on *Price Waterhouse v. Hopkins* with respect to discrimination based on stereotypes.

**Disability - Qualified Individual with Disability/Essential Job Functions (Ch. 13)**

*Colon-Fontanez v. Municipality of San Juan*, 660 F.3d 17, 25 A.D. Cas. 423 (1st Cir. 2011) – Need not consider allegation of failure to accommodate since individual was not qualified person with disability – extensive absenteeism over the years rendered her unqualified since her duties required her to be physically present at work.

*Mauerhan v. Wagner Corp.*, 649 F.3d 1180, 24 A.D. Cas. 769 (10th Cir. 2011) – Employee fired after testing positive for illegal drugs – he successfully completed a one-month in-patient rehabilitation program – he then applied for reinstatement and was rejected – summary judgment for employer affirmed – plaintiff not a qualified individual with a disability because he was currently engaging in illegal use of drugs – the ADA “safe harbor” that protects individuals who have “successfully completed” a rehabilitation program and are “no longer engaging in the illegal use of drugs” not applicable – “[A]n individual is currently engaging in the illegal use of drugs if the drug use was sufficiently recent to justify the employer’s reasonable belief that the drug use remained an ongoing problem.” (649 F.3d at 1187) (citation omitted).

*VandenBroek v. PSEG Power, CT LLC*, 356 Fed. Appx. 457, 22 A.D. Cas. 1304 (2d Cir. 2010) – Discharge sustained – reliable attendance is an essential job function.

**Disability - Reasonable Accommodation (Ch. 13)**

*McFadden v. Ballard Spahr Andrews & Ingersoll LLP*, 611 F.3d 1, 109 FEP 1057 (D.C. Cir. June 29, 2010) – African-American legal secretary suffered from Graves disease which prevented her from typing – asked for transfer to receptionist position – firm’s long-time receptionist was on leave, and position filled by temp – employer expected long-term receptionist to return, and denied transfer, and terminated plaintiff – summary judgment for employer affirmed – position was not vacant since firm expected long-term receptionist to return – did not matter that long-term receptionist had exhausted statutory entitlement to leave and later decided not to return.

*Duvall v. Georgia-Pacific Consumer Prods. LP*, 607 F.3d 1255, 23 A.D. Cas. 420 (10th Cir. 2010) – Summary judgment affirmed – company decided to outsource shipping, and

filled the department with temporary employees – plaintiff requested assignment as an accommodation for breathing difficulties he was experiencing in present job – jobs filled by temporary employees pursuant to an outsourcing plan are not vacant – plaintiff had no right to such positions as an accommodation – positions were not available to non-disabled employees, so no discrimination.

*McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 22 A.D. Cas. 650 (2d Cir. 2009) – Failure to engage in interactive process not a violation if no accommodation was possible.

*Hennagir v. Utah Dep’t of Corr.*, 581 F.3d 1256, 22 A.D. Cas. 545 (10th Cir. 2009) – Discharge of physician’s assistant at prison who failed to complete an emergency response certification upheld – certification was an essential job function for positions that involved direct contact with inmates – does not matter that assistant never had to respond to a crisis situation during her eight years as a physician’s assistant – proposed accommodation of waiving the certification was not reasonable.

*Peyton v. Fred’s Stores of Ark., Inc.*, 561 F.3d 900, 21 A.D. Cas. 1345 (8th Cir.), *cert. denied*, 130 S. Ct. 243 (2009) – Indefinite leave of absence when there is no reasonable estimate of a time to return to work is not a reasonable accommodation – ADA does not require employer to keep job open indefinitely.

**Disability – Effect of Representations in Applying for Disability Benefits (Ch. 13)**

*Mathews v. Denver Newspaper Agency*, \_\_\_ F.3d \_\_\_, 2011 WL 2040396, 112 FEP 432 (10th Cir. Mar. 17, 2011) – Employee lost arbitration with respect to his claim that he was discriminatorily demoted, and filed a social security claim alleging total disability from a date preceding the demotion – this results in judicial estoppel of his discrimination claim – some social security claims of total disability will not result in estoppel since in some circumstances a plaintiff may be disabled for social security purposes yet sufficiently qualified – here plaintiff persuaded an Administrative Law Judge for the Social Security Administration that a bulging disk rendered him completely disabled from working in any capacity – “We are left with a paradigmatic case for judicial estoppel: [Plaintiff’s] inconsistent statement to the SSA has resulted in his receipt of significant benefits in the form of disability payments, and allowing him to retain these benefits while he now pursues a claim predicated on a complete rejection of his prior position would give him an unfair advantage.” (2011 WL 2040396, at \*9).

*Kurzweg v. SCP Distribs. LLC*, 2011 WL 1519105, 24 A.D. Cas. 1555 (11th Cir. 2011) (unpublished) – ADA claim based on discharge after leave for neck surgery expired was

barred by social security disabilities benefit application alleging unable to work as of the date of the discharge.

*Butler v. Vill. of Round Lake Police Dep't*, 585 F.3d 1020, 22 A.D. Cas. 833 (7th Cir. 2009) – Police officer with chronic obstructive pulmonary disease applied for permanent disability benefits – his testimony before the disability board estops him from pursuing an ADA claim – based on his testimony before the disability board, he cannot establish that with or without a reasonable accommodation he could do the essential functions of the job.

### **Retaliation (Ch. 14)**

*Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863 (2011) – Third-party retaliation claim unanimously recognized – plaintiff's fiancée filed an EEOC charge, and three weeks later Thompson was fired – *en banc* Sixth Circuit held that while charging party, the fiancée, had a valid claim, since Thompson had not personally engaged in protected activity he was unprotected – Title VII allows a civil action by a person “claiming to be aggrieved” – previous dictum that term “aggrieved” in Title VII reaches as far as Article III of the Constitution permits “was ill considered, and we decline to follow it” (131 S. Ct. 869) – this could lead to absurd consequences – for example, a shareholder could sue a company for firing a valuable employee for racially discriminatory reasons – but it's too narrow to limit the term “person aggrieved” to the employee who engaged in the protected activity – a plaintiff may sue if he or she “falls within the zone of interests sought to be protected by the statutory provision . . . .” (*id.* at 870) (citation and internal quotation marks omitted) – a third-party plaintiff may not sue if his or her interests are only “marginally related to or inconsistent with the purposes implicit in the statute” (*id.*) (citation omitted) – Justice Scalia acknowledges that the test is imprecise – Thompson in this case clearly falls within the zone of interests since it must be assumed that the employer injured Thompson as an alleged means of punishing his fiancée – hurting Thompson was the unlawful act by which the employer punished the fiancée who filed the charge.

*Crawford v. Metro. Gov't of Nashville & Davidson Cnty.* 555 U.S. 271, 129 S. Ct. 846, 105 FEP 353 (2009) – During a sexual harassment investigation of her superior, not initiated by plaintiff, plaintiff was interviewed and reported that her superior had sexually harassed her – the issue was whether this constituted “opposition” to illegal conduct which would protect her against retaliation – the Sixth Circuit held that it did not – that the Opposition Clause demanded “active, consistent” opposing activities – the Supreme Court unanimously reversed – the Opposition Clause extends to an employee who speaks out about discrimination not on her own initiative but in answering the employer's

questions – opposition includes someone who has taken no action at all to advance a position beyond disclosing it – in dicta the Court stated: “We would call it ‘opposition’ if an employee took a stand against an employer’s discriminatory practices by not ‘instigating’ action, but by standing pat, say, by refusing to follow a supervisor’s order to fire a junior worker for discriminatory reasons.” (129 S. Ct. at 851) – Justice Alito, with Justice Thomas concurring, asserted that “the Court’s holding does not and should not extend beyond employees who testify in internal investigations or engage in analogous purposive conduct” (*id.* at 853) – asserting that there was no need to adopt a definition of the term “oppose” any broader than the case demanded, they noted that “[b]ut in dicta, the Court . . . embraces silent opposition.” (*id.* at 854) – the concurrence concluded by stating: “The question whether the opposition clause shields employees who do not communicate their views to their employers through purposive conduct is not before us . . . and I do not understand the Court’s holding to reach that issue here.” (*id.* at 855).

*Tepperwien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556, 113 FEP 1153 (2d Cir. 2011) – Jury retaliation verdict reversed – no reasonable jury could find that alleged retaliatory acts were materially adverse – employer investigated plaintiff for alleged misconduct three times, counseled him, threatened to terminate him twice, and forced him to switch from day to night shift – this conduct simply as a matter of law was not materially adverse.

*Quinn v. St. Louis County*, 653 F.3d 745, 113 FEP 236 (8th Cir. 2011) – Summary judgment affirmed in retaliation case – claimant said after taking protected action her office was moved, she was excluded from meetings, she lost responsibilities, her new boss (formerly the attorney who represented the county with respect to her charges) called her a problem employee, yelled at her, and unfairly accused her of turning work late – summary judgment affirmed on the basis that claimant failed to establish a material factual issue as to whether she suffered a cognizable adverse employment action – fact that claimant felt harassed is not the issue – subjective feelings do not show retaliation.

*Porter v. City of Lake Lotawana*, 651 F.3d 894, 113 FEP 136 (8th Cir. 2011) – Mayor and Board of Aldermen voted 4-3 to terminate plaintiff – retaliation claim that termination was in response to letter complaint to City Attorney of gender and age discrimination fails since Mayor and Board of Aldermen were unaware of letter.

*McDonald-Cuba v. Santa Fe Protective Servs., Inc.*, 644 F.3d 1096, 112 FEP 327 (10th Cir. 2011) – Employee sued under Title VII – employer filed counterclaims – employee asserted in litigation that counterclaims constituted retaliation – retaliation claims dismissed without prejudice for failure to exhaust administrative remedies – retaliation counterclaims required the filing of a new EEOC charge and court lacks jurisdiction even though the alleged retaliatory acts occurred as part of federal court proceedings.

*Crowe v. ADT Sec. Servs. Inc.*, 649 F.3d 1189, 112 FEP 1 (10th Cir. 2011) – Plaintiff, an African-American male, had been accused of sexual harassment prior to engaging in protected activity – he then met with a manager to discuss concerns about the lack of African Americans in management and the perception that African Americans had been passed over for promotions – the company investigated and found no merit to the harassment allegations – he was the subject of further sexual harassment complaints and rudeness complaints – HR investigated – HR recommended termination, noting “What if a white male exhibits the same harassing . . . behavior . . . . If we decide to fire this person, we have now set ourselves up for a reverse discrimination lawsuit.” (649 F.3d at 1193) – plaintiff was discharged – two basic contentions: (1) it was inappropriate to fire plaintiff because of concern about a reverse discrimination lawsuit; and (2) having tolerated the conduct before the protected activity, this creates an inference that the real reason was the protected activity – the HR report merely urged that the company enforce its workplace policies regardless of race – *Staub v. Proctor Hospital* (cat’s paw) is not helpful to plaintiff – while the HR rep intended discharge, her report simply does not exhibit hostility to plaintiff based on race – plaintiff argued that the employer had received numerous complaints against him for nearly seven years, yet had fired him on the basis of three complaints that occurred two months after he engaged in protected activity – “Mr. Crowe cites no legal authority in support of his argument that ADT’s prior leniency raises an inference of pretext . . . . Accepting Mr. Crowe’s argument would have the peculiar effect of penalizing employers which . . . attempt to rectify alleged inappropriate behavior instead of immediately terminating an employee upon the first transgression.” (*id.* at 1198) – “ADT’s prior leniency . . . , without more, does not constitute evidence from which a reasonable jury could conclude that firing Mr. Crowe based on his long history of alleged inappropriate behavior was pretextual.” (*id.*).

*EEOC v. Willamette Tree Wholesale, Inc.*, 111 FEP 1392 (D. Or. 2011) – Employer not entitled to summary judgment in case where claim is that a male employee was wrongfully discharged in retaliation for opposing sexual harassment of his sister – even if claimant had never affirmatively opposed the discriminatory behavior, his relationship to another claimant was sufficient under *Thompson v. North American Stainless*.

*Loudermilk v. Best Pallet Co.*, 636 F.3d 312, 111 FEP 865 (7th Cir. Feb. 18, 2011) – Black employee was fired on the spot after giving a supervisor a note complaining of racial discrimination – district court granted summary judgment asserting that temporal proximity is not enough, and the supervisor did not read the note – the day before, when the employee orally complained of discrimination, the supervisor told him to “put it in writing” – the Seventh Circuit commented “What did [he] think was in the note he received the next day? An invitation to a birthday party?” (636 F.3d at 314-15) – although temporal proximity is normally not enough to get by summary judgment, this

was “so close on the heels of a protected act that an inference of causation is sensible” (*id.*).

*Rivera-Colon v. Mills*, 635 F.3d 9, 111 FEP 737 (1st Cir. 2011) – Plaintiff anonymously complained about sexual harassment – summary judgment for employer – plaintiff failed to rebut employer’s evidence that decisionmakers who suspended her did not know she was the one who had complained.

*Young-Losee v. Graphic Packaging Int’l, Inc.*, 631 F.3d 909, 111 FEP 488 (8th Cir. 2011) – Plaintiff complained of sexual harassment and met with plant manager to discuss complaint – plant manager wadded up her complaint, threw it in the garbage can, told plaintiff it was “total bullshit,” told her “I want you out of here,” and stated he never wanted to see her again – HR got involved, and two days later told her she was not terminated and should return to work – plaintiff refused – the company treated her refusal as a voluntary resignation – trial court granted summary judgment for the employer – Eighth Circuit reversed – being fired for making a discrimination complaint even if rescinded might well dissuade a reasonable employee from making a complaint – therefore the *Burlington* standard was met – remanded for trial.

*Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 110 FEP 1353 (8th Cir. 2010) – Female charged male coworker with sexual harassment – investigation led to discovery that male coworker and plaintiff had both engaged in conduct that violated the company’s sexual harassment policy, and were both suspended – summary judgment on retaliation claim sustained – did not matter that company would not have conducted the investigation that resulted in her suspension but for her complaint – did not matter that there was conflicting evidence as to whether she violated the policy since company honestly believed that she had.

*Leitgen v. Franciscan Skemp Healthcare, Inc.*, 630 F.3d 668, 111 FEP 289 (7th Cir. 2011) – Summary judgment affirmed against female doctor who repeatedly complained about hospital policy of paying all doctors in the obstetrics department the same amount of money, where female doctors delivered more babies than male doctors – the Seventh Circuit agreed that she had engaged in protected activity, but affirmed summary judgment because she did not show a causal connection between her complaints and her discharge – she was discharged because of hostility toward the nursing staff and patients – even though there was temporal proximity between her latest complaint and her discharge, “suspicious timing alone is almost always insufficient to survive summary judgment” (630 F.3d at 675) – moreover, plaintiff had been complaining about the compensation system for years before she was fired, and had been put on notice of her interpersonal flaws – did not matter that hospital failed to follow its policy which favored but did not require written warnings.

*Tyler v. Univ. of Ark. Bd. of Trs.*, 628 F.3d 980, 111 FEP 161 (8th Cir. 2011) – Pre-selection of other candidate not evidence of retaliation – black assistant dean filed race charge three years before – despite lack of temporal proximity plaintiff argued that seven months before he had helped a black student file a race charge and was required to move his office – this did not “bridge the temporal gap” or show that the university “took escalating adverse and retaliatory action” (628 F.3d at 987) – the pre-selected applicant had just earned her master’s degree and had political connections – while evidence of pre-selection and setting job requirements to benefit the pre-selected applicant may in some cases discredit the defendant’s explanation, the university was entitled to modify the job description to fit this person’s qualifications – even if it pre-selected, “that ruse did not conceal retaliation” (*id.* at 988).

*El Sayed v. Hilton Hotels Corp.*, 627 F.3d 931, 110 FEP 1764 (2d Cir. 2010) – Muslim employee discharged three weeks after complaining that coworker referred to him as a “terrorist Muslim Taliban” – hotel’s nondiscriminatory reason was that it learned that the employee had misrepresented his prior employment history, grounds for discharge under its policies – temporal proximity is insufficient to establish retaliation by itself – summary judgment affirmed.

*Bonn v. City of Omaha*, 623 F.3d 587, 110 FEP 929 (8th Cir. 2010) – City auditor who did a study of police traffic stops and sent the study to a newspaper and criticized the city government was discharged – discharge not in violation of Title VII – could not have reasonably believed that what she was opposing was employment discrimination – claims of discrimination in traffic stops far removed from any relationship to employment – no First Amendment rights since it was her job to conduct the study.

*Goodman v. NSA, Inc.*, 621 F.3d 651, 110 FEP 134 (7th Cir. 2010) – Employee hired as security guard at Site No. 1 – asked for more favorable shift and was transferred to Site No. 2 – complained about perceived sex discrimination in pay – was scheduled to be transferred back to Site No. 1 and quit – “Her chief problem with this claim is factual; she was never reassigned.” (621 F.3d at 655) – she also admitted at deposition that she quit for reasons unrelated to the prospective transfer – “At best, she testified that she was worried that a shift change may be coming. It is well established that unfulfilled threats that result in no material harm cannot be considered an adverse employment action under Title VII.” (*id.* at 656) (citation, internal quotation marks and alteration omitted).

*Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 110 FEP 129 (7th Cir. 2010) – Plaintiff filed a charge against Dealership No. 1 alleging discrimination against white Christians in favor of Pakistani Muslims – new employer, Dealership No. 2, heard about it and threatened to fire him unless the complaint was withdrawn – he promptly quit, but Dealership No. 2 repeatedly asked him to return to work – district court found

retaliation – Seventh Circuit reversed, finding no actual or constructive discharge – there was no actual discharge despite the threat to do so – there was no constructive discharge because working conditions had not become intolerable and the employer continually asked him to return to work – working conditions are not intolerable merely because of the prospect of discharge – no reasonable employee under these facts would believe that if he had not resigned he would have been immediately fired – “To find that one singular threat, followed by multiple reassurances that the employee has retained his job, was a constructive discharge is to lower the threshold of the ‘intolerable’ workplace so far as to be unrecognizable.” (621 F.3d at 681).

*Hatmaker v. Mem’l Med. Ctr.*, 619 F.3d 741, 110 FEP 143 (7th Cir. 2010) – Plaintiff suggested her superior had difficulty working with women because he frequently referenced his two divorces and the fact that he does “not do women well” – the company decided to investigate – during investigation and afterwards plaintiff kept contending that her boss needed spiritual training, further insight, a spiritual director, that because he is a Southern Baptist and “good old boy” he puts down women – he needs therapy – she claimed not surprising that a rabbi and a priest had written rave reviews about him because both religions exclude women – she compared a decision he made to the bigoted comment made about the Rutgers women’s basketball team – employer gave her 30 days to express willingness to put her feelings about her boss behind her, and when she did not do so she was terminated – summary judgment affirmed – “[P]articipation [in an investigation] doesn’t insulate an employee from being discharged for conduct that, if it occurred outside an investigation, would warrant termination.” (619 F.3d at 745) – “This includes making frivolous accusations, or accusations grounded in prejudice. For it cannot be true that a plaintiff can file false charges, lie to an investigator, and possibly defame co-employees, without suffering repercussion simply because the investigation was about sexual harassment.” (*id.*) (citation and internal quotation marks omitted) – some courts disagree and think even defamatory and malicious accusations made in the course of an EEOC investigation cannot be a lawful ground for discipline – in any case, there was no EEOC charge – the Participation Clause is not applicable, and the Opposition Clause requires that the opposition be based on a good-faith and reasonable belief that there is a statutory violation, which is not the case.

*Fercello v. Cnty. of Ramsey*, 612 F.3d 1069, 109 FEP 1516 (8th Cir. 2010) – Employer discharged worker because she was argumentative and difficult to work with – makes no difference if she was productive and a hard worker since that does not render her discharge pretextual – hard-working employee can be argumentative and difficult – alleged acts of retaliation, reassigning parking place, less desirable office, exclusion from meetings are petty slights and not actionable in any case because they would not deter a reasonable employee from making a claim of harassment – alleged adverse actions where

there was a gap of several months following her sexual harassment claim are not causally related.

*Collazo v. Bristol-Myers Squibb Mfg.*, 617 F.3d 39, 109 FEP 1601 (1st Cir., 2010) – Non-verbal assistance to female employee pursuing sexual harassment claim may constitute protected opposition activity – verbal communication of opposition to harassment unnecessary – by repeatedly accompanying the sexual harassment complainant to HR to file and pursue her sexual harassment complaint, plaintiff effectively and purposely communicated his opposition.

*Morales-Vallellanes v. Potter*, 605 F.3d 27, 109 FEP 491 (1st Cir. 2010) – Plaintiff claimed retaliation because he was granted less favorable break times than co-workers and was temporarily assigned to post office window duty rather than his preferred backroom assignment – jury found for plaintiff and awarded \$500,000 in damages which trial judge reduced to \$364,000 – First Circuit said that even under the plaintiff-friendly standard in *Burlington Northern* plaintiff could not show that the employer’s conduct was so materially adverse that it would dissuade a reasonable employee from complaining about discrimination.

*Fincher v. Depository Trust & Clearing Corp.*, 604 F.3d 712, 109 FEP 467 (2d Cir. 2010) – African-American employee asserted race discrimination – employer decided not to investigate – she then claimed this was retaliation for making the complaint – case dismissed – no adverse action – “[A]n employer’s failure to investigate a complaint of discrimination cannot be considered an adverse employment action taken in retaliation for the filing of the same discrimination complaint.” (604 F.3d at 712) – she was not punished for making the complaint because her employment situation is the same as it would have been had she not brought the complaint – hostile work environment and constructive discharge claims based on the same inaction also dismissed.

*Roman v. Potter*, 604 F.3d 34, 109 FEP 228 (1st Cir. 2010) – In retaliation case alleging that the adverse action was a one-month delay in approving a paid leave, a mistake by the decisionmaker is a legitimate, nondiscriminatory reason – postmaster mistakenly believed that paper application was required.

*Burkhart v. Am. Railcar Indus., Inc.*, 603 F.3d 472, 109 FEP 478 (8th Cir. 2010) – Plaintiff was fired some months after her successful sexual harassment claim against her supervisor, who was disciplined – she was fired for inventory mistakes – she contended that because the company had not disciplined her for earlier mistakes, but then terminated her for an inventory mistake after she complained about sexual harassment, this created her prima facie case – the court found no causal connection as a matter of law: “The [August 2006] inventory mistake resulting in her termination was arguably [plaintiff’s]

worst and costliest error. That ARI forgave [plaintiff's] earlier errors does not prohibit it from terminating her when the mistakes continued and worsened. . . . [N]o reasonable fact finder could conclude that ARI's proffered reason for firing her was pretextual . . . ." (603 F.3d at 477-78).

*Smith v. Xerox Corp.*, 602 F.3d 320, 108 FEP 1422 (5th Cir. 2010) – Mixed-motive charge okay in Title VII retaliation case – Supreme Court decision in *Gross v. F.B.L. Financial Services, Inc.*, 106 FEP 833 (2009) (but for test, not mixed motive, in ADEA case) not applicable to Title VII retaliation case – split with Seventh Circuit – 2-1 decision – jury verdict for plaintiff affirmed on mixed-motive theory – no direct evidence required for mixed-motive theory – circumstantial evidence can be equally or more persuasive than direct evidence – dissent says language of ADEA and Title VII retaliation is identical.

*Johnson v. Weld Cnty.*, 594 F.3d 1202, 108 FEP 681 (10th Cir. 2010) – Affirming summary judgment – plaintiff claimed the county violated Title VII by retaliating against her for her internal complaints about alleged sex and disability bias – she alleged that, after her complaints, she got “the cold shoulder,” and that supervisors sat farther away from her at staff meetings, became too busy to answer her questions, and tried to avoid her – “these alleged snubs, though surely unpleasant and disturbing, are insufficient to support a claim of retaliation” (594 F.3d at 1216) – nor was it sufficient that she alleged that she was urged not to consult an attorney regarding alleged sex discrimination – “[M]erely suggesting on one occasion to an employee that she ‘not get the lawyers involved’ simply does not rise to the level of material adversity necessary to sustain a retaliation claim . . . ." (*id.* at 1216-17).

*Scruggs v. Garst Seed Co.*, 587 F.3d 832, 107 FEP 1449 (7th Cir. 2009) – No retaliation for filing EEOC charge when company eliminated plaintiff's position – the company made the decision to restructure and communicated the decision to employees before the charge was filed – second allegation was failure to rehire into an open position – no genuine issue of material fact to rebut the company's explanation that it selected a more qualified candidate.

*Barker v. Riverside Cnty. Office of Educ.*, 584 F.3d 821, 22 A.D. Cas. 35 (9th Cir. 2009) – Non-disabled teacher who contends she was retaliated against because of her advocacy on behalf of disabled students has standing to pursue retaliation claims under both Title 2 of the ADA and Section 4 of the Rehabilitation Act – Title 1 of the ADA (employment) is not the exclusive remedy because the teacher did not allege discharge because of her disability – opinion by Harry Pregerson.

*O'Neal v. City of Chicago*, 588 F.3d 406, 107 FEP 1350 (7th Cir. 2009) – Police officer filed lawsuit and retaliation grievance and claimed retaliation in two allegedly adverse transfers – only direct evidence pertained to her first transfer – lieutenant who recommended the transfer called her a “complainer” – this was insufficient as a matter of law to prove a causal connection between her lawsuit and her transfer under the direct evidence method of proof – under indirect method of proof she could not establish she was meeting the department’s legitimate expectations.

*Hunter v. Sec’y of U.S. Army*, 565 F.3d 986, 106 FEP 431 (6th Cir. 2009) – Summary judgment affirmed on two grounds – supervisors did not know of alleged EEO complaint and, further and separately, alleged adverse actions were merely petty slights and minor annoyances – work package held up for a week, moved to a new work unit, and required to leave a note whenever he left his work station.

*Lakeside-Scott v. Multnomah Cnty.*, 556 F.3d 797, 105 FEP 876 (9th Cir. 2009) – Biased supervisor played a role in bringing misconduct of plaintiff to company’s attention – decisionmaker, properly motivated, conducted a full investigation, and uninfluenced by the bias of the supervisor, made a proper discharge decision – a jury nevertheless awarded damages against the supervisor for the supervisor’s role in the process – the Ninth Circuit reversed, holding that since the supervisor’s bias played no role in the ultimate decision, the supervisor could not be held liable for damages – the Ninth Circuit framed the question as “Can a final decisionmaker’s wholly independent, legitimate decision to terminate an employee insulate from liability a lower-level supervisor involved in the process who had a retaliatory motive to have the employee fired?” (556 F.3d at 799) – the answer was in the affirmative – “[T]he initial report of possible employee misconduct came from a presumably biased supervisor, but whose subsequent involvement in the disciplinary process was so minimal as to negate any inference that the investigation and final termination decision were made other than independently and without bias.” (*id.* at 807) - the individual supervisor’s role in events leading up to the investigation is insufficient to support liability – the relevant question is whether the presumptively biased supervisor “improperly influenced the subsequent investigation or the decision to terminate” (*id.* at 808).

**Sexual and Other Forms of Harassment – Cases**  
**Interpreting *Faragher/Ellerth* (Ch. 19)**

*Crawford v. BNSF Ry. Co.*, 665 F.3d 978, 114 FEP 249 (8th Cir. 2012) – *Faragher/Ellerth* defense upheld – plaintiffs contended that employer’s weak response to prior harassment complaints showed that its policy was not effective – in response to prior complaints harasser had not been terminated but merely counseled and required to

attend a seminar on harassment – fact that employees would have liked harsher responses does not make the policy ineffective – employer’s business judgment is entitled to some deference with respect to how it handled complaints – once plaintiffs reported harassment employer moved promptly and took appropriate action – delay in reporting the harassment was not reasonable – fears of retaliation discounted because employer had anti-retaliation provision and harassment could have been reported on an anonymous hotline.

*Helm v. State of Kansas*, 656 F.3d 1277, 113 FEP 225 (10th Cir. 2011) – Summary judgment against plaintiff affirmed – *Faragher/Ellerth* affirmative defense applies – trial court judge is not the state’s alter ego for purposes of discrimination laws – plaintiff was terminated by state court chief judge after she was arrested for domestic violence and admitted to a felony – this does not constitute a tangible employment action that would prevent application of the *Faragher/Ellerth* defense – “[A] plaintiff cannot show that a supervisor’s harassment ‘culminated’ in a tangible employment merely by demonstrating that the tangible action followed the harassment.” (656 F.3d at 1287) – “Rather, the plaintiff must establish a strong causal connection between the supervisor’s harassment and the tangible employment action.” (*id.*) – plaintiff unreasonably delayed in taking advantage of the state’s policies against sexual harassment.

*Wilson v. Moulison N. Corp.*, 639 F.3d 1, 111 FEP 1451 (1st Cir. 2011) – CEO berated harassers after black employee complained of racial epithets and told them any further harassing incidents would result in their termination – harassment continued but plaintiff did not re-report it – “When coworkers . . . are responsible for the creation and perpetration of a hostile work environment . . . an employer can only be liable if the harassment is causally connected to some negligence on the employer’s part.” (639 F.3d at 7) (citation omitted; second alteration in original) – company’s response to the initial harassment was swift and appropriate and plaintiff’s failure to re-report the harassment doomed his hostile environment case.

*Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 108 FEP 769 (2d Cir. 2010) – Harassee complained only to manager who was harassing her – employer’s policy allowed harassment complaints to be brought to the attention of the employee’s supervisor, human resources, or any member of management – trial court found it unreasonable for employee not to go to other managers or HR – Second Circuit reversed: “We do not believe that the Supreme Court . . . intended that victims of sexual harassment, in order to preserve their rights, must go from manager to manager until they find someone who will address their complaints.” (596 F.3d at 104-05) – some evidence that pursuing other avenues of complaint would have been futile.

*Taylor v. Solis*, 571 F.3d 1313, 106 FEP 1121 (D.C. Cir. 2009) – Summary judgment affirmed - five-month delay in reporting sexual harassment to an EEO counselor was unreasonable as a matter of law – 2-1 decision – there was an investigation when she finally reported the harassment and the harassment did not recur – confiding to one of the managers that she was being harassed was no substitute for following the policy and reporting it to an EEO counselor – her explanation that “no one would believe her” was not an excuse for the delay – claims of retaliation after claiming harassment rejected because the actions were not materially adverse – the actions included criticizing her for negativity and not recommending her for a position that ultimately was not created, and lowering performance evaluations.

*Huston v. P&G Paper Prods. Corp.*, 568 F.3d 100, 106 FEP 746 (3d Cir. 2009) – Employer not liable for coworker harassment – two supervisors who were aware of the harassment were not “management level” employees whose knowledge could be imputed to the employer – knowledge of employees who merely have supervisory authority over performance of work is insufficient to attribute that knowledge to the employer – employer took prompt action as soon as plaintiff complained to higher-level managers.

*Pinkerton v. Colo. Dep’t of Transp.*, 563 F.3d 1052, 105 FEP 1765 (10th Cir. 2009) – Employee alleged that supervisor gave her poor performance evaluations because he was setting her up for an attempt to exact sexual favors – no evidence to support this theory even though she was sexually harassed – she was terminated after rejecting advances – no evidence supervisor’s reviews were biased or that such bias caused the decisionmaker to terminate her – failure to use employer’s grievance procedure barred sexual harassment claim because there was no tangible employment action tied to the harassment – harassment separate from termination – 2-1 decision.

*Monteagudo v. Asociacion de Empleados del Estado Libre Asociado*, 554 F.3d 164, 105 FEP 494 (1st Cir.), *cert. denied*, 130 S. Ct. 362 (2009) – Judgment as a matter of law following jury verdict for plaintiff properly denied under *Faragher/Ellerth* affirmative defense – jury could reasonably conclude failure to report harassment reasonable because plaintiff knew that harassing supervisor was “drinking buddy” of the director of HR and she had also been told that the harassing supervisor was a close friend of the executive director.

### **Sexual and Other Forms of Harassment - General (Ch. 19)**

*Cherry v. Shaw Coastal, Inc.*, \_\_\_ F.3d \_\_\_, 2012 WL 147867, 114 FEP 323 (5th Cir. Jan. 19, 2012) – Jury same-sex harassment verdict reinstated since conduct sexual in nature – male-on-male harassment – homosexuality of harasser established because of sexually explicit emails – egregious because many complaints over a two-month period

to management took place before HR was informed – HR’s conclusion that there was insufficient evidence of sexual harassment, totally contrary to the jury’s verdict, supported the jury’s conclusion that the employer did not take prompt remedial action.

*Vance v. Ball State Univ.*, 646 F.3d 461, 112 FEP 582 (7th Cir. 2011) – Summary judgment on hostile environment claim affirmed – coworker harassment included the use of racial epithets, references to the Ku Klux Klan, and threats of physical harm – every complaint was thoroughly investigated and coworkers were counseled and disciplined as warranted – there was thus no case for employer liability.

*Williams v. CSX Transp. Co.*, 643F.3d 502, 112 FEP 961 (6th Cir. 2011) – Judgment as a matter of law on racial harassment and racial hostile environment affirmed – no evidence that damage to her vehicle was based on race – since her job description included janitorial duties a reasonable jury could not conclude that assigning her to clean restrooms was racially related – racial comments not severe or pervasive enough – the overtly racist statements were isolated – all but two occurred over a two-day period while watching a political convention – comments included that she was a Democrat only because she was a black woman, that certain black leaders were “monkeys,” and that black people should go back to where they came from – these more closely resemble a “mere offensive utterance” rather than conduct that is “physically threatening or humiliating” – 2-1 decision.

*Ellis v. CCA of Tenn. LLC*, 650 F.3d 640, 112 FEP 791 (7th Cir. 2011) – Four African-American nurses were subjectively offended by a six-page excerpt from a book about management in a manager’s office that likens monkeys to workplace problems as in “there is a monkey on my back” – summary judgment affirmed – book was excerpted from “The One-Minute Manager Meets the Monkey” – plaintiffs’ case “founders on the objective component – that is, what a reasonable person would find offensive or hostile. The book is plainly directed at management concerns, and the metaphor employed by the book (monkeys represent workplace problems) is unlikely to cause confusion.” (650 F.3d at 647) – the management book is a spinoff of a classic article that was first published in the HARVARD BUSINESS REVIEW in 1974 entitled “Management Time: Who’s Got the Monkey?” – while analogizing employees to monkeys can well have racial overtones, the facts here simply do not in the words of the Eighth Circuit “suggest that a human being’s physical appearance is essentially a caricature of a jungle beast” (*id.* at 648) which would be “degrading and humiliating in the extreme” (*id.*) (citation omitted) – two other incidents fail the frequency and extremely serious test.

*EEOC v. Xerxes Corp.*, 639 F.3d 658, 112 FEP 109 (4th Cir. 2011) – Summary judgment affirmed on coworker harassment case brought by black employees with respect to harassment complaints received on or after February 3, 2006, the date the employer took

prompt appropriate steps reasonably calculated to stop the harassment – summary judgment reversed with respect to prior acts of harassment – factual issue whether the company was on notice of the alleged slurs and pranks constituting racial harassment – its actions after February 3 included suspending workers who used the slurs, retraining employees on anti-harassment policies, and warnings about the consequences shield the employer from further liability after that date – fact that harassment recurred after discipline does not create an inference that the employer’s response was unreasonable.

*Wilkie v. Dep’t of Health and Human Servs.*, 638 F.3d 944, 112 FEP 100 (8th Cir. 2011) – No continuing violation – older conduct constituted direct sexual advances by the acting CEO – this was substantially different in kind from acts of harassment allegedly directed toward her during the relevant time frame which did not involve personal sexual advances.

*Sutherland v. Wal-Mart Stores, Inc.*, 632 F.3d 990, 111 FEP 495 (7th Cir. 2011) – Employer not liable for sexual battery by coworker – plaintiff reported incident No. 1 and store conducted an immediate investigation – coworker admitted only to hugging her, putting his face against hers and giving her a gift but denied touching her inappropriately – employer decided on discipline one step short of termination and adjusted work schedules so that they only overlapped for 90 minutes each week and assigned them to work 80 feet apart – about a month after the incident the employee reported it to the local police – coworker failed a lie detector test and admitted sexual battery – coworker was immediately terminated – contention that employer knew or should have known coworker was dangerous rejected – employer knew of one prior incident some years earlier which may or may not have risen to the level of actionable harassment.

*Montgomery v. Am. Airlines, Inc.*, 626 F.3d 382, 110 FEP 1345 (7th Cir. 2010) – Coworker racial harassment – summary judgment affirmed – work environment was offensive, cause was race, and harassment was severe or pervasive but (1) no supervisor participated; and (2) no showing employer was negligent in not remedying the coworker harassment – complaints of general unfairness did not put the employer on notice – “Employers need not divine complaints from the ether, guessing at the subjective suspicions of employees,” (*id.* at 392).

*Smith v. Fairview Ridges Hosp.*, 625 F.3d 1076, 110 FEP 1025 (8th Cir. 2010) – Summary judgment in racial harassment case affirmed 2-1 – coworker harassment – numerous alleged incidents – only incidents that have a racial character or purpose can support the claim – non-racial comments such as a contention that a lunch of African nature smelled bad, that her acne did not show up because of her darker skin, questions about whether speaking Spanish meant she was Puerto Rico, and the like, “at most only

tenuously relate to race” – these comments were excluded – the totality of the remaining comments, which were racial and inappropriate, were simply not severe or frequent enough – these comments do “not satisfy the high threshold of actionable harm necessary to constitute a hostile work environment,” (*id.* at 1086) (internal quotation marks and citation omitted) – incidents were relatively infrequent, occurring over 12 months of active employment – so frequency is insufficient – the severity of the conduct does not rise to the requisite level – “Most of the events involved conduct that was not particularly severe, involved coworkers as opposed to [plaintiff’s] direct supervisors, and could only be considered non-actionable, mere offensive utterances.” (*id.*) (citation, internal quotation marks and alteration omitted) – nothing was physically threatening or intimidating.

*Smith v. Hy-Vee, Inc.*, 622 F.3d 904, 110 FEP 840 (8th Cir. 2010) – Coworker harassment – female-on-female – summary judgment affirmed – coworker engaged in the same conduct with both male and female employees - sex was not a contributing factor to the alleged harassment.

*EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991, 110 FEP 271 (9th Cir. 2010) – Summary judgment reversed on sexual harassment of male worker by female coworker – does not matter that other men welcomed the female coworker’s sexual advances – welcomeness is subjective – plaintiff had no prior romantic or sexual relationship with her and repeatedly told her he did not want such a relationship – female’s propositions were relentless in the face of clear rejection – she enlisted other employees to relay messages to him – other employees began ridiculing him for his failure to respond to her advances – this affected the quality of his work to the point where he was discharged – employer did nothing about the conduct despite multiple complaints.

*Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 109 FEP 1824 (9th Cir. 2010) – Male pilots discharged following sexual harassment complaints of female flight attendant – defensively they pointed out that some females had engaged in similar conduct – only male pilots discharged – no violation since not comparably situated – several instances of harassing conduct by pilots undisputed – it was the pilots’ conduct that gave rise to harassment complaint – pilots reported the flight attendants’ alleged misconduct defensively.

*Cross v. Prairie Meadows Racetrack & Casino, Inc.*, 615 F.3d 977, 109 FEP 1712 (8th Cir. 2010) – Summary judgment affirmed in coworker hostile environment case – “[T]he reported harassment was not so severe or pervasive that it met the high threshold for a hostile work environment.” (615 F.3d at 981) – she reported four discrete incidents over two years – coworker grabbed her hair and pulled her out of the valet shack, he brushed the back of his hand across her breast, that he responded in an angry and physically

threatening manner when she rebuffed his request that they be more than friends, and that he spread a rumor that she had performed oral sex on him – four incidents over two years is insufficient – even if it rose to the level of a hostile work environment the employer responded adequately by warning all employees not to engage in horseplay – unreported incidents were not so severe or pervasive that knowledge can be attributed to the company.

*Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 109 FEP 1190 (2d Cir. 2010) – Dismissal of hostile environment sexual harassment claim reversed – male boss told female subordinate he would “choke” and “kill” her – that he would “see her in a coffin” – such apparently gender-neutral statements should be evaluated in the context of other evidence indicating that the harasser had a sexual interest in the secretary.

*McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 109 FEP 782 (2d Cir. 2010) – Issue was whether time-barred acts of harassment were revived under *National R.R. Passenger Corp. v. Morgan* by “chickies” and “sleep over” remarks – employee had been harassed outside the 300 days in Department No. 1 – she was transferred to Department No. 2 where she heard a salesman refer to women as “chickies” and stating that he would not take a woman on a trip unless she agreed to “sleep over” – “Even if the chickies comments could be deemed unrefined or uncivil, Title VII simply ‘does not set forth a general civility code . . . .’” (609 F.3d at 76) (citation omitted) – the sleep over comment was insufficiently related to the time-barred harassment – it was made a year later by someone who worked in neither Department No. 1 nor Department No. 2.

*Beckford v. Dep’t of Corr.*, 605 F.3d 951, 109 FEP 360 (11th Cir. 2010) – Prison liable for harassment of female employees by inmates – case is no different than private employer with obligation to protect employees from harassment by customers or other third-party harassers – department failed to correct the harassing behavior even though reasonable options were available.

*Lockridge v. Univ. of Me. Sys.*, 597 F.3d 464, 108 FEP 1160 (1st Cir. 2010) – Time-barred acts of sexual harassment not resurrected by decisions within relevant time frame denying her a raise and better office space – neither decision qualified as an “anchoring act” with respect to harassment – to be an anchoring act the discriminatory act must be substantially similar to the earlier incidents – neither a denial of a pay increase nor an office assignment qualifies as an anchoring act – in any event, neither was discriminatory.

*Turner v. The Saloon, Ltd.*, 595 F.3d 679, 108 FEP 673 (7th Cir. 2010) – Only one act of harassment occurred within statute of limitations – a comment by the female harasser to the male harassee that she missed seeing him naked – but that was sufficient to bring into

play three earlier instances of sexual touching and punishment for refusing her advances – however, retaliation claim dismissed since no jury could find a causal connection given 10-month gap and string of discipline and no jury could find that plaintiff was meeting his employer’s legitimate expectations.

*Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798 (11th Cir. 2010) (en banc) – Summary judgment in a hostile work environment sexual harassment case reversed – although the conduct was not directed against plaintiff, in addition to the fact that profane language of a non-sexual nature permeated the workplace, there is also “ample evidence of gender-specific, derogatory comments made about women on account of their sex” (594 F.3d at 803) – offensive conduct was between men but overheard by necessity by the plaintiff – although not referring to plaintiff, her male coworkers referred to individual females in the workplace with extremely offensive terms, using the “b” word, the “f” word, and the “c” word – her coworkers tuned the radio to a crude morning show that had offensive language of a graphic nature – one coworker displayed a pornographic image of a fully naked woman on his screen saver – general vulgarity is not enough to violate Title VII – Title VII is not a civility code – sexual language in discussions that truly are indiscriminate do not establish sexual harassment – the issue is whether members of one sex are exposed to disadvantageous terms and conditions of employment – “Nevertheless, a member of a protected group cannot be forced to endure pervasive, derogatory conduct and references that are gender-specific in the workplace, just because the workplace may be otherwise rife with generally indiscriminate vulgar conduct. Title VII does not offer boorish employers a free pass to discriminate against their employees specifically on account of gender just because they have tolerated pervasive but indiscriminate profanity as well.” (*id.* at 810) – “Calling a female colleague a ‘bitch’ is firmly rooted in gender. It is humiliating and degrading based on sex.” (*id.*) – “A final principle that guides us . . . is that words and conduct that are sufficiently gender-specific and either severe or pervasive may state a claim of a hostile work environment, even if the words are not directed specifically at the plaintiff.” (*id.* at 811) – employer defense that the comments preceded plaintiff’s arrival rejected – “It is no answer to say that the workplace may have been vulgar and sexually degrading before [plaintiff] arrived.” (*id.* at 813).

*Alaniz v. Zamora-Quezada*, 591 F.3d 761, 108 FEP 24 (5th Cir. 2009) – Four employees who worked at a doctor’s office sued him for quid pro quo and hostile work environment sexual harassment – all four prevailed – doctor contended abuse of discretion by failing to order separate trials – doctor argued that for each plaintiff this allowed the jury to consider his “other bad acts” in violation of Federal Rule of Evidence 404(b) which prohibits other bad acts evidence “to show action and conformity therewith” – character evidence is admissible for other purposes to show intent, plan, motive, and absence of mistake – the plaintiffs thus portrayed the doctor as an intimidating boss with the

particular modus operandi in making sexual overtures to female subordinates – this evidence is admissible to demonstrate plan, motive, or absence of mistake – three verdicts upheld – one failed because of lack of evidence of a tangible employment action to support a quid pro quo claim.

*Duch v. Jakubek*, 588 F.3d 757, 107 FEP 1576 (2d Cir. 2009) – Responsibility for coworker sexual harassment may be imputed to the employer based on evidence that her supervisor had reason to suspect the harassment yet failed to take appropriate action – does not matter that supervisor was never told of and did not witness any harassment – jury could find that supervisor had constructive knowledge based upon awareness of the harasser’s past sexual misconduct toward other females and the plaintiff’s emotional response to the subject of working with him even though she refused to say what was the matter – investigation did not begin until three months after the supervisor should have known of the harassment – “[A] supervisor’s purposeful ignorance of the nature of the problem . . . will not shield an employer from liability under Title VII” (588 F.3d at 766).

*Alexander v. Opelika City Schs.*, 352 Fed. Appx. 390, 107 FEP 1356 (11th Cir. 2009) (unpublished) – Eight instances of African-American employee being called “boy” and noose comment not directed at him insufficient as a matter of law to establish severe or pervasive hostile environment harassment.

*Stewart v. Miss. Transp. Comm’n*, 586 F.3d 321, 107 FEP 911 (5th Cir. 2009) – Plaintiff reported supervisor’s harassment in 2004 – he was reprimanded and she reassigned – in 2006 she was again placed under his supervision – the reassignment was an intervening action which negated any continuing violation doctrine so the 2004 harassment would not be relied upon in 2006 – that conduct must itself be severe and pervasive – telling her they should be “sweet” and that he “loved her” was unwanted and offensive at most and not sufficiently severe – placing complainant on paid administrative leave for three weeks while the 2006 harassment was investigated was not an adverse employment action.

*Sutherland v. Mo. Dep’t of Corr.*, 580 F.3d 748, 107 FEP 269 (8th Cir. 2009) – Allegations by female corrections officer that a captain who was not currently supervising the plaintiff rubbed her arm and grabbed her breast on one occasion insufficient to support hostile environment claim where supervisor was disciplined and there was no further contact between them – lowering of performance rating after complaint of sexual harassment from “highly successful” to “successful” is not materially adverse since it had no effect on pay – summary judgment affirmed.

*Anderson v. Family Dollar Stores of Ark., Inc.*, 579 F.3d 858, 107 FEP 157 (8th Cir. 2009) – Alleged sexual harassment not severe or pervasive – district manager fired her as store manager after brief tenure in that position – the alleged conduct included rubbing

her shoulders or back, accusing her of not wanting to be “one of my girls,” calling her “baby doll,” and, during a business phone conversation when he was traveling out of state, suggesting that she should be there in bed with him having a cocktail, and insinuating she could go further in the company if she got along with him – this was simply not severe or pervasive enough – she also cannot show that she suffered an adverse employment action as a result of her refusal to submit to alleged demands for sexual favors – no evidence that her discharge related to his comment about being in bed with him, and their only contacts while she was a store manager were on her first and last day on the job and her telephone calls to him.

*Sandoval v. Am. Bldg. Maint. Indus. Inc.*, 578 F.3d 787, 107 FEP 38 (8th Cir. 2009) – Trial court erred in dismissing claim of sexual harassment on ground that company lacked notice of harassment of two female plaintiffs – it disregarded evidence of company-wide sexual harassment which by itself was sufficient to put the employer on notice – while a particular plaintiff cannot prevail based on harassment against others of which she was unaware, pervasive sexual harassment is sufficient to negate a company’s claim that it was not put on notice – case remanded.

*Neely v. McDonald’s Corp.*, 340 Fed. Appx. 83, 106 FEP 1845 (3d Cir. 2009) (unpublished) - Harassment was coworker harassment rather than supervisorial harassment, even though alleged harasser was “assistant manager” – he did not have authority to hire, fire, discipline, or schedule staff – employer launched immediate investigation without delay, issued written warning, and assistant manager shifts were rearranged – fact that this did not end his conduct does not mean efforts were inadequate – for coworker harassment must show negligence.

*Porter v. Erie Foods Int’l, Inc.*, 576 F.3d 629, 106 FEP 1806 (7th Cir. 2009) – Alleged harasser has duty to cooperate with employer during employer’s investigation – black employee complained about hanging of a noose – employer immediately investigated – alleged harasser refused to name the coworkers responsible because he did not want anyone fired – harasser expressly refused to disclose who had made the noose and who showed it to him – alleged harasser rejected offer of transfer to a different shift – after quitting employee named coworker who had made the noose and given it to him, and the coworker was fired – summary judgment for employer – Title VII is not a strict liability statute – for coworker harassment plaintiff must show employer was negligent – employer reasonably responded when put on notice – employee claims response was insufficient because the harassment continued – this is not the sole issue in determining whether employer response was effective – employee had duty to cooperate – Title VII borrows from tort law the avoidable consequences doctrine – if the victim could have avoided harm, there will be no liability – employee’s subjective fears of confrontation did not justify failure to cooperate – no reasonable trier of the fact could conclude that the

employer had been negligent in investigating or responding to the harassment complaint - constructive discharge claim also rejected.

*Sassaman v. Gamache*, 566 F.3d 307, 106 FEP 417 (2d Cir. 2009) – Female coworker accused plaintiff of harassing and stalking her after she allegedly declined to have sex with him – employer did not conduct investigation – employer told employee “I really don’t have any choice. [She] knows a lot of attorneys; I’m afraid she’ll sue me. And besides you probably did what she said you did because you’re male and nobody would believe you anyway.” (*id.* at 311) – the Second Circuit reversed summary judgment for the employer, finding that a reasonable jury could construe this as an invidious sex stereotype – “[F]ear of a lawsuit does not justify an employer’s reliance on sex stereotypes to resolve allegations of sexual harassment, discriminating against the accused employee in the process.” (*id.* at 313).

*McCullough v. Univ. of Ark. for Med. Scis.*, 559 F.3d 855, 105 FEP 1476 (8th Cir. 2009) – Two female employees filed sexual harassment charges against male employee – male denied allegations and filed sexual harassment charges against the two females – male was discharged – he alleged it was retaliation for filing charges – University alleged they discharged him because of the sexual harassment – clear that University had a reasonable belief that he had engaged in sexual harassment and thus his denials are not material – neither are his discrimination/retaliation claims even though discharge letter referenced filing untruthful charges.

*Paul v. Northrop Grumman Ship Sys.*, 309 Fed. Appx. 825, 105 FEP 1053 (5th Cir. 2009) (unpublished) – Single-incident sexual harassment claim dismissed since single incident not severe enough – supervisor brushed up against plaintiff’s chest, placed his hand on her stomach and ran his arm around her waist, and rubbed his pelvic region across her hips and buttocks – incident lasted about 90 seconds – one isolated incident of unwanted physical touching is not severe enough.

*Ladd v. Grand Trunk W. R.R., Inc.*, 552 F.3d 495, 105 FEP 373 (6th Cir. 2009) – Harassment allegations of black female railroad welder not severe enough to alter conditions of employment even though she alleges that she heard the words “lesbian,” “dyke,” and “gay” used generally, that there were many comments criticizing her for working because she is a woman, and that a certain foreman referred to her as a “black bitch” – even when considered together, they are insufficient – there was no touching – she testified to only one epithet being directed at her – she did not learn that the foreman had referred to her using racial terms until after her termination, and when she complained employer warned the employees not to repeat the conduct – retaliation claim rejected because thorough investigation substantiated false injury report – certainly railroad had an honest belief that she had filed a false injury report.

### **Discharge and Reduction in Force (Ch. 20)**

*Trierweiler v. Wells Fargo Bank*, 639 F.3d 456, 111 FEP 1768 (8th Cir. 2011) – Summary judgment affirmed - pregnant bank teller quit after being told further absences would be unacceptable and would result in discharge – “We have recognized that [constructive discharge] is a ‘substantial burden’ as the ‘bar is quite high’ in constructive discharge cases.” (639 F.3d at 460) – employee claimed the restrictions on future absences during her pregnancy were unreasonable – at most she has shown an unpleasant working environment but a claim of constructive discharge requires considerably more – even if the conditions were sufficiently intolerable she has to show that the employer intended to force her to quit or could have reasonably foreseen that she would do so – in fact the HR people tried to work with her – furthermore, there cannot be a constructive discharge if the employee quits without giving her employer a reasonable chance to work out a solution – she made no effort to speak to HR – she failed to show that a reasonable person would find her working conditions to be intolerable or that she provided her employer with a reasonable opportunity to remedy the situation.

*Geiger v. Tower Auto*, 579 F.3d 614, 107 FEP 285 (6th Cir. 2009) – Summary judgment affirmed in layoff case – employee had to meet heightened standard to establish a prima facie case because he was discharged in a reduction in force rather than replaced – not replaced since some of his duties were performed by the younger employee who was selected for the new position and some of his duties were absorbed by other employees – despite irregularities in selection process no prima facie case – individuals alleged to be biased played no part in the decisionmaking process – assuming, *arguendo*, a prima facie case, no evidence to rebut employer’s explanation that younger employee was selected because he was more qualified.

### **Employers (Ch. 21)**

*Bryson v. Middlefield Volunteer Fire Dep’t, Inc.*, 656 F.3d 348, 113 FEP 97 (6th Cir. 2011) – Female employee of fire department alleged sexual harassment by the fire chief – district court dismissed since volunteer firefighters could not be considered employees and 15-employee threshold therefore not met – Sixth Circuit 2-1 reverses – remuneration is not necessary to be an employee – “[T]he firefighter-members received workers’ compensation coverage, insurance coverage, gift cards, personal use of the Department’s facilities and assets, training, and access to an emergency fund. . . . Although remuneration is a factor to be considered, it must be weighed with all other incidents of the relationship.” (656 F.3d at 355) – dissent proposed two-step analysis applied by other circuits, analyzing first whether employee receives remuneration and then applying the common-law agency test.

*DeLia v. Verizon Commc'ns, Inc.*, 656 F.3d 1, 113 FEP 1 (1st Cir. 2011) – Sexual harassment discrimination case against Verizon dismissed since subsidiary of Verizon, and not Verizon, was the employer – congratulatory letter plaintiff received from Verizon for years of service and Verizon’s responsibility for administering benefit plans do not establish an employment relationship – her immediate employer was the subsidiary – common-law principles of agency define the employer according to the element of control, which was missing – parent’s code of conduct disclaims supervision of subsidiary’s employees.

#### **Charging Parties and Plaintiffs (Ch. 24)**

*Rabé v. United Air Lines, Inc.*, 636 F.3d 866, 111 FEP 1094 (7th Cir. 2011) – French flight attendant not covered by Title VII and ADEA because she worked on flights that traveled outside the United States – however, because her contract stated that her employment would “‘governed exclusively by applicable United States law’” (636 F.3d at 868) – she had a contractual right not to be discriminated against in violation of Title VII or the ADEA.

*Murray v. Principal Fin. Grp., Inc.*, 613 F.3d 943, 109 FEP 1524 (9th Cir. 2010) – Summary judgment affirmed – insurance company career agents were independent contractors and not employees – Ninth Circuit applied the common law agency formulations – agent was free to decide when and where she worked, kept her own office, scheduled her own leave, did not get vacation or sick days, was paid on commission alone, and reported herself as self-employed to the IRS.

*Ernster v. Luxco, Inc.*, 596 F.3d 1000, 108 FEP 916 (8th Cir. 2010) – Marketing representative not employee but independent contractor – trial court properly used common law test and considered 16 different factors.

*Kirleis v. Dickie, McCamey & Chilcote, PC*, 107 FEP 1121 (W.D. Pa. 2009), *aff’d*, 109 FEP 1428 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 925 (2011) – Law firm equity shareholder/director was employer and not employee under Title VII and Equal Pay Act – court conducted six-factor analysis set forth in *Clackamas Gastroenterology Associates v. Wells*, 538 U.S. 440 (2003) – plaintiff bears burden of proof that she was a statutory employee and not employer – six *Clackamas* factors are not exhaustive – plaintiff at firm for over 20 years – 10 years as an associate, three years as Class B shareholder, and nine years as Class A shareholder/director – bylaws provided plaintiff with car allowance, annual trip to legal seminar, reimbursement of 70% of country club dues, and life insurance policy – board of directors on which plaintiff sat under the bylaws effectively ran the firm - plaintiff contended that the bylaws were not followed in fact, that she had not received a copy, and that in practice the firm is run by a small group

of senior partners – firm had between 61 and 69 Class A shareholders during relevant time frame, and plaintiff contended she had no real opportunity to effect decisions – directors including plaintiff voted on all major decisions – lower-level attorneys did not – whether the organization can fire the plaintiff weighs in favor of the firm – plaintiff could be terminated for cause only by a vote of three-fourths of the board of directors – “This factor weighs *heavily* in defendant’s favor . . .” (107 FEP at 1134-35) (emphasis in original) – directors including plaintiff have access to a great deal of financial information that lower-level attorneys do not have – the one exception is access to compensation of individual shareholders – plaintiff sees the withholding of that information as indicating a lack of independence – the court does not agree – since three-fourths of the directors can amend the bylaws, confidentiality of compensation was the choice of the directors – who “reports” to whom at the firm is not a simple question – plaintiff has far more independence than associate attorneys – plaintiff devoted 90% of her time to one large firm client, and was closely supervised with respect to that work – the same rules applied to every attorney handling cases for that client – plaintiff had almost complete autonomy with regard to her own clients – she can turn down assignments unlike associates – she set her own hours and work schedule – associates did not have the same flexibility – with respect to hiring non-lawyer employees, her authority was no different from any other director – plaintiff was able to influence the organization because she had a vote – she was eligible to be elected to the executive committee – generally deferring to the recommendations of the executive committee does not establish that all other directors are employees – plaintiff was an equity owner – finding that plaintiff has substantial influence, even though less than members of the executive committee, which supports a finding that she is an employer – on compensation, when profits go up, shareholders make more money – all shareholders make a contribution toward liability – the *Clackamas* monetary factor weighs heavily in favor of the firm – summary judgment granted to the firm.

*Kirleis v. Dickie, McCamey & Chilcote*, 109 FEP 1428 (3d Cir. 2010) (nonprecedential unpublished), *cert. denied*, 131 S. Ct. 925 (2011) – Affirming decision reported at 107 FEP 1121, Third Circuit finds that shareholder in law firm is employer and not employee – summary judgment reviewed *de novo* – plaintiff has been a Class A shareholder for the last eight years – she alleged equal pay violations – to determine whether a shareholder/director of a professional corporation is an employer or an employee we look to six *Clackamas* factors: (1) right to hire or fire; (2) supervision of the individual’s work; (3) reporting to someone higher in the organization; (4) ability of the individual to influence the organization; (5) the parties’ intention; and (6) share in profits – touchstone is control – employee claims her purported position was a mere rubber stamp and that executive committee, not board of directors, makes all important decisions and sometimes forces shareholders to resign – her work for the firm’s largest client is closely supervised – she is not employee because she had the ability to

participate in the firm's governance, she has right not to be terminated without a three-quarters vote of the board of directors for cause, and she shared profits and losses – for these and all the other reasons set forth in the district court's thorough opinion, Kerleis is an employer as a matter of law and is precluded from suing under the employment discrimination laws.

### **EEOC Administrative Process (Ch. 25)**

*EEOC v. Loyola Univ. Med. Ctr.*, \_\_\_ F. Supp. 2d \_\_\_, 25 A.D. Cas. 481 (N.D. Ill. 2011) – District court refused to enforce EEOC subpoena of medical information on all hospital employees – does not matter that hospital failed to file petition to revoke under applicable regulations – sensitivity of information sought and lack of relevance to the single charge determinative.

*Blakly v. Schlumberger Tech. Corp.*, 648 F.3d 921, 113 FEP 14 (8th Cir. 2011) – Gender and disability discrimination claims under Title VII properly dismissed because plaintiff did not check either the box for “sex” or “disability” discrimination – “As a result, she has waived any challenge on this basis.” (648 F.3d at 931).

*EEOC v. Schwan's Home Serv.*, 644 F.3d 742, 112 FEP 1227 (8th Cir. 2011) – Nationwide EEOC subpoena seeking gender data upheld on single charge of female not offered manager position – does not matter that there was no systemic gender discrimination charge.

*EEOC v. Konica Minolta Bus. Solutions U.S.A., Inc.*, 639 F.3d 366, 112 FEP 97 (7th Cir. 2011) – EEOC could subpoena company's records concerning hiring throughout the Chicago metropolitan area even though the charge before the Commission concerned the discipline and termination of one employee at one facility – Supreme Court has set a “generous standard of relevance” so hiring data could be relevant to the discharge allegation.

*EEOC v. Philip Servs. Corp.*, 635 F.3d 164, 111 FEP 1189 (5th Cir. 2011) – Title VII's confidentiality provision – “Nothing said or done” during conciliation “may be made public by the Commission . . . or used as evidence . . .” (635 F.3d at 166) bars the EEOC from filing suit to enforce an oral agreement reached during conciliation.

*EEOC v. Kronos Inc.*, 620 F.3d 287 (3d Cir. 2010) – Hearing- and speech-impaired charging party applied for work as a cashier, bagger, and stocker – she was rejected and claimed disability discrimination – Kroger utilizes a customer service assessment created by Kronos as part of its hiring process – Kronos claims applicants who perform well on the assessment are more likely to be cheerful, polite and friendly – charging party

received a low score – EEOC issued a third-party subpoena to Kronos which sought extensive materials nationwide and later expanded to include race – district court substantially limited the subpoena – court of appeal ruled as follows: The district court abused its discretion in limiting the subpoena to the positions applied for, limiting the subpoena to the State of West Virginia where the incident occurred (“An employer’s nationwide use of a practice under investigation supports a subpoena for nationwide data on that practice.”) (620 F.3d at 298); abused its discretion in narrowing the temporal scope of the subpoena to an 18-month period; and abused its discretion in limiting the EEOC subpoena only to materials held by Kronos that related to Kroger (non-Kroger materials “may aid the EEOC in understanding the Assessment’s potential for disparate impact on the disabled.” (*id.* at 300) – irrelevant that charging party did not allege adverse impact since it is up to the EEOC to decide upon legal theories – court of appeal affirmed district court’s refusal to enforce subpoena with respect to race discrimination – “EEOC’s subpoena for materials related to race constitutes an impermissible ‘fishing expedition.’” (*id.* at 301) – “We acknowledge that the EEOC’s investigatory powers are expansive; however, the EEOC is still not permitted to ‘wander . . . into wholly unrelated areas.’” (*id.* at 302) (citation omitted) – Third Circuit vacated and remanded confidentiality order requiring EEOC to return confidential material within 10 days after conclusion of investigation and to destroy all notes and memoranda – “Courts must exercise caution when issuing confidentiality orders so as not to demand that the [EEOC] destroy government documents, including notes and memoranda, in conflict with the EEOC’s duty to obey the requirements of the [Federal Records Disposal Act].” (*id.* at 304) – noteworthy that at the court of appeal level the EEOC withdrew the request for enforcement of the provision of the subpoena that would have required production of all of the actual assessments, as opposed to the assessment materials and validity studies.

*EEOC v. United Parcel Serv., Inc.*, 587 F.3d 136, 107 FEP 1345 (2d Cir. 2009) – Nationwide EEOC subpoena requiring information at every location on religious exemptions to uniform and personal appearance guidelines upheld – charge was filed by only two employees, one in New York and one in Texas – employer’s guidelines apply throughout the country – arguments on the merits do not prevent the EEOC from investigating charges which includes the right to issue subpoenas – EEOC need not establish probable cause or a prima facie case at the investigatory stage.

*EEOC v. ABM Indus, Inc.*, 261 F.R.D. 503, 107 FEP 1091 (E.D. Cal. 2009) – EEOC must provide employer with requested discovery consisting of responses to questionnaire survey sent by EEOC to about 4,000 employees – no evidence survey responders sought to become EEOC clients – questionnaire did not invite attorney-client relationship – questionnaire responses not protected by work product doctrine either – EEOC did not contend that form of questionnaire was protected by work product doctrine – responses

are essentially verbatim witness statements made by third parties and not protected by work product doctrine.

*Teal v. Potter*, 559 F.3d 687, 21 A.D. Cases 1153 (7th Cir. 2009) – Employee discharged for striking her supervisor’s hand – filed charge alleging disability discrimination and termination – arbitrator reinstated her with the condition that she had to submit to a fitness-for-duty examination – she did not submit to the examination – she was discharged a second time – the only charge filed pertained to the initial discharge – failure to exhaust administrative processes bars claim of discharge for failing to submit to fitness-for-duty examination – even though original charge alleged termination based on disability, it was based on the striking the supervisor’s hand incident rather than the basis for the later discharge – separate charge had to be filed since discharge claim based on striking supervisor’s hand is not like or related to discharge based on failure to submit to fitness-for-duty examination.

*EEOC v. Fed. Express Corp.*, 558 F.3d 842, 105 FEP 1112 (9th Cir. 2009) – Prior opinion reported at 543 F.3d 531 withdrawn and replaced by amended opinion – EEOC retains right to issue and enforce administrative subpoena even after it issues a right to sue notice to a private party and the private party has instituted private litigation – Ninth Circuit rejects the view of the Fifth Circuit to the contrary in *EEOC v. Hearst Corp.*, 103 F.3d 462 (5th Cir. 1997) – need not decide whether EEOC has authority to bring a lawsuit after charging party has done so.

*EEOC v. Watkins Motor Lines, Inc.*, 553 F.3d 593, 105 FEP 364 (7th Cir. 2009) – Federal district court refused to enforce EEOC subpoena on the ground that it lacked jurisdiction since the EEOC had unreasonably refused to allow the charging party to withdraw his charge so that he could settle with the employer – district courts can adjudicate subpoena enforcement actions regardless of the current existence of a valid charge – the EEOC had the right to enforce the subpoena because the charge was valid when filed – the EEOC need not allow withdrawal of the charge when in its judgment the settlement would injure others – the EEOC treatment of the no-withdrawal decision as a Commissioner’s charge was appropriate – subpoena enforced.

### **Timeliness – Continuing Violation (Ch. 26)**

*AT&T Corp. v. Hulteen*, 556 U.S. 701, 106 FEP 289 (2009) – *Lilly Ledbetter Fair Pay Act* interpreted – prior to 1979, when the Pregnancy Discrimination Act (PDA) became effective, the employer did not provide full credit for leaves of absence caused by pregnancy for the purpose of calculating pension benefits – Ninth Circuit en banc found a violation – Supreme Court 7-2 reversed – *Ledbetter Act* does not affect a bona fide seniority system that was legal at the time – it imposes no duty to correct sex-based

disparities and benefits where the disparity was not based on illegal conduct – retiring female employees who had taken pregnancy leaves received lower pensions than similarly situated male employees who had not done so – the key difference from *Ledbetter* and the *Ledbetter* statute is that during the time the pregnancy differential was in effect it was lawful – Ginsburg and Breyer dissented.

*Jenkins v. Mabus*, 646 F.3d 1023, 112 FEP 1454 (8th Cir. 2011) – No continuing violation in sexual harassment case where only contact within limitations period was insults, slights and affronts that were not similar in nature, frequency and severity to be allegations of sexual advances.

*Tomlinson v. El Paso Corp.*, 2009 U.S. Dist. LEXIS 77341, 107 FEP 194 (D. Colo. Aug. 28, 2009) – *Lilly Ledbetter* Fair Pay Act of 2009 requires reconsideration of order granting summary judgment to employer on claim that conversion of defined benefit pension plan to cash balance formula violates the ADEA – court’s order was based on a finding that the employees failed to timely file EEOC charge within 300 days after the plan was amended – but the Act covers “wages, benefits, or other compensation” which includes employer contributions to plan during the 300-day period – court felt torn between Act’s declaration that it was not intended to work any change in existing law “when pension benefits are considered paid” and the express provision renewing the limitations period “each time wages, benefits, or other compensation is paid” – court distinguished between cases involving “the payment of retirement benefits” where the Act does not apply and cases like this one which concern “the rate of accrual of benefits” – if the charge is filed during the period when benefits are still accruing (presumably while plaintiff is still employed) a charge will be timely even if the accrual formula was changed long ago – court required briefing on the merits of the conversion allegations.

*Hutson v. Wells Dairy Inc.*, 578 F.3d 823, 107 FEP 50 (8th Cir. 2009) – Employee was notified of discharge but allowed to work for three more days – her charge was filed on the 303rd day after notification but on the 300th day after discharge – not timely – discharge is a discrete act, not a continuing violation.

*Jackson v. City of Chi.*, 552 F.3d 619, 105 FEP 257 (7th Cir. 2009) – Denials of training opportunities that occurred more than 300 days before EEOC charge filed cannot be considered as part of discriminatory promotion claim – they were discrete acts.

**Timeliness – General Issues (Ch. 26)**

*Lewis v. City of Chi.*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 2191, 109 FEP 449 (2010) – City in 1995 gave a written examination to applicants seeking firefighter positions – in January 1996 the City announced that those scoring below 89 out of 100 points were not likely to be considered – no charge was filed within 300 days of this announcement – the first class of applicants was selected in May of 1996 – no charge was filed within 300 days of the first class of applicants being selected – the process was repeated nine more times over the next six years – the first charge was filed in March of 1997, within 300 days of the selection of the second class – the 89-point cutoff had a severe disparate impact against African Americans – after a trial, the City’s business necessity defense was rejected – the Seventh Circuit reversed on the ground that the unlawful employment practice occurred no later than the announcement of the results – the statute on its face in adding adverse impact “says that a claim ‘is established’ if an employer ‘uses’ an ‘employment practice’ that ‘causes a disparate impact’ on one of the enumerated bases,” (130 S. Ct. at 2198) – thus, since the City used a practice that caused the disparate impact, the charge was timely – disparate treatment claims are different – there the plaintiff must demonstrate deliberate discrimination within the limitations period – cases such as *Evans*, *Lorange*, *Ricks*, and *Chardon*, while they describe the harm which the unsuccessful plaintiffs suffered as the present effects of past discrimination, really dealt with disparate treatment and their reasoning has no application to a disparate impact case – “Under the City’s reading, if an employer adopts an unlawful practice and no timely charge is brought, it can continue using the practice indefinitely, with impunity, despite ongoing disparate impact.” (*id.* at 2200) – this is not the law – “Congress allowed claims to be brought against an employer who uses a practice that causes disparate impact, whatever the employer’s motives and whether or not he has employed the same practice in the past.” (*id.* at 2192) – with respect to the City’s arguments that it will be difficult to prove business necessity long after a selection device was initially implemented, “[i]f that effect was unintended, it is a problem for Congress, not one that federal courts can fix.” (*id.* at 2200) – unanimous decision.

*Tiberio v. Allergy Asthma Immunology of Rochester*, 664 F.3d 35, 25 A.D. Cas. 929 (2d Cir. 2011) – Suit filed 92 days after plaintiff received right-to-sue notice, but 90 days after the right-to-sue notice reached her attorney – time for filing runs from earliest receipt of EEOC notice.

*Almond v. Unified Sch. Dist. #501*, 665 F.3d 1174, 113 FEP 1473 (10th Cir. 2011) – *Ledbetter* Act does not apply to demotions – statute of limitations ran from date demotions were announced, not from when they became effective – does not matter that school district employer told them demotions would take effect only if its financial

prospects did not improve – fact that a challenged employment decision is subject to later review does not stop the clock from running.

*Phillips v. Leggett & Platt, Inc.*, 658 F.3d 452, 113 FEP 490 (5th Cir. 2011) – 2-1 decision finding no equitable tolling of 180-day statute of limitations to file an EEOC charge – time period began to run on the day plaintiff notified she would be laid off – jury award of damages reversed – four days after layoff was rehired for temporary position that had no end date – temporary position ended within days after 180-day time limit expired – majority acknowledged employee was in a predicament because she was hoping that temporary job would become permanent and feared that filing a charge while occupying that job would prejudice her chances – plaintiff “either had to file allegations of discrimination against her employer or forfeit them at a time when she might still have clung to a hope of gaining permanent employment. That hope, however, is not enough to delay the start of the ADEA limitations period.” (658 F.3d at 456-47) – employee would have a claim for retaliation if temporary job was terminated because she filed the charge.

*McClelland v. Deluxe Fin. Servs. Inc.*, 2011 WL 3100341, 112 FEP 1467 (10th Cir. July 26, 2011) – Amended complaint did not relate back for statute of limitations purposes to original complaint – amended complaint asserted class claims and new allegations that management instigated discrimination on a widespread basis – amended complaint with class claims barred by statute of limitations.

*DeTata v. Rollprint Packaging Prods., Inc.*, 632 F.3d 962, 111 FEP 295 (7th Cir. 2011) – Actual receipt of right to sue letter, and not much earlier EEOC verbal notification it had been issued, starts 90-day clock – EEOC sent letter to person believed to be her attorney, it was returned as undeliverable, and a month and a half went by before the EEOC was able to locate her file and send the letter – unlike cases from other circuits where the charging party failed to update mailing address or to follow her case diligently, the charging party in this case was diligent and did nothing wrong – the EEOC simply mishandled her case.

*Noel v. Boeing Co.*, 622 F.3d 266, 110 FEP 609 (3d Cir. 2010) – *Lilly Ledbetter* Fair Pay Act does not apply to failure-to-promote claims where charge was filed more than 300 days after the promotion decision – fact that white coworkers who were promoted received more pay than he did does not transform a failure-to-promote claim into a compensation claim – failure to promote is not a “discriminatory compensation decision or other practice” because the other practice must relate to a pay disparity – if Congress had intended to cover employment discrimination claims apart from pay discrimination it would have done so explicitly.

*Burkhart v. Am. Railcar Indus., Inc.*, 603 F.3d 472, 109 FEP 378 (8th Cir. 2010) – Continuing violations doctrine not applicable to save untimely sexual harassment claims – only conduct within time limits were allegations of shunning by co-workers and being discharged – this is not about continuing sexual harassment.

*Schuler v. PricewaterhouseCoopers LLP*, 595 F.3d 370, 108 FEP 795 (D.C. Cir. 2010) – *Ledbetter* law does not apply to make ADEA promotion claim timely – *Ledbetter* law affects “discriminatory compensation decision” or “other practice” – the legislative history makes it clear that the other practice is a practice related to compensation such as a discriminatory evaluation which leads to a lower pay rate – “In context, therefore, we do not understand ‘compensation decision or other practice’ to refer to the decision to promote one employee but not another to a more remunerative position,” (595 F.3d at 375 - Congress’s intent in the *Ledbetter* law was to overrule the Supreme Court decision and the subject of that decision was pay – the *Ledbetter* law is directed at the specific type of discrimination involved in the Supreme Court case.

*Ikossi-Anastasiou v. Bd. of Supervisors of La. State Univ.*, 579 F.3d 546, 106 FEP 1815 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1285 (2010) – Statute of limitations for terminated professor began to run when she received letter from University denying her request for additional unpaid leave and requiring her to report to work, and not from time when she received University’s letter discharging her for job abandonment for not returning within the specified time – any discriminatory act was communicated in the first letter.

*Jones v. Bernanke*, 557 F.3d 670, 105 FEP 1241 (D.C. Cir. 2009) – Retaliation claim timely filed – employee could not litigate gender and age discrimination claims which were not timely filed since they did not relate back – those claims were filed outside the limitations period – the discrimination and retaliation claims were not based on the same incident and the original complaint contained no mention of an alleged non-promotion.

*Abraham v. Woods Hole Oceanographic Inst.*, 553 F.3d 114, 105 FEP 367 (1st Cir. 2009) – Court complaint filed more than a year after EEOC mailed initial notice of dismissal of charge – mailed to former address of charging party – he never filed change of address with EEOC – no basis for tolling statute.

*Lukovsky v. City & Cnty. of S.F.*, 535 F.3d 1044, 103 FEP 1673 (9th Cir.), *cert. denied*, *Zolotarev v. City & Cnty. of S.F.*, 129 S. Ct. 1997 (2009) – Statute of limitations for purposes of failure-to-hire discrimination claim begins to run when City notified plaintiffs they would not be hired, rather than the date when they learned of City’s alleged discriminatory intent in giving preferential hiring treatment to others – statute of limitations runs from date of actual injury, not when plaintiff suspects legal wrong – no

basis for equitable estoppel based on contention that City alleged it was hiring the most qualified where the alleged fraud is not above and beyond the wrongdoing upon which the claim is filed.

### **Jurisprudential Bars to Action (Ch. 27)**

*Slater v. Energy Servs. Group Int'l*, 634 F.3d 1326, 111 FEP 1185 (11th Cir. 2011) – Florida district court properly dismissed discrimination case based on forum-selection clause that required all claims related to employment be brought in Richmond, Virginia – employee hired in Virginia but shortly thereafter reassigned to work at a plant in Florida.

*White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 109 FEP 1731 (6th Cir. 2010) – Summary judgment for employer upon sexual harassment claim affirmed based on judicial estoppel – plaintiff omitted the claim from her initial Chapter 13 bankruptcy filing.

*Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 109 FEP 641 (D.C. Cir. 2010) – Plaintiff barred by judicial estoppel because he did not mention lawsuit in Chapter 7 bankruptcy petition – plaintiff then amended bankruptcy filing to reflect the lawsuit – bankruptcy trustee attempted to settle the case but was unsuccessful and abandoned it – that gave plaintiff standing to appeal the summary judgment based on judicial estoppel – however, judicial estoppel affirmed – “Even after he had filed for bankruptcy, Moses continued to hold himself out before the District Court as a valid plaintiff, a position which was ‘clearly inconsistent’ with his pursuit of relief in bankruptcy. \* \* \* In other words, had he prevailed in his lawsuit against Howard, he would have kept any damages for solely himself, to the detriment of his creditors.” (606 F.3d at 792, 799).

*Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 108 FEP 804 (11th Cir. 2010) – Failure to disclose claim in preexisting pending bankruptcy proceeding judicially estops plaintiff from proceeding after discharge from bankruptcy.

*Rederford v. US Airways, Inc.*, 589 F.3d 30, 22 A.D. Cas. 1167 (1st Cir. 2009) – Bankruptcy discharge eliminated ADA claim – this included equitable remedy of reinstatement because front pay can be ordered as an alternative to reinstatement.

*Hankins v. NY Annual Conference of United Methodist Church*, 107 FEP 776 (2d Cir. 2009) (unpublished), *amended and superseded by* 351 Fed. Appx. 489 (2d Cir. 2009) – Ministerial exception to ADEA requires dismissal of church pastor’s challenge to mandatory age 70 retirement – ministerial exception is constitutionally based and cannot be displaced by legislation.

*State of Alaska v. EEOC*, 564 F.3d 1062, 106 FEP 97 (9th Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 1054 (2010) – Eleventh Amendment does not bar Title VII claims asserted through the EEOC against the State of Alaska by two high-level employees of the Governor’s office – Government Employee Rights Act amended Title VII to extend its protections to such employees – this validly abrogated state sovereign immunity pursuant to the Fourteenth Amendment – underlying complaints alleged pay discrimination on the basis of race and sex, sexual harassment, and retaliation for complaining about the alleged discrimination.

*Tice v. Bristol-Myers Squibb Co.*, 325 Fed. Appx. 114, 105 FEP 1777 (3d Cir. 2009) (unpublished) – Title VII and ADEA action barred by collateral estoppel – relevant issues were decided against plaintiff by Department of Labor Administrative Law Judge in whistleblower action that she filed under *Sarbanes-Oxley* – issue was the same – whether stated reason for her termination, falsified sales call reports, was pretextual.

### **Title VII Litigation Procedure (Ch. 28)**

*Martin v. Atlanti-Care*, \_\_\_ F. Supp. 2d \_\_\_, 2011 U.S. Dist. LEXIS 122987, 113 FEP 1228 (D. N.J. Oct. 25, 2011) – Plaintiff’s law firm disqualified – law firm employed lawyer who formerly worked for defendant’s law firm and worked on this very case – even though no allegation that she worked on the instant action while employed by plaintiff’s firm, her disqualification is imputed to the entire firm.

*Mohawk Indus., Inc. v. Carpenter*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 599 (2009) – There is no right to an immediate appeal of a ruling adverse to the attorney-client privilege – outside counsel interviewed a company supervisor just before his discharge – the attorney then advised the company with respect to the discharge - the attorney-client privilege was held waived for all conversations, including advice – the appeals court rejected Mohawk’s interlocutory appeal and the Supreme Court affirmed – the plaintiff alleged that after he spoke to the company lawyer he was fired for refusing to recant his accusation that the company was employing illegal workers.

*Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009) – Applying the rule of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), Supreme Court held that a lawsuit against former Attorney General by individual imprisoned after September 11 attack must be dismissed for lack of sufficient factual matter – to have facial plausibility a claim must plead factual content that allows a court to draw the reasonable inference that the defendant is liable – the principle that a court must accept a complaint’s allegations as true is inapplicable to threadbare recitals of a cause of action’s elements supported by mere conclusory statements – in determining whether a complaint states a plausible claim the reviewing court must draw on its experience and common sense and consider the

context of the claim – a motion to dismiss may begin by identifying allegations that because they are mere conclusions they are not entitled to the assumption of truth – only well-pleaded factual allegations warrant an assumption of veracity – argument that *Twombly* case is limited to antitrust context rejected – *Twombly* applies to antitrust and discrimination suits alike – a complaint that is defectively pleaded does not entitle the plaintiff to discovery.

*Jackson v. United Parcel Service, Inc.*, 643 F.3d 1081, 112 FEP 1094 (8th Cir. 2011) – African-American female filed charge alleging discrimination when a named white female was promoted to a manager’s position rather than the charging party – summary judgment granted with respect to allegations of discrimination pertaining to other, later promotions – cannot construe her complaint under a continuing violation theory that applies to all future promotions.

*Czarniecki v. City of Chi.*, 633 F.3d 545, 111 FEP 490 (7th Cir. 2011) – Summary judgment - national origin claim under § 1983 given res judicata effect under Title VII despite allegations that burden of proof was different – core operative facts the same.

*Coleman v. Md. Court of Appeals*, 626 F.3d 187, 110 FEP 1217 (4th Cir. 2010) – Complaint dismissed at pleading stage under *Iqbal/Twombly* pleading standards requiring “plausible claim for relief” that is “above the speculative level” – director of procurement terminated for steering contracts to vendors in which he had an interest – complaint alleged that white coworker had outside business involvements and was not disciplined – but complaint failed to identify why the coworker’s conduct was improper or that it was comparable to the plaintiff’s alleged conduct.

*Alexander v. CareSource*, 576 F.3d 551, 106 FEP 1710 (6th Cir. 2009) – Federal district court properly granted motion to strike cause determination by state agency – circumstances indicate lack of trustworthiness – there was no hearing before the state made its cause determination – the investigation lingered for over a year before the report was completed – there is no information in the record as to the evidence available to the agency.

*Gates v. Caterpillar, Inc.*, 513 F.3d 680, 102 FEP 609 (7th Cir. 2008) – In response to summary judgment motion in retaliation case, employee in declaration alleged for the first time that she had made a statement to her supervisor opposing gender bias – statement made for first time in declaration properly disregarded even though there was never a specific deposition question calling for the comment – “Although the affidavit statement does not necessarily conflict with [plaintiff’s] testimony from her previous deposition, the *omission* of such a significant statement during her deposition in a sex discrimination case speaks volumes.” (513 F.3d at 688) – while we have long held that a

plaintiff cannot avoid summary judgment by contradicting a prior deposition, it is less obvious when the new statement does not directly contradict prior testimony – “Under the circumstances at hand here, where specific, gender-based complaints are vital to [plaintiff’s] claim and where she made no mention of the statement in her deposition, it is reasonable to exclude it.” (*id.* at n.5) – summary judgment affirmed.

### **EEOC Litigation (Ch. 29)**

*EEOC v. CRST Van Expedited Inc.*, \_\_\_ F.3d \_\_\_, 2012 WL 555510 (8th Cir. Feb. 22, 2012) – 2-1 decision affirming dismissal of a section 706 sexual harassment class action – EEOC had failed to investigate and conciliate the claims of each putative class member — instead, EEOC had used discovery as a “fishing expedition” to try to locate affected individuals after suit had been filed – this was backward – EEOC admitted that 27 of the 67 claimants never had alleged sexual harassment until after EEOC had found probable cause to believe class-based harassment had occurred – the result would have been different if EEOC had alleged a pattern or practice under section 707, because then no individual conciliation obligation would have existed – court unanimously vacated \$4.5 million fee award against EEOC because two individual harassment claims survived summary judgment and were remanded for trial — as a result, the company no longer was a “prevailing defendant” in every respect.

*EEOC v. Product Fabricators, Inc.*, 666 F.3d 1170, 25 A.D. Cas. 1314 (8th Cir. 2012) – Court of appeals reversed a trial-court decision that had refused to enter an ADA consent decree in a case attacking a company’s prescription drug-use policy – trial judge thought the EEOC had failed to identify a sufficient reason why the court should retain jurisdiction in a case that involved isolated acts of discrimination – the court of appeals found an abuse of discretion – “Continuing jurisdiction is the norm (and often the motivation) for consent decrees.” (666 F.3d at 1173) – the EEOC has a vital interest in enforcing the law, and a consent decree can have significant deterrent value.

### **Federal Employee Litigation (Ch. 31)**

*Diggs v. HUD*, \_\_\_ F.3d \_\_\_, 2011 U.S. App. LEXIS 22075, 113 FEP 1170 (Fed. Cir. Nov. 1, 2011) – Federal Circuit has no jurisdiction because Title VII allows retaliation cases to be brought by federal employees against the federal government.

*Rattigan v. Holder*, 643 F.3d 975, 112 FEP 975 (D.C. Cir. 2011) – Jury verdict finding discrimination against FBI agent whose security clearance was questioned following an internal complaint overturned – the trial judge’s instructions allowed the jury to second-guess the FBI security division’s reasons for initiating a review – under Supreme Court

precedent federal agency decisions to deny or revoke security clearances are non-justiciable because court review would involve judges in matters left exclusively to the discretion of the executive branch.

*Carver v. Holder*, 606 F.3d 690, 109 FEP 556 (9th Cir. 2010) – Plaintiff prevailed before the EEOC but did not get all the back pay he sought – he cannot challenge the EEOC’s disposition only on back pay – he is limited to either a trial de novo in federal court, putting at issue both liability and damages, or a suit to enforce the EEOC award.

*Porter v. Winter*, 603 F.3d 1113, 109 FEP 225 (9th Cir. 2010) – Federal employee who prevailed before EEOC may bring suit in federal court to challenge the amount of fees awarded to him – circuit split described at 188 LRR 150.

*El-Ganayni v. U.S. Dep’t of Energy*, 591 F.3d 176, 108 FEP 100 (3d Cir. 2010) – Department of Energy physicist fired after security clearance was revoked – district court had Article III jurisdiction to review his claims, but district court could not review the basis for the revocation of his security clearance under the separation of powers doctrine – merits of the decision to revoke his clearance are beyond judicial review.

### **Class Actions (Ch. 32)**

*Wal-Mart Stores, Inc. v. Dukes*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2541, 112 FEP 769 (2011):

#### **Overview:**

- Unanimous – case improperly certified under Rule 23(b)(2) – claims for monetary relief may not be so certified at least where the monetary relief is not incidental – individualized monetary claims must be certified if at all under 23(b)(3).
- Unanimous – Wal-Mart is entitled to individualized determinations of each employee’s eligibility for back pay – this is required by § 706(g) of Title VII and by the *Teamsters* line of cases – this right cannot be replaced by “trial by formula.”
- 5-4 – commonality requirement of 23(a)(2) not established – common question means determination of its truth or falsity will resolve a central issue.
- 5-4 – plaintiffs must factually prove all requirements of Rule 23 – *Eisen* does not prohibit considering merits evidence when relevant to Rule 23 issues.

**Detail of Majority Opinion:**

Wal-Mart store managers have great discretion with respect to pay and promotions utilizing their own subjective criteria – plaintiffs say because Wal-Mart is aware of statistics indicating men were favored that this amounts to disparate treatment – plaintiffs contend strong and uniform corporate culture permits bias against women to infect these discretionary decisions making every woman the victim of a common practice – Ninth Circuit *en banc* approved nationwide class certification based on three forms of proof: statistical evidence, anecdotal reports, and a sociologist’s testimony – Ninth Circuit would allow formula relief by randomly selecting claims that would be litigated and then extrapolating the value of those claims to the entire class – crux of the case is commonality – whether the named plaintiffs’ claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence – commonality requires the plaintiffs to have suffered the same injury as the class members – “Their claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor” (131 S. Ct. at 2550) – commonality “means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke” (*id.*) – quoted a commentator that commonality requires “the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation” (*id.* at 2551) (citation omitted; emphasis in original) – analysis is rigorous – plaintiff must prove with evidence that frequently will overlap the merits of each of the Rule 23 requirements – *Eisen* case has been mistakenly believed to preclude consideration of merits evidence even if relevant to Rule 23 issues – not so – it merely precludes deciding the merits – “Proof of commonality necessarily overlaps with [plaintiffs’] merits contention [of] a *pattern or practice* of discrimination” (*id.* at 2552) (emphasis in original) – crux of the inquiry is the reason for a particular employment decision – here plaintiffs wish to sue about literally millions of employment decisions at once – “Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to . . . produce a common answer to the crucial question *why was I disfavored.*” (*id.*) (emphasis in original) – *Falcon* describes how commonality must be proven: “[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.” (*id.* at 2553) (quoting *Falcon*) – significant proof is absent – the only evidence of a general policy of discrimination was the testimony of Dr. William Bielby, plaintiffs’ sociological expert, who testified that Wal-Mart has a strong corporate culture which makes it vulnerable to bias – but “[a]t his deposition . . . Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.” (*id.*) – the parties dispute whether Bielby’s

testimony should even be admissible under *Daubert* – the district court concluded that *Daubert* did not apply to experts at the certification stage – “We doubt that is so” but even if properly considered, Bielby’s testimony adds nothing in light of his concession that he cannot even estimate what percent of employment decisions were infected by stereotypes – the only corporate policy attacked is allowing discretion by local supervisors – this “is a policy *against having* uniform employment practices” (*id.* at 2554) (emphasis in original) – subjective decisionmaking is common and presumptively reasonable – when different store managers can operate differently, “demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s. A party seeking to certify a nationwide class will be unable to show that all the employees’ Title VII claims will in fact depend on the answers to common questions.” (*id.*) – the statistical studies are insufficient – “As Judge Ikuta observed in her dissent, ‘[i]nformation about disparities at the regional and national level does not establish the existence of disparities in individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level.’ [citation omitted] A regional pay disparity, for example, may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs’ theory of commonality depends.” (*id.* at 2555) – moreover, despite the requirements of *Wards Cove* plaintiffs have identified no specific employment practice that ties together their 1.5 million claims – the anecdotal evidence is too weak – in *Teamsters* it was one anecdote for every 40 class members – here it is one for every 12,500 – next, certification under 23(b)(2) was improper – whether or not monetary relief can ever be certified under (b)(2) “we now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief” (*id.* at 2557) – “Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class” (*id.*) – these claims could be certified if at all under 23(b)(3), which “allows class certification in a much wider set of circumstances but with greater procedural protections” (*id.* at 2558) – moreover, the test of whether injunctive relief predominates, which plaintiffs urge, creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief, including, in the *Wal-Mart* case, dropping compensatory damages – “Contrary to the Ninth Circuit’s view, Wal-Mart is entitled to individualized determinations of each employee’s eligibility for backpay. Title VII includes a detailed remedial scheme.” (*id.* at 2560) - § 2000e-5(g)(1) flatly bars backpay to any non-victim – “[I]f the employer can show that it took an adverse employment action against an employee for any reason other than discrimination, the court cannot order backpay under §2000e-5(g)(2)(A)” (*id.* at 2560-61) – *Teamsters* sets forth the procedure – a district court must usually conduct additional proceedings to determine individual relief – the burden of proof will shift to the company but it will have the right to raise any individual affirmative defenses – “The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula” (*id.* at 2561) – “We

disapprove that novel project.” (*id.*) – the Rules Enabling Act forbids interpreting Rule 23 to abridge any substantive right and therefore “a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.” (*id.*).

*McReynolds v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, \_\_\_ F.3d \_\_\_, 2012 WL 592745 (7th Cir. Feb. 24, 2012) – Posner opinion reversing denial of certification of a class of 700 African-American financial advisers – class sought injunctive relief against company policies that allegedly had a race-based adverse impact, specifically a “teaming” policy (which allows advisers to team up to share accounts) and policy for distributing accounts of departing advisers (generally favoring those with the best prior record of production) – rejecting the company’s reliance on *Wal-Mart Stores, Inc. v. Dukes* – it is true that the company policies are implemented at the local level by local managers, but the local managers still are implementing a company-wide policy – if those “company-wide policies authorizing broker-initiated teaming, and basing account distributions on past success, increase the amount of discrimination,” (2012 WL 592745, at \*8) then “[t]he incremental causal effect . . . of those company-wide policies – which is the alleged disparate impact – could be most efficiently determined on a class-wide basis” (*id.*) – court emphasized that plaintiffs did not seek a classwide determination of monetary relief – Rule 23(c)(4) allows “an action [to] be brought or maintained as a class action with respect to particular issues,” (*id.*) here the question of class-based adverse impact — “The practices challenged in this case present a pair of issues that can most efficiently be determined on a class-wide basis . . . .” (*id.*) – it is true that “resolving an issue common to hundreds of different claimants in a single proceeding may make too much turn on the decision of a single, fallible judge or jury,” (*id.* at \*9) but “that is an argument for separate trials on pecuniary relief,” (*id.*) not injunctive relief — “We have trouble seeing the downside of the limited class action treatment that we think would be appropriate in this case . . . .” (*id.*) because no money will be paid without individualized factfinding — even if adverse impact is established, “hundreds of separate trials may be necessary” (*id.* at \*8) to decide who is entitled to monetary relief, in which “[e]ach class member would have to prove that his compensation had been adversely affected by the corporate policies, and by how much” (*id.*) – “[A]t least it wouldn’t be necessary in each of those trials to determine whether the challenged practices were unlawful.” (*id.*)

*Ellis, et al. v. Costco Wholesale Corp.*, 657 F.3d 970, 113 FEP 496 (9th Cir. 2011) – *Wal-Mart Stores v. Dukes* requires a remand to the district court of the nationwide class certification issued below – at least one named plaintiff legitimately seeks injunctive relief and therefore the district court’s ruling on standing is affirmed – two named plaintiffs cannot adequately represent the class because they were former employees and had no incentive to pursue injunctive relief – motion for class certification supported by testimony of statistician Dr. Richard Drogin, labor economist Dr. Marc Bendick, and

sociologist Dr. Barbara Reskin – Costco’s expert, Dr. Ali Saad, a statistician and labor economist, concluded that women are not underrepresented and that any gender disparities if they exist are confined to two regions – district court certified a class of all current and former female employees nationwide who were denied promotions – “Because the district court certified a class broader than the class requested by plaintiffs, the parties stipulated to a narrower class definition . . . .” (657 F. 3d at 977-78) (footnote omitted) – finding as to commonality is vacated since the district court failed to conduct the required “rigorous analysis” to determine whether there were common questions of law and fact among the class members’ claims – district court assumed the admissibility of plaintiffs’ evidence – on commonality it is insufficient to merely allege for example “Were Plaintiffs passed over for promotion?” (*id.* at 981) (quoting *Wal-Mart*) – a common question must be why people were passed over for promotion and common answers must drive the resolution of the litigation – “Plaintiffs must have a common question that will connect many individual promotional decisions to their claim for class relief,” (*id.*) – “[And] the merits of the class members’ substantive claims are often highly relevant when determining whether to certify a class. More importantly, it is not correct to say a district court *may* consider the merits to the extent that they overlap with class certification issues; rather, a district court *must* consider the merits if they overlap . . . . [citing *Wal-Mart*]” (*id.*) (emphasis in original) – in considering expert testimony the district court correctly applied the Daubert evidentiary standard – the district court confused the Daubert standard it correctly applied with the rigorous analysis standard to be applied when analyzing commonality – “Instead of judging the persuasiveness of the evidence presented, the district court seemed to end its analysis of the plaintiffs’ evidence after determining such evidence was merely admissible.” (*id.* at 982) – it rejected Costco’s challenge on the propriety of using aggregate data on the ground that this went to the weight of the evidence and not its admissibility – district court was not obliged to resolve factual disputes about whether there was discrimination or whether there is a culture or gender stereotyping – “[T]he district court was required to resolve any factual disputes necessary to determine whether there was a common pattern and practice that could affect the class *as a whole*. If there is no evidence that the entire class was subject to the same allegedly discriminatory practice, there is no question common to the class. In other words, the district court must determine whether there was ‘significant proof that [Costco] operated under a general policy of discrimination.’” (*id.* at 983) (citation to *Wal-Mart* omitted; emphasis in original; footnote omitted) – “If the [promotion] decisions were made at the local warehouse, Plaintiffs likely cannot show this decisionmaking process affected the class as a whole . . . .” (*id.* at n.7) (citing *Wal-Mart*) on the other hand there is no obligation of the district court to turn class certification into a mini trial on the merits – however, whether gender disparities are confined to only two regions goes to whether there are common questions of law and fact – a disparity in only 25% of the regions would not show a general policy of discrimination nationwide – it was error to fail to resolve the critical factual disputes centering around national versus regional

discrimination – district court’s ruling as to typicality also vacated since the district court failed to consider the effect that defenses unique to the named plaintiffs would have on this question – the district court in finding typicality rejected the argument that individualized defenses are relevant – the district court erred – Costco asserts unique defenses against each of the named plaintiffs – for example, one named plaintiff rejected a rotation and stated several times she wished to defer her pursuit of promotion – two of the named plaintiffs are not employed and therefore do not have standing to seek injunctive relief – in light of *Wal-Mart’s* rejection of the predominance test the district court must consider whether the claims for various forms of monetary relief will require individual determinations and are therefore appropriate only under (b)(3) which requires vacation of district court’s certification under (b)(2) – the relevant inquiry is what procedural safeguards are required – in a (b)(3) class putative class members are afforded the right to be notified and to opt out – the absence of these protections in a class action predominantly for monetary damages violates due process – *Wal-Mart* repeatedly held that claims for individualized relief do not satisfy (b)(2) – on remand the district court would have to determine if it thinks a (b)(2) class may be certified consistent with this opinion whether the claim for punitive damages can be sought by a (b)(2) class – on remand the district court must consider whether a class may be certified under (b)(3) for compensatory damages and back pay – as the district court properly recognized this requires individual determinations – remand for district court to consider whether class can be certified under (b)(3) – if so, district court must consider how to manage those class members who are no longer Costco employees – Costco argues class would be unmanageable or would violate its constitutional rights – district court believed it could accommodate need for individualized determinations of compensatory damages by bifurcating the trial into different phases – district court did not actually adopt a trial plan – these arguments are thus premature.

*Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 111 FEP 1565 (7th Cir. 2011) – Denial of class certification affirmed in sex discrimination pay and promotion case – summary judgment affirmed against named plaintiffs – Rolls-Royce’s expert, Bernard Siskin, showed that once differences in the jobs performed by male and female employees in each compensation category are corrected for market-based adjustments, the sex-correlated difference disappears – “[I]f, as Siskin found, there were at the outset of the complaint period more male than female employees in jobs that command a higher market wage, the average compensation of male employees would exceed that of female employees . . . unrelated to sex discrimination. If cardiologists command a higher market wage than internists, they will be paid more even if the clinic that employs both types of physician regards them as equally valuable.” (637 F.3d at 823) – comparable worth is not a theory recognized in federal discrimination law – plaintiffs’ expert Richard Drogin “made errors besides failing to adjust for differences in the jobs . . . . He included in the comparison employees hired after the beginning of the complaint period. That made no

sense . . . .” (*id.*) – reference to “Drogin’s defective report,” (*id.*) – inherent conflict of interest – plaintiffs are high-level employees who have authority over the compensation of both males and females – “Although we doubt that the plaintiffs would deliberately depress the salary of female employees . . . or increase the salary of male employees . . . in order to create evidence of discrimination, the possibility of such strategic conduct (which might be unconscious) creates a conflict of interest . . . .” (*id.* at 824) – inappropriate to bring the case under 23(b)(2) – how far 23(b)(2) can be stretched is at issue in *Dukes*, now before the Supreme Court – “The present case is not as big a stretch, but it is big enough.” (*id.* at 825) – the only monetary remedy is back pay, but to be brought under 23(b)(2) it has to be incidental in the sense of requiring only a mechanical computation – here, if plaintiffs prevail, there would have to be hundreds of individual hearings and “the monetary tail would be wagging the injunction dog” (*id.* at 826) – plaintiffs attempted to substitute in more appropriate class representatives – that is possible but not automatic – here there was too long a delay – four years – “Intervention shouldn’t be allowed just to give class action lawyers multiple bites at the certification apple, when they have chosen, as should have been obvious from the start, patently inappropriate candidates to be class representatives.” (*id.* at 827).

*United Steelworkers v. Shell Oil Co.*, 602 F.3d 1087, 16 WH Cases 2d 1 (9th Cir. 2010) – Wage-hour purported class action properly removed to federal court under Class Action Fairness Act – after class certification denied, case remanded – that was error – federal court should have retained jurisdiction.

*Am. Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010) – In a products liability case, the Seventh Circuit has held that if an expert opinion is critical to class certification there must be a full Daubert hearing – “We hold that when an expert’s report or testimony is critical to class certification . . . a district court must conclusively rule on any challenge to the expert’s qualifications or submissions prior to ruling on a class certification motion.” (600 F.3d at 815-16) – “That is, the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants.” (*id.* at 816). [Note: Conflicts with Ninth Circuit *Wal-Mart en banc* decision.]

*Narouz v. Charter Comms’ns., LLC*, 591 F.3d 1261 (9th Cir. 2010) – Class settlement agreed upon – named plaintiff to receive \$60,000 for individual claims and eligible to receive an additional amount if the district court approved the class settlement – District Court Judge Real refused to certify the case as a class action for settlement purposes or to approve the settlement – issue was whether individual plaintiff could appeal the adverse certification order – “We hold that when a class representative voluntarily settles his or her individual claims, but specifically retains a personal stake . . . , he or she retains jurisdiction to appeal the denial of class certification.” (591 F.3d at 1264) – “In order to retain such a ‘personal stake,’ a class representative cannot release any and all interests

he or she may have had in class representation through a private settlement agreement.” (*id.*) – here, the named plaintiff was to receive additional consideration if the class settlement was approved – denial of class certification not reviewed under abuse of discretion standard because Judge Real failed to make sufficient findings – case remanded for reconsideration of approval of class settlement – “Under the circumstances of this case, it is appropriate that the case be reassigned to a different district judge on remand.” (*id.* at 1267) – concurring judge noted that “[O]nly an explicit waiver of the right to appeal would deny [plaintiff] the opportunity to appeal the adverse judgment by the district court.” (*id.* at 1268) – Judge Rymer in dissent would hold that a class representative who dismisses all substantive claims cannot appeal the denial of class certification unless the settlement papers explicitly carve out a live controversy and personal stake.

*Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 22 A.D. Cas. 133 (3d Cir. 2009) – This highly awaited ADA nationwide class certification case had former Supreme Court Justice Sandra Day O’Connor sitting by designation on the panel, and amicus briefs from a significant number of employer and plaintiff groups – it was authored by Chief Judge Scirica, who had authored the *In Re Hydrogen Peroxide* case – plaintiffs obtained class certification based on their allegation that UPS had a “100% healed” policy – class certification was reversed because no one could be victimized by the policy who is not a qualified person with a disability, so individual issues predominated – the court indicated that it was analyzing the issue under Title VII principles and *Teamsters* pattern or practice jurisprudence – “And that the *Teamsters* framework contemplates a second stage of proceedings where questions of individual relief may be addressed, does not mean that all individualized inquiries with respect to a given class can be delayed until that stage.” (574 F.3d at 184) – “[I]n light of the substantive requirements of the ADA, we find [plaintiffs’] claims cannot be adjudicated within the parameters of Rule 23 such that a determination of class-wide liability and relief can be reached.” (*id.* at 185) – *Teamsters* framework cannot solve necessity of resolving individual issues at the liability stage – separately, case is not appropriate for certification under 23(b)(2) because of monetary relief – “[O]ur sister circuits are split on that question, with some adopting the ‘incidental damages’ standard . . . in *Allison* . . . and others opting for a more discretionary, ‘ad hoc balancing’ approach such as that used by the Court of Appeals for the Second Circuit in *Robinson*.” (*id.* at 198) – trial court found that plaintiffs’ claims for compensatory and punitive damages could not be certified under (b)(2), but that back pay could – “[P]laintiffs’ requested compensatory and punitive damages would be ineligible for class treatment under Rule 23(b)(2), regardless of whether the ‘incidental damages’ or the ‘ad hoc balancing’ approach is applied.” (*id.* at 200) – UPS says this necessity to sever alone precludes certification under (b)(2) – need not resolve that question – but conditional certification of plaintiffs’ request for back pay was improper – a trial court must make a definitive determination that the requirements of Rule 23 have been met – a trial court

cannot rely on later developments to determine whether certification is appropriate – “[B]efore moving forward with certification, it was necessary for the court to determine whether plaintiffs’ back-pay request actually conforms with the requirements of Rule 23, including Rule 23(b)(2)’s monetary-predominance standard. And, were the court to find such relief could go forward under Rule 23(b)(2), it would then need to address how that relief would be managed, specifying, for example, the methodology by which calculations and awards of relief would be made with respect to individual class members.” (*id.* at 202) – advisory committee’s 2003 note to Rule 23 introduces the concept of a “trial plan” which as we said in *Hydrogen Peroxide* focuses attention on a rigorous evaluation of a likely shape of a trial – “Such rigorous analysis would be appropriate were the court to use either the ‘incidental damages’ or ‘ad hoc balancing’ standard to evaluate plaintiffs’ back-pay request, as both stress that only monetary relief sufficiently manageable on a class-wide basis may be certified under Rule 23(b)(2).” (*id.*) – “The court’s deferral of this analysis post-class certification was an abuse of discretion.” (*id.*)

*Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935 (9th Cir. 2009) – “[D]efendants may move to deny class certification before a plaintiff files a motion to certify a class.” (*id.* at 940 n.4).

*Serrano v. Cintas Corp.*, 2009 WL 910702, 106 FEP 154 (E.D. Mich. Mar. 31, 2009) – Class certification denied in proposed nationwide class of all female, African American and Hispanic candidates who unsuccessfully applied for service sales representative positions – allegation was “excess subjectivity” in allowing individual location managers to make employment decisions.

*Whitaker v. 3M Co.*, 2009 WL 1118951, 106 FEP 215 (Minn. Ct. App. Apr. 28, 2009) – Age discrimination Rule 23-type class action – class certification reversed and remanded – lawsuit alleged pattern or practice of discrimination in performance appraisals, training, promotions, compensation and terminations under both intentional discrimination and disparate impact theories – trial court abused discretion in failing to require proof of certification requirements by preponderance of evidence – it considered employee’s statistical analysis without addressing employer’s objections or alternative analyses – it failed to resolve factual disputes, including disputes among expert witnesses – reliance on Second Circuit decision of *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006), for proposition that must resolve disputes overlapping the merits if relevant to class certification – further reliance on *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 323 (3d Cir. 2008) (“[e]xpert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis” and “[w]eighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands”) – court

cited Seventh Circuit in *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) - “[F]ailing to resolve expert disputes at the time of a certification application amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert.” 2009 WL 1118951, at \*5 (internal quotation marks omitted).

*Semsroth v. City of Wichita*, 555 F.3d 1182, 105 FEP 1049 (10th Cir. 2009) - Pattern or practice method of proof is available only to government and in class actions – individual plaintiffs may not utilize pattern or practice – continuing violation doctrine is available only for hostile work environment claims and not for claims of disparate treatment, disparate impact, or retaliation – U.S. Supreme Court has never allowed individual plaintiff to shift burden to employer without demonstrating full prima facie case and has never extended pattern or practice method to individuals.

### **Discovery (Ch. 33)**

*Bobo v. United Parcel Service, Inc.*, 665 F.3d 741, 114 FEP 254 (6th Cir. 2012) – Black employee terminated for violating employer’s integrity policy needs to show that similarly protected employees outside his protected group were treated more favorably – district court limited his discovery to the only white employee who had the same supervisor – this was error – plaintiff was not required to demonstrate an exact correlation between himself and comparators – although Sixth Circuit in earlier case said that similarly situated employees must have dealt with the same supervisor, this does not automatically apply in every case to create an inflexible rule – whether it is relevant in a particular case depends on the facts presented.

*Brown v. Oil States Skagit Smatco*, 664 F.3d 71, 113 FEP 1537 (5th Cir. 2011) (*per curiam*) – Title VII case properly dismissed for perjured deposition testimony – at deposition plaintiff testified that he quit for only one reason – racial harassment, in his accident personal injury lawsuit, he testified under oath that he left his job “solely” because of the back pain caused by the accident – lawsuit dismissed with prejudice – “[D]ismissal with prejudice [is] a more appropriate sanction when the objectionable conduct is that of the client, not the attorney,” (664 F.3d at 77) – contention lesser sanction should have been imposed rejected – “Brown deceitfully provided conflicting testimony in order to further his own pecuniary interests . . . and, in doing so, undermined the integrity of the judicial process. Through his perjured testimony, Brown committed fraud upon the court, and this blatant misconduct constitutes contumacious conduct.” (*id.* at 78) – the lesser sanction of a monetary sanction would not work because Brown could not pay it – not everyone like Brown will be caught and when perjury is discovered the penalty needs to be severe – “Brown plainly committed perjury, a serious offense that constitutes a severe affront to the courts and thwarts the administration of justice. . . .

Brown, and not his attorney, committed the sanctionable conduct, which makes the harsh dismissal with prejudice all the more appropriate.” (*id.* at 80).

*Norelus v. Denny’s, Inc.*, 628 F.3d 1270, 111 FEP 4 (11th Cir. 2010) – Sanctions affirmed under 28 U.S.C. § 1927 (attorney “who so multiplies the proceedings in any case unreasonably and vexatiously . . . [can be required] to satisfy personally the excess costs, expenses and attorney’s fees”) (628 F.3d at 1280-81) (citation omitted; first alteration in original) – discrimination plaintiff’s attorney submitted an errata document making 868 changes to her deposition testimony – changes were contradictory and not merely corrective.

*Arnold v. ADT Sec. Servs.*, 627 F.3d 716, 110 FEP 1781 (8th Cir. 2010) – Sanctions affirmed against plaintiffs and plaintiffs’ attorney jointly and severally for employer’s reasonable attorney’s fees in preparing motion to compel discovery – employer attempted to confer with plaintiffs in good faith without court intervention and repeatedly attempted to confer with their counsel regarding incomplete discovery responses – eventual dismissal of action based on failure to comply with court’s order to attend status conference also affirmed.

*Norman-Nunnery v. Madison Area Tech. Coll.*, 625 F.3d 422, 110 FEP 1121 (7th Cir. 2010) – Adverse inference instruction properly rejected with respect to alleged spoliation of evidence – employer lost plaintiff’s application and other hiring documents – they disappeared as a result of office moves that occurred before she filed any claims – no evidence documents were destroyed in order to hide adverse information.

*Booker v. Mass. Dep’t of Pub. Health*, 612 F.3d 34, 109 FEP 1281 (1st Cir. 2010) – Failure of two managers to retain emails related to plaintiff after she filed an administrative complaint did not justify an adverse inference instruction.

### **Statistical and Other Expert Proof (Ch. 34)**

*Aliotta v. Bair*, 614 F.3d 556, 109 FEP 1701 (D.C. Cir. 2010) – Plaintiff’s statistical proof in age case rejected – plaintiff lumped those employees who left under a voluntary buy-out program with those who were involuntarily terminated – this is improper – excluding those who took the buy-out program demonstrates an absence of any impact against older employees.

**The Civil Rights Acts of 1866 and 1871 (Ch. 35)**

*Groesch v. City of Springfield, Ill.*, 635 F.3d 1020, 111 FEP 1441 (7th Cir. 2011) – *Lilly Ledbetter* Act “paycheck accrual rule” applies to claims under § 1983 as well as Title VII claims – *Lilly Ledbetter* Act applied retroactively to overturn grant of summary judgment properly granted based on the law as it existed at the time – underlying claim was by white police officers who were not given credit for prior service when rehired as compared to a black police officer, who was given credit for prior service.

*Cintron-Lorenzo v. Fondo Del Seguro Del Estado*, 634 F.3d 1, 111 FEP 609 (1st Cir. 2011) – EEOC charge does not toll statute of limitations for filing § 1983 claim – opinion by Justice Souter sitting by designation.

*McGovern v. City of Phila.*, 554 F.3d 114, 105 FEP 481 (3d Cir.), amended by 2009 U.S. App. LEXIS 2293 (Feb. 5, 2009) – Discharged City employee cannot sue under Section 1981 – Section 1983 provides the sole remedy for discrimination in City employment – Civil Rights Act of 1991 did not overrule *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), which so held – assuming *arguendo* that Section 1981 provides a remedy, employee failed to allege that the City acted pursuant to an official policy or custom of discrimination – *Jett* made it clear that this requirement, for Section 1983 actions, is in any event applicable if Section 1981 is available.

*Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 105 FEP 358 (2009) – Title IX of the Education Amendments of 1972 does not preclude § 1983 equal protection claims of gender discrimination in schools – parents of daughter sexually harassed by fellow student can sue under both statutes – case arguably implies that Seventh Circuit decision in *Waid v. Merrill Area Public School*, 91 F.3d 857, 71 FEP 577 (7th Cir. 1996) (Title IX precluded female applicant who was rejected for teacher position from asserting § 1983 claim) is erroneous.

**Reverse Discrimination and Affirmative Action (Ch. 37)**

*Ricci v. DeStefano*, 557 U.S. 557, 129 S. Ct. 2658, 106 FEP 929 (2009) – City of New Haven had contract with firefighters union to make promotions on the basis of a written examination (weighted 60%) and oral evaluations (weighted 40%) – City spent \$100,000 with professional test designer to develop both portions – written test was based on specified manuals and source materials and constituted 100 questions, multiple choice – oral examinations graded by panels, each composed of three out-of-state firefighters - each panel consisted of one white, one black, and one Hispanic – promotions to lieutenant and captain at issue – many firefighters spent large amounts of time and in some cases money preparing for the tests – if test followed no black would have been

promoted – significant disparate impact which would have constituted a prima facie case of disparate impact discrimination – Civil Service Board held five hearings, and received conflicting advice – political pressure involved – Civil Service Commission by 2-2 vote did not certify the test results – white and Hispanic firefighters sued City – City defended on the ground that it had a right not to expose itself to disparate impact litigation – if disparate impact litigation, since prima facie case existed, City would have to prove tests job related and consistent with business necessity – if successful, plaintiff could still succeed by showing that City refused to adopt an available alternative employment practice that has less impact and would serve the employer’s legitimate needs – “[T]he City made its employment decision because of race,” regardless of its motive – issue is whether “purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination” (129 S. Ct. at 2674) – white firefighters’ suggestion that employer must prove that it was in fact in violation “overly simplistic and too restrictive” (*id.*) – “Forbidding employers to act unless they know, with certainty, that a practice violates the disparate-impact provision would bring compliance efforts to a near standstill” (*id.*) – City’s asserted “good faith belief” that actions are necessary to avoid disparate impact liability is not sufficient – “Allowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact. A minimal standard could cause employers to discard the results of lawful and beneficial promotional examinations even where there is little if any evidence of disparate-impact discrimination. That would amount to a de facto quota system . . .” (*id.* at 2675) – “[S]trong basis in evidence” test adopted – “We conclude that race-based action . . . is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.” (*id.* at 2664) – This test “limits [employer] discretion to cases in which there is a strong basis in evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation.” (*id.* at 2676) – “The standard leaves ample room for employers’ voluntary compliance efforts, which are essential to the statutory scheme and to Congress’s efforts to eradicate workplace discrimination.” (*id.*) – there is no strong basis in evidence based on the record herein – “There is no genuine dispute that the examinations were job-related and consistent with business necessity.” (*id.* at 2678) – “If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.” (*id.* at 2681) – 5-4 decision – dissent emphasized flaws in the test and questioned whether multiple-choice questions can really predict success in leadership posts.

*Everett v. Cook County*, 655 F.3d 723, 113 FEP 9 (7th Cir. 2011) – White dentist brought reverse discrimination case alleging he was laid off rather than black dentist for

discriminatory reasons – productivity reports do not establish pretext – “The fact that a decision was poorly considered is not enough to establish pretext” (655 F.3d at 730) – in a reverse discrimination case a plaintiff’s burden includes showing “background circumstances” “suggesting that the employer discriminates against the majority” (*id.*) (citation omitted) – no such circumstances were shown – summary judgment affirmed.

*Briscoe v. City of New Haven*, 654 F.3d 200, 112 FEP 1793 (2d Cir. 2011) – Supreme Court in *Ricci* held that New Haven did not have a strong basis in evidence for believing it would face disparate impact liability if it certified test results under which promotions would go almost totally to whites – the Supreme Court ordered New Haven to certify the test results, stating “If, after it certifies the test results, the City faces a disparate impact suit, then in light of our holding today it should be clear that the City would avoid disparate impact liability based on the strong basis in evidence that had it not certified the results, it would have been subject to disparate treatment liability.” (654 F.3d at 205) (quoting *Ricci v. DeStefano*, 557 U.S. 557, 129 S. Ct. 2658, 2681 (2009) – the plaintiff in this case, Briscoe, brought the anticipated lawsuit – Briscoe was not a party to the *Ricci* case – the district court dismissed the lawsuit based on the Supreme Court holding – the Second Circuit reversed – the City argued that it had a strong basis in evidence that it was facing disparate treatment liability (i.e., the Supreme Court so held) if it did not certify the results, so that in itself was sufficient – the *Ricci* decision does not cut both ways – Briscoe is not bound by a litigation in which he did not play a part – the Supreme Court language is dicta unrelated to its actual holding – Briscoe did not have a reasonable opportunity to present objections to the *Ricci* judgment – the City argued that an employer may defeat a disparate impact claim if it had a strong basis in evidence for believing it would have been subject to disparate treatment liability had it not certified the test – “The dicta contemplating a disparate impact standard symmetrical to the disparate treatment standard established in the holding is perhaps attributable to a simple logical error. The sentence does not present a holding but rather a conclusion . . . .” (654 F.3d at 206) – “[I]t has no actual logical relationship to the holding.” (*id.*) – “In any event, we see no way to reconcile the dicta . . . with either the Court’s actual holding in *Ricci* or longstanding fundamental principles of Title VII law . . . .” (*id.*) – “An employer seeking to protect itself from the interplay between disparate-impact and disparate-treatment liability needs only the guidance from the express holding of *Ricci*.” (*id.* at 208) – “To rule for the City, we would have to conclude that the Supreme Court intended to effect a substantial change in Title VII disparate-impact litigation in a single sentence of dicta . . . .” (*id.* at 209) – the City could have avoided this by joining all interested parties in the *Ricci* case – court expresses no view as to whether other issues may warrant dismissal of the action including the relevant statute of limitations, the doctrine of laches or the unavailability of requested relief.

*United States v. Brennan*, 650 F.3d 65, 112 FEP 193 (2d Cir. 2011) – In 1999 city settled government suit alleging discrimination against minorities and women – settlement provided for retroactive competitive seniority to 63 minority and female individuals – in this case white males claimed reverse discrimination – principal issue was the district court’s belief that the Title VII analysis of this case was governed by the affirmative action cases of *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), and *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) – these cases held that the validity of affirmative action programs was determined on whether or not they were justified by a “manifest imbalance” in the work force and resulted in “no unnecessary trammeling” of the rights of the majority group – these cases are not applicable because they extend “at most, to circumstances in which an employer has undertaken a race- or gender-conscious affirmative action plan designed to benefit *all* members of a racial or gender class in a forward-looking manner only” (650 F.3d at 72) (emphasis in original) – but where “the employer instead provides individualized race- or gender-conscious benefits as a remedy for previous disparate impact, the employer must satisfy the requirements of *Ricci*, not *Johnson* and *Weber*, in order to avoid disparate-treatment liability. Under *Ricci*, the employer must show a strong basis in evidence that . . . the employer was faced with disparate-impact liability and that the race- or gender-conscious action was necessary to avoid or remedy that liability” (*id.*) – case went on to discuss application of *Ricci* and its strong basis in evidence test to multiple factual scenarios.

*Humphries v. Pulaski Cnty. Special Sch. Dist.*, 580 F.3d 688, 107 FEP 140 (8th Cir. 2009) – School district’s affirmative action policies which included biracial committees, special efforts to employ and advance blacks, and hiring goals including having at least one minority administrator at each school and pairing assistant principals with principals of different races can constitute direct evidence of reverse discrimination.

### **Monetary Relief (Ch. 40)**

*Barton v. Zimmer, Inc.*, 662 F.3d 448, 113 FEP 929 (7th Cir. 2011) – Supervisor 1 discriminated against plaintiff which caused a psychological breakdown – Supervisor 1 terminated, plaintiff returned, and Supervisor 2 gave him nondiscriminatory assignments which caused an anxiety attack which left him totally disabled – front pay in lieu of reinstatement is available if discrimination causes a disability – not applicable here since disability caused by nondiscriminatory assignment.

*Thomas v. iStar Fin. Inc.*, 629 F.3d 276, 112 FEP 1556 (2d Cir. 2011) – Jury’s award of \$1.6 million in punitive damages was unconstitutionally excessive and properly reduced to \$190,000 – employer’s conduct did not result in physical injury or evince reckless disregard for health or safety – plaintiff was awarded very substantial compensatory

damages – size of jury’s award as compared to civil penalty of \$250,000 indicates award was excessive – employer’s conduct involved moderate level of reprehensibility.

*Black v. Pan Am. Labs. LLC*, 646 F.3d 254, 112 FEP 1185 (5th Cir. 2011) – Cap of \$200,000 on compensatory and punitive damages applies to total award, not to each separate claim in the lawsuit.

*Hernandez-Miranda v. Empresas Diaz Masso, Inc.*, 651 F.3d 167, 112 FEP 1113 (1st Cir. 2011) – The number of employees that an employer has in the “current” calendar year for purposes of determining which Title VII damages cap applies refers to the year in which the discrimination occurred and not to the year in which damages were awarded – employer had 241 employees in the year of discrimination but at the time of the verdict the workforce had shrunk to only 25 employees.

*Marion Cnty. Coroner’s Office v. EEOC*, 612 F.3d 924, 109 FEP 1510 (7th Cir. 2010) – Termination by coroner of chief deputy for racial reasons discriminatory but \$200,000 compensatory damages awarded remitted to \$20,000 – “[T]he evidence here does not come close to supporting the \$200,000 award for compensatory damages.” (612 F.3d at 931) – testimony supporting the award was that plaintiff underwent weekly therapy sessions for several months for situational depression – this was extremely brief and there was no threat of physical injury.

*Traxler v. Multnomah Cnty.*, 596 F.3d 1007, 15 Wage & Hour Cas. 2d 1584 (9th Cir. 2010) – Front pay under the Family and Medical Leave Act is an equitable remedy to be decided by a trial judge rather than by a jury – jury’s \$1.5 Million award vacated - \$267,000 in front pay awarded instead.

*Shelton v. Comm’r*, 2009 Tax Ct. Memo LEXIS 113, 106 FEP 534 (TC 2009) – Sexual harassment settlement proceeds are taxable – agreement stated that settlement was for “emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and non-pecuniary losses” (2009 Tax Ct. Memo LEXIS 113, at \*7) – does not matter if there are physical symptoms from emotional distress – only personal injury or physical sickness proceeds are excludable from taxation.

*Donlin v. Philips Lighting N. Am. Corp.*, 564 F.3d 207, 106 FEP 1 (3d Cir. 2009) – Plaintiff-employee improperly allowed to testify as to damages requiring expert testimony – her testimony included calculating pension benefits, life expectancy, and front pay discounted to present value – this requires technical or specialized knowledge – new trial on damages required.

*Wallace v. DTG Operations, Inc.*, 563 F.3d 357, 105 FEP 1761 (8th Cir. 2009) – Employee recovered \$30,000 in lost wages and emotional distress, and punitive damages

of \$500,000 – punitives reduced to \$120,000 – anything above a 4-1 ratio would raise constitutional questions.

*Betts v. Costco Wholesale Corp.*, 558 F.3d 461, 105 FEP 1228 (6th Cir. 2009) – Jury concluded that three discharged black employees had been subjected to a racially hostile work environment but that none of their discharges had resulted from discrimination – district court properly vacated jury’s award of lost wages for two of the three employees – issue was whether the emotional distress flowed from the hostile work environment or the economic losses caused by the lawful discharges – with respect to Plaintiff No. 1, “Costco is clearly correct. There is no material evidence in the record regarding any emotional distress that Lewis suffered as a result of Costco’s hostile work environment. Her distress flowed instead from the financial difficulty she faced after her nondiscriminatory discharge. . . . The district court therefore erred as a matter of law in upholding the jury’s award compensating Lewis for her emotional distress.” (558 F.3d at 472) – Plaintiff No. 2, on the other hand, provided generalized testimony about the stress she suffered before termination – although medical evidence is not necessary, emotional distress damages will not be presumed and there must be competent evidence – the second plaintiff’s “generalized comments are not sufficient to support an award for emotional distress” (*id.* at 473) – vote was 2-1 with respect to the second plaintiff.

### Attorney’s Fees (Ch. 41)

*Fox v. Vice*, 131 S. Ct. 2205 (2011) – Must apportion attorney’s fees between those caused by frivolous cause of action and fees that would have been incurred without frivolous cause of action – “but for” test – just as plaintiffs may receive fees even if they are not victorious on every claim, so too may a defendant even if the plaintiff’s suit is not wholly frivolous – but defendant is not entitled to fees caused by the non-frivolous claims – the issue is whether the attorney’s fees and costs would have been incurred in the absence of the frivolous allegation – this should not result in a second major litigation since the essential goal is rough justice, not auditing perfection – case filed in state court with § 1983 claim – removed by defendant to federal court - § 1983 claim dismissed and state claims remanded to state court – award of totality of attorney’s fees vacated and remanded.

*Perdue v. Kenny A.*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1662, 109 FEP 1 (2010) – Prevailing plaintiff in civil rights case can have lodestar increased but only in “extraordinary circumstances” – lodestar approach is key – it has “achieved dominance” – six important rules govern decision – (1) reasonable fee is one that is sufficient to induce a capable attorney to take a meritorious case but does not provide “a form of economic relief to improve the financial lot of attorneys.” (130 S. Ct. at 1673) (citation omitted));

(2) strong presumption that lodestar method yields a sufficient fee; (3) Court has never sustained an enhancement of a lodestar for performance and has always said enhancement is only for “rare” and “exceptional” circumstances; (4) lodestar includes most if not all of the relevant factors constituting a reasonable attorney’s fee and thus an enhancement may not be based on a factor already subsumed such as novelty, complexity or the quality of an attorney’s performance; (5) burden of proving an enhancement is necessary is borne by the fee applicant; and (6) an applicant seeking enhancement must produce “specific evidence” supporting the enhancement to ensure that the calculation is objective and capable of being reviewed – lodestar may be overcome only in those rare instances in which the lodestar does not adequately account for a factor that may be properly considered in determining a reasonable fee – it would be a rare and exceptional case where the lodestar does not take into account superior attorney performance – an example might be where the lodestar hourly rate is based on years of practice but the attorney’s ability transcends that measure – an enhancement might be warranted if the attorney had to advance extraordinary expenses and the litigation is exceptionally protracted – the enhancement amount in such cases must be calculated through objective criteria – an enhancement may be appropriate where an attorney’s performance involves exceptional delay – enhancement in this case reversed – reliance on the contingency of the outcome was inappropriate and contravenes *Burlington v. Dague*, 505 U.S. 557 (1992) – case is remanded for proceedings consistent with the opinion.

*EEOC v. Great Steaks, Inc.*, \_\_\_ F.3d \_\_\_, 2012 WL 234362, 114 FEP 289 (4th Cir. Jan. 26, 2012) – EEOC sued for sexual harassment, but jury ruled against it – Equal Access to Justice Act (EAJA) provides that when a party is sued by the federal government it can recover its legal costs if the government action was not “substantially justified” – need not reach that issue, since EAJA is not applicable to Title VII – it has a savings clause which states that it does not alter any other federal law that authorizes attorneys’ fees – therefore a prevailing defendant can recover attorneys’ fees under Title VII only if it meets the frivolous standard.

*Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 114 FEP 76 (7th Cir. 2011) – Federal district court erred in reducing requested hourly rate of Title VII plaintiff’s attorney because his fee arrangement entitled him to a contingency fee and flat fee in addition to statutory fees – fees from client and statutory fee recovered from losing party are distinct entitlements – total amount attorney stands to recover must not influence determination of whether rate and hours requested are reasonable.

*McClain v. Lufkin Indus. Inc.*, 649 F.3d 374, 112 FEP 1665 (5th Cir. 2011) – District court erred in using in lodestar local hourly rates rather than the San Francisco Bay Area rates for outside counsel who were brought in by local counsel on this case – abundant and uncontradicted evidence proved the necessity of out-of-district counsel – their home

rate should be considered as a starting point – but local rates may well reflect a lower cost of living which will also be indicative of lower potential damage award so the district court retains discretion to adjust the lodestar – plaintiffs argued that legal fees paid to defense counsel can be considered in setting a reasonable fee award, arguing that in the case of *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 109 FEP 1 (2010), that “[T]he lodestar method produces an award that *roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case.” (130 S. Ct. at 1672) (emphasis in original) – plaintiffs argued that this meant they should receive the same fees as defense counsel – the court rejected this: “But *Perdue* never requires or even hints at the plaintiffs’ proposition: that their hourly rate should approximate those charged by the defense counsel.” (649 F.3d at 384).

*Harris v. Maricopa Cnty. Superior Court*, 631 F.3d 963, 111 FEP 503 (9th Cir. 2011) – Defendant that prevailed in frivolous case can recover only attorney’s fees for legal work done exclusively in defense of the claims that were frivolous – Judge Reinhardt opinion – 2-1 – plaintiff asserted 10 claims – Ninth Circuit disagreed with lower court’s designation of certain of them as frivolous – it also reversed lower court’s one-tenth allocation of general fees to each claim – cannot prorate overall fees between frivolous claims and non-frivolous claims – fees may be awarded only for frivolous claims and defendant bears the burden of establishing that the time in question was incurred solely because of the need to defend against the frivolous claims – circuits split on the issue.

*Simmons v. N. Y. City Transit Auth.*, 575 F.3d 170, 22 A.D. Cas. 257 (2d Cir. 2009) – Prevailing plaintiff sought attorney’s fees based on prevailing rates in the Southern District of New York, where her attorneys were based, rather than prevailing rates in the Eastern District of New York (Brooklyn), where the case was litigated – Brooklyn attorney rates were far lower – “Forum rule” applied – “[I]n order to receive an attorney’s fee award based on higher out-of-district rates, a litigant must overcome a presumption in favor of the forum rule, by persuasively establishing that a reasonable client would have selected out-of-district counsel because doing so would likely (not just possibly) produce a substantially better net result. In this case, [plaintiff] has not overcome the presumption in favor of the forum rule.” (575 F.3d at 172).

*McCown v. City of Fontana*, 565 F.3d 1097 (9th Cir. 2009) – Excessive force case against police department – settlement of \$20,000 – fees of \$300,000 requested and \$200,000 awarded – reversed and remanded for reduction in light of limited success – claims thrown out were related but success limited in light of what was sought and settlement demanded – Supreme Court’s *Hensley v. Eckerhart* (461 U.S. 424 (1983)) decision requires answering the question “[D]id the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?”

(565 F.3d at 1103-04) – “[W]e hold that attorney’s fees awarded . . . must be adjusted downward where the plaintiff has obtained limited success . . . and the result does not confer a meaningful public benefit.” (*id.* at 1103) – as *Hensley* stated, “[a] reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.” (*id.*, quoting 461 U.S. at 440); (alteration in original) – “[A] comparison of damages awarded to damages sought is required” (*id.* at 1104) – the Supreme Court in *Farrar v. Hobby* (506 U.S. 103, 114 (1992)) made it clear that “a district court should give primary consideration to the amount of damages awarded as compared to the amount sought” (*id.*) (internal quotation marks omitted) – the court in *McGinnis v. Ky. Fried Chicken* (51 F.3d 805, 808, 810 (9th Cir. 1994)) “noted that [t]he district court must reduce the attorney’s fee award so that it is commensurate with the extent of the plaintiff’s success” (*id.*) (internal quotation marks omitted; alteration in original) – on remand the trial court must “take into account [plaintiff’s] limited success when determining a reasonable award” (565 F.3d at 1105).

*Sahyers v. Prugh, Holliday & Karatinos, P.L.*, 560 F.3d 1241, 14 Wage & Hour Cas. 2d 1000 (11th Cir. 2009) – Paralegal left law firm, retained lawyer, and sued for overtime, alleging she was nonexempt – prior to suit there was no claim and no contact with the defendant – defendant served discovery asking for total number of hours worked and plaintiff “objected to those requests and repeated that she worked in excess of 40 hours per workweek and wanted payment for it.” (560 F.3d at 1243) – in settlement discussions plaintiff’s lowest demand was \$25,000 – defendant served a Rule 68 offer for \$3,500 plus attorney’s fees and costs which was accepted – court asked plaintiff’s lawyer why there had been no pre-suit contact with defendant and explanation was that his client had so instructed him to file suit – plaintiff sought \$13,800 in attorney’s fees plus costs – all fees and costs denied – district court wrote: “there are some cases in which a reasonable fee is no fee” (*id.* at 1244) - ruling affirmed – district court has inherent powers to supervise the conduct of lawyers – “Defendants are lawyers and their law firm. And the lawyer for Plaintiff made absolutely no effort – no phone call; no email; no letter – to inform them of Plaintiff’s impending claim much less to resolve this dispute before filing suit.” (*id.* at 1245) – “[T]his conscious disregard for lawyer-to-lawyer collegiality and civility caused (among other things) the judiciary to waste significant time and resources on unnecessary litigation and stood in stark contrast to the behavior expected of an officer of the court.” (*id.*) – “Given the district court’s power of oversight for the bar, we cannot say that this decision was outside of the bounds of the district court’s discretion.” (*id.* at 1246) – “We strongly caution against inferring too much from our decision today. These kinds of decisions are fact-intensive. We put aside cases in which lawyers are not parties.” (*id.*)

*Garner v. Cuyahoga Cnty. Juvenile Court*, 554 F.3d 624, 105 FEP 507 (6th Cir. 2009) – Federal district court did not err in finding that claims of black employees were frivolous, and the employees and their attorney should be liable for attorneys’ fees – it did err in

making each employee, who had a separate claim, jointly and severally liable for the totality of the attorneys' fees – it also erred in not evaluating ability to pay with respect to the individual employees – attorney asserted that she alone should be held responsible for the attorneys' fees – appeals court rejected this argument, saying attorney should be jointly liable with clients, but that the amount of her liability, imposed as a sanction, should also be dependent upon remand on the degree of her responsibility and her ability to pay.

*EEOC v. Agro Distributions LLC*, 555 F.3d 462, 21 A.D. Cas. 788 (5th Cir. 2009) – Award of \$225,000 in attorneys' fees against EEOC affirmed – allegedly disabled employee admitted in deposition that he was able to perform the manual labor in question by using mitigating measures and thus he was clearly not disabled prior to the ADA amendments of 2008, which do not apply retroactively – even if disabled, employee admitted at deposition that he never was denied reasonable accommodation – EEOC was aware after his deposition that its action was groundless and was unjustified in continuing to pursue it.

#### **Alternative Dispute Resolution - Arbitration (Ch. 42)**

*Marmet Health Care Ctr., Inc. v. Brown*, \_\_\_ U.S. \_\_\_, 2012 WL 538286 (Feb. 21, 2012) – non-employment case – the West Virginia Supreme Court had held unenforceable a predispute arbitration agreement covering claims alleging personal injury or wrongful death against a nursing home, citing West Virginia “public policy” – the defendants, seeking to enforce the agreement, had relied upon prior U.S. Supreme Court Federal Arbitration Act preemption cases, but the West Virginia court dismissed those cases as “tendentious” and “created from whole cloth” – the U.S. Supreme Court summarily reversed – “West Virginia’s prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA.” (2012 WL 538286, at \*2) – no state “public policy” can supersede that of the FAA – Justice Thomas, who several times had stated his view that the FAA does not apply to cases in state courts, joined the unanimous *per curiam* – case remanded to allow the West Virginia court to consider whether the same result rested on an independent and adequate state-law ground of unconscionability that was untainted by the state court’s misunderstanding of federal preemption.

*AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) – California’s judicially created *Discover Bank* rule finds arbitration agreements unconscionable if they do not allow classwide arbitration – the *Discover Bank* rule is preempted by the FAA – the issue is “whether the FAA prohibits States from conditioning the enforceability of certain

arbitration agreements on the availability of classwide arbitration procedures” (131 S. Ct. at 1744) – the answer is yes – the FAA was enacted in response to widespread judicial hostility to arbitration agreements – federal policy favors arbitration – Section 2 of the FAA permits arbitration agreements to be declared unenforceable “upon such grounds as existed in law or in equity for the revocation of any contract” (*id.*) – this allows arbitration agreements to be invalidated by generally applicable defenses such as fraud, duress or unconscionability “but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” (*id.* at 1746) – plaintiffs argue that unconscionability is included within FAA Section 2 – when state law prohibits outright the arbitration of a particular claim the analysis is straightforward – FAA preemption – inquiry is more complex when a normally applicable doctrine such as duress or unconscionability is alleged to have been applied in a manner that disfavors arbitration – an obvious illustration would be a state policy finding unconscionable arbitration agreements that fail to provide for judicially monitored discovery, or finding unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence – although Section 2’s savings clause preserves generally applicable contract defenses it is not intended to preserve state law rules that stand as an obstacle to the accomplishment of the FAA’s objective – “Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” (*id.* at 1748) – arbitration is a creature of contract – parties may agree to limit the issues – parties may agree to limit with whom they will arbitrate – parties can agree that the proceedings will be kept confidential to protect trade secrets – the parties can agree on streamlined procedures – “California’s *Discover Bank* rule . . . interferes with arbitration. . . . [Its] rule is limited to adhesion contracts . . . but the times in which consumer contracts were anything other than adhesive are long past.” (*id.* at 1750) – “States remain free to take steps addressing the concerns that attend contracts of adhesion – for example, requiring class-action waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.” (*id.* at 1750 n.6) – *Gilmer* case cited as allowing ADEA claims “despite allegations of unequal bargaining power between employers and employees” (*id.* at 1749 n.5) – as held in *Stolt-Nielsen* cannot interpret silent arbitration agreement to allow class arbitration – huge differences between individual and class arbitration – arbitrators not generally knowledgeable about procedural aspects of certification – “The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.” (*id.* at 1750-51) – switch from bilateral to class arbitration sacrifices the principal advantage of arbitration, its informality – as of September 2009, AAA had opened 283 class arbitrations, 121 remained active, and “[n]ot a single one, however, had resulted in a final award on the merits” (*id.* at 1751) – class arbitration was not envisioned by Congress when it passed the FAA – “[I]t is at the very least odd to think

that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied" (*id.* at 1751-52) – class arbitration greatly increases the risks to defendants – “[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of ‘in terrorem’ settlements that class actions entail . . . (*id.* at 1752) – “Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification question on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well.” (*id.*) – “We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.” (*id.*) – “Because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . California’s *Discover Bank* rule is preempted by the FAA.” (*id.*) (citation and internal quotation marks omitted) – 5-4 decision – Justice Thomas concurred based on his interpretation of the wording of the FAA, which allowed a failure to enforce only based on grounds applicable to all contracts “for the revocation of any contract” (*id.* at 1753).

*Rent-A-Center W. Inc. v. Jackson*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 2772, 109 FEP 897 (2010) – 5-4 decision – arbitration agreement signed as condition of hire provided that “[t]he Arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve any dispute relating to . . . any claim that all or any part of this Agreement is void or voidable.” (130 S. Ct. at 2775) – plaintiff alleged that the entire agreement was unconscionable and thus unenforceable – Supreme Court characterized this as a challenge to the agreement to arbitrate in its entirety, which under the agreement must go to the arbitrator, rather than challenging the above-quoted provision delegating to the arbitrator the right to determine the agreement’s validity – due to the failure of the plaintiff to challenge the delegation provision in particular, it must be treated as valid and any challenge to the agreement as a whole must be decided by the arbitrator – here the agreement to arbitrate enforceability (delegation to arbitrator) is severable from the remainder of the agreement, and since plaintiff did not challenge the severable delegation provision specifically, it must be treated as valid and enforced under the FAA – plaintiff in his brief to the Supreme Court raised a challenge to the delegation provision for the first time, as opposed to a challenge to the entire agreement – that is too late and will not be considered – Ninth Circuit reversed.

*Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1758 (2010) – Arbitration agreement was silent on class arbitration – parties stipulated that there was no agreement on arbitrating class cases – AAA found that silent contract allowed for class arbitration – Supreme Court reversed – imposing class arbitration on those who had not

agreed is “fundamentally at war” with the Federal Arbitration Act since under the FAA arbitration is a matter of consent – an implicit agreement on class arbitration “is not a term that the arbitrator may infer solely from the fact of the parties’ agreement to arbitrate,” (130 S. Ct. at 1775) – FAA’s purpose is to enforce private arbitration agreements according to their terms – a party may not be compelled to arbitrate under the FAA unless there is a contractual basis for concluding that the party agreed to do so – the differences between individual and class arbitration are just too great to presume a consent to class arbitration from silence – one enters into individual arbitration agreements for reasons such as speed and lower costs but that is not true for class arbitration – a presumption of confidentiality does not apply in class arbitration – rights of absent parties are adjudicated – what is at risk is comparable to class action litigation but without judicial review – “We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties’ mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.” (*id.* at 1776) – since the parties stipulated there was no agreement to class arbitration, “We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration.” (*id.* n.10).

*14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S. Ct. 1456, 105 FEP 1441 (2009) – Union contract provided that arbitration clause covered statutory discrimination claims – this is a mandatory subject of bargaining under the National Labor Relations Act – a decision to arbitrate Title VII and ADEA claims cannot be equated to a decision to forgo substantive rights against employment discrimination – those rights are enforceable in arbitration – the ADEA itself does not remove age discrimination claims from the National Labor Relations Act’s broad sweep – *Gardner-Denver* distinguished but not overruled – the collective bargaining agreement in *Gardner-Denver* did not contain an express commitment to arbitrate statutory claims – *Gardner-Denver*’s highly critical view of using arbitration to vindicate statutory rights is based on now-outmoded judicial hostility to arbitration – 5-4 decision – “Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.” (556 U.S. at 258) – citing the *Employment Discrimination Law* text, the Supreme Court noted that a union is subject to liability under the ADEA if it discriminates against its members on the basis of age either in negotiations or by acquiescing in employer discrimination.

*Compucredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012) – A credit card customer signed an agreement that all claims would be resolved by binding arbitration – the arbitration agreement precluded class actions – the federal Credit Repair Organizations Act in its disclosure provision advised consumers that “[y]ou have a right to sue a credit repair organization that violates the [Act]” (132 S. Ct. at 669) – this in no way constitutes a

prohibition of agreements to bring such claims in arbitration and does not override the FAA's mandate that arbitration agreements will be enforced as written – "Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the [Federal Arbitration Act] requires the arbitration agreement to be enforced according to its terms." (*id.* at 673).

*In re D.R. Horton, Inc.*, 357 NLRB No. 184, 192 L.R.R.M. 1137 (NLRB 2012) – Employer commits unfair labor practice by requiring employees to sign an arbitration agreement that waived their right to collectively pursue employment-related claims such as class actions in all forums.

*Jock v. Sterling Jewelers, Inc.*, 646 F.3d 113, 112 FEP 1137 (2d Cir. 2011) – 2-1 decision reverses district court vacation of arbitration award which held that arbitration agreement silent on class arbitration impliedly allowed class arbitration – arbitrator decided the issue under the Second Circuit's *Stolt-Nielsen* decision prior to its reversal – the parties stipulated that the issue of whether or not the arbitration agreement allowed for class arbitration could be decided by the arbitrator – once the arbitrator did so, it did not matter that the arbitrator might have made a mistake of fact or law as long as the arbitrator acted within her authority to reach an issue properly submitted to her – company acknowledged it had deliberately chosen not to revise the arbitration agreement despite several arbitral decisions permitting class claims in the absence of an express prohibition – *Stolt-Nielsen* clearly allowed for the possibility of implied agreements to arbitrate – issue is not whether the arbitrator was right but whether the arbitrator had the power to decide the issue – not for the district court to decide whether the arbitrator got it right – *Stolt-Nielsen* did not contain a bright line test – "Our circuit has never held that an intervening change of law, standing alone, provides grounds for vacating an otherwise proper arbitral award" (646 F.3d at 125) – dissent contended *Stolt-Nielsen* was on all fours - it reversed a decision of an arbitration panel that had issued a clause construction award allowing class arbitration when the agreement was silent – although *Stolt-Nielsen* recognized the possibility of implied agreements, it held that an agreement on class arbitration could not be inferred from silence or the fact that the agreement did not expressly preclude class actions – not clear that an arbitrator can properly function in approving a class settlement – "An arbitrator who disapproves a settlement may do so only at a risk of not being selected in future cases." (*id.* at 132) – limited review was also the case in *Stolt-Nielsen*.

*Mathews v. Denver Newspaper Agency*, \_\_\_ F.3d \_\_\_, 112 FEP 432 (10th Cir. 2011) – Under union contract, employee lost arbitration under collective bargaining agreement, which included his contractual discrimination claims – no bar to proceeding in court – *14 Penn Plaza* only dealt with collective bargaining agreements where there was a clear and unmistakable waiver of statutory rights in favor of collective bargaining agreement

arbitration – *Alexander v. Gardner-Denver* is still good law with respect to its holding that losing a contractual claim by itself does not waive the right to litigate statutory claims – although *Gardner-Denver* contained anti-arbitration dicta its “core holding . . . remains intact” (112 FEP at 436) – summary judgment nevertheless affirmed because of total disability representations made on social security application – summary judgment on retaliation claim reversed.

*Kepas v. eBay*, 2010 WL 4318585, 110 FEP 1373 (10th Cir. Nov. 2, 2010) – Arbitration agreement employee required to sign is enforceable despite exclusion of claims involving proprietary information - forum-selection clause is not substantively unconscionable – provision allowing arbitrator to impose costs of arbitration is severable.

*Ragone v. Atlantic Video*, 595 F.3d 115, 108 FEP 781 (2d Cir. 2010) – Employee ordered to arbitrate sexual harassment claim despite potentially unenforceable provisions in the arbitration agreement that would make it unconscionable – these provisions included shortening the statute of limitations and mandating attorney’s fees to the prevailing party – the employer waived the objectionable provisions – the court made it clear that had the employer attempted to enforce the arbitration agreement as written it would not have been enforced.

*McNamara v. Yellow Transp., Inc.*, 570 F.3d 950, 106 FEP 1025 (8th Cir. 2009) – Employer did not waive right to compel arbitration by failing to seek arbitration during EEOC proceedings.

*Mazera v. Varsity Ford Mgmt. Servs., LLC*, 565 F.3d 997, 21 A.D. Cas. 1537 (6th Cir. 2009) – Provision in arbitration agreement requiring deposit of \$500 or five days’ pay within 10 days of an adverse employment decision is exorbitant and unenforceable – however, arbitration ordered because the arbitration agreement provided that the employee could request a waiver of the deposit – employee directed to request waiver within 10 days of the arbitration order.

### **Settlement (Ch. 43)**

*Weems v. Tyson Foods, Inc.*, 665 F.3d 958, 114 FEP 65 (8th Cir. 2011) – Plant manager removed from her position and told her would be terminated if did not find another position within 30 days – she alleged sex discrimination – company responded by offering her money for a general release – she refused – jury verdict in her favor – new trial granted because she introduced proposed settlement agreement into evidence – settlement agreement was clearly offer of compromise which could not be admitted into evidence under Rule 408.

*Johnson v. Nextel Commc'ns, Inc.*, 660 F.3d 131, 113 FEP 714 (2d Cir. 2011) – 587 employees retained law firm of Leeds, Morelli & Brown (LMB) to bring discrimination case against Nextel – LMB instead negotiated an agreement with Nextel that firm would be paid cumulative total of \$7.5 million to persuade employees to drop lawsuits in favor of expedited mediation/arbitration procedure and to waive claims for punitive damages and non-monetary relief – employees sued LMB for fraud, breach of contract, and malpractice and sued Nextel for aiding and abetting the above and tortious interference with a contract – dismissal below reversed.

*Bissada v. Ark. Children's Hosp.*, 639 F.3d 825, 112 FEP 321 (8th Cir. 2011) – Plaintiff's attorney emailed an offer to settle which was verbally accepted by the hospital's attorney, hospital took action in reliance on the settlement, and purported revocation and fact that plaintiff did not sign the agreement is immaterial – agreed-upon revocation of hospital privileges cannot form the basis of a Title VII claim.

*Galera v. Johanns*, 612 F.3d 8, 109 FEP 1289 (1st Cir. 2010) – General release of all retaliation claims existing at time of settlement upheld – plaintiff contended that release must “identify the claims resolved” – “[g]eneral waivers of this nature which are, as here, knowing and voluntary, have previously been found valid” (612 F.3d at 14).

*Hampton v. Ford Motor Co.*, 561 F.3d 709, 105 FEP 1670 (7th Cir. 2009) – Employee accepted cash buyout which included a release waiving “any and all rights or claims” – this extended to Title VII – her subjective understanding is irrelevant – release provided that she carefully read and reviewed the agreement and she had ample time – to the extent she is seeking rescission, she needed to return the cash payment but has not offered to do so.

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