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EMPLOYMENT DISCRIMINATION LAW UPDATE

By

Paul Grossman∗

This is a supplement to Lindemann, Grossman & Weirich, Employment Discrimination Law (5th ed. 2013). It is organized by book chapters. The 5th edition includes court of appeals decisions through June 30, 2011 and Supreme Court cases through June 30, 2012. With a few exceptions, this update begins with cases decided after January 1, 2011. It focuses almost exclusively on court of appeals and Supreme Court decisions.

Disparate Treatment (Ch. 2)

Summary Judgment Standards

Lobato v. N.M. Env’t Dep’t, Envtl. Health Div., 733 F.3d 1283, 120 FEP 989 (10th Cir. 2013) – No cat’s paw liability – supervisor called Hispanic plaintiff “f***ing Mexican” – reliance on Staub – plaintiff contends that Staub has announced a categorical rule that if a biased supervisor’s animus in any way leads to an adverse employment decision, it is the proximate cause even if there is an independent investigation – “Staub does not go this far,” 733 F.3d at 996 – Staub explained that a necessary element of a claim is the decisionmaker’s uncritical “reliance” on facts provided by a biased supervisor – “If there is no such reliance – that is to say, if the employer independently verifies the facts and does not rely on the biased source – then there is no subordinate bias liability,” id. – Staub recognized the problem that a biased supervisor will frequently initiate an

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investigation but the decision will be made independently by others – in *Staub* the court explained “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,” id. (emphasis in original) – “In short, an employer is not liable under a subordinate bias theory if the employer did not rely on any facts from the biased subordinate in ultimately deciding to take an adverse employment action – even if the biased subordinate first alerted the employer to the plaintiff’s misconduct,” 733 F.3d at 997 – in *Staub* there was a claim of falsification and the HR Rep did not follow up – here there is no evidence the decisionmakers relied upon the biased supervisor’s version of the facts – “Because there is no genuine dispute that [the employer] decided to dismiss [the plaintiff] after conducting an independent investigation without relying on facts from [the biased supervisor], we conclude this theory of Title VII liability fails,” id. – summary judgment affirmed.

*Perez v. Thorntons, Inc.*, 731 F.3d 699, 120 FEP 1 (7th Cir. 2013) – Convenience store employee sold herself $127 worth of candy for $12 and was fired – summary judgment reversed – only a few months earlier plaintiff’s non-Hispanic male supervisor committed a similar act and was merely warned – a jury must hear employer’s evidence “and decide why [the employer] chose to treat arguably similar wrongdoing so differently,” 731 F.3d at 700 – our circuit has jettisoned the “direct/indirect paradigm” in favor of a simple analysis of whether a reasonable jury could infer prohibited discrimination – to use comparative evidence, “a plaintiff must identify at least one employee who is directly comparable to her in all material respects,” 731 F.3d at 704 – but the comparator does not have to be identical in every conceivable way – the courts must conduct a commonsense examination – her supervisor covered up theft from the store – employer said that the supervisor’s conduct was not comparable because there was no actual economic harm – “[a] jury might buy that explanation, but we cannot resolve that issue on summary judgment,” id. – supervisor covered up larger economic loss and acted in secret whereas we must assume that the discounted candy bars were bought with the supervisor’s consent – 2 to 1 decision – decisionmaker both hired and promoted the plaintiff before he fired her – same decisionmaker argument will be considered by the jury – the assumption that since the decisionmaker was unbiased at Time A when he hired the plaintiff he must also have been unbiased at Time B “is not a conclusive presumption, but we treat it as a reasonable inference,” 731 F.3d at 710.
Pearson v. Mass. Bay Transp. Auth., 723 F.3d 36, 119 FEP 1 (1st Cir. 2013) – Opinion by Associate Justice Souter sitting by designation – summary judgment affirmed on claims of discrimination – arbitrator’s decision overturning discharge not inconsistent with summary judgment – “it simply means that [plaintiff] should not have been fired because [the supervisor’s] directive was ambiguous: there was no intimation that the firing had been motivated by racial animus,” 723 F.3d at 41 – to defeat summary judgment plaintiff had to offer some minimally sufficient evidence both of pretext and animus – repeated insubordination is a legitimate non-discriminatory reason – decisionmaker was also African-American. [NOTE – retaliation portion of case discussed in retaliation chapter.]

Johnson v. Koppers, Inc., 726 F.3d 910, 119 FEP 673 (7th Cir. 2013) – Summary judgment affirmed against employee with history of outbursts – in latest outburst, she was terminated for pushing a co-worker – she clearly does not meet the company’s legitimate job expectations even if her work was satisfactory – relevant inquiry is not whether she admitted to shoving the co-worker, or whether she did shove the co-worker, but whether the decisionmaker genuinely believed that she had engaged in the conduct.

Evance v. Trumann Health Serv., LLC, 719 F.3d 673, 118 FEP 1532 (8th Cir. 2013) – Pentecostal nurse working in nursing home terminated for inappropriate sexual contact with 80-year old resident – she claimed no one ever terminated because of inappropriate sexual contact initiated by the patient – this is not a substitute for comparative evidence – to establish unlawful discrimination she must show that the alleged comparators were similarly situated in all relevant respects – they must have had the same supervisor, been subject to the same standards, engaged in the same conduct without any mitigating or distinguishing circumstances – general allegations are insufficient – only she was accused of misconduct, and investigated by the police.

Muor v. U.S. Bank, N.A., 716 F.3d 1072, 118 FEP 1537 (8th Cir. 2013) – Cambodian banking specialist did not produce proper comparative evidence – comparators not similarly situated in that she did not show that they made the same errors, made errors as frequently, or that their level of experience was commensurate to hers – comment about “slant eyes” was made years before the decisionmaker was promoted to become a supervisor.
**Kuhn v. Washtenaw Cnty., 709 F.3d 612, 117 FEP 935 (6th Cir. 2013)** – An extensive internal investigation is not an adverse employment action – black deputy sheriff was accused of rape – full investigation exonerated him – he contended that the mere fact of the investigation was a material adverse action, and he was entitled to a trial on the question of whether it was motivated by race discrimination – he claimed the investigation was not in good faith – no basis for a court imposing a good faith requirement on an employer conducting an internal investigation – “[s]uch an inquiry into the employer’s subjective motive would be contrary to objective analysis of whether an employment action is adverse,” 709 F.3d at 626.

**Haire v. Bd. of Supervisors of La. State Univ., 719 F.3d 356, 118 FEP 917 (5th Cir. 2013)** – Summary judgment for employer reversed and case remanded for trial on “cat’s paw” theory – male in LSU Police Department chosen for promotion over female despite the fact that she was a college graduate and he was not – decisionmaker was new to the college – claimant’s immediate supervisor had made sexist statements and ordered her to enter information that supervisor later claimed to decisionmaker violated University policy – cat’s paw theory applicable when biased supervisor has influence over the official decisionmaker – remanded for trial.

**Pulczinski v. Trinity Structural Towers, Inc., 691 F.3d 996, 26 A.D. Cas. 1293 (8th Cir. 2012)** – Summary judgment affirmed because employer had “honest belief” on basis for termination – there is a distinction between a “mistaken” reason and a “false” reason – employer after investigation reasonably believed that plaintiff was organizing his crew to refuse to work overtime – argument that investigation was not comprehensive and that this showed pretext rejected – scope of investigation was a valid business judgment not subject to review.

**Ross v. Jefferson Cnty. Dep’t of Health, 701 F.3d 655, 116 FEP 930, 27 A.D. Cas. 1 (11th Cir. 2012)** – Summary judgment properly granted on black employee’s race discrimination claim since she waived her complaint of racial discrimination when she was asked whether she “felt like her termination had anything to do with her race” and she responded “no.”
Coleman v. Donahoe, 667 F.3d 835, 114 FEP 160 (7th Cir. 2012) – African-American female plaintiff terminated after 32 years because she told her psychiatrist she was having thoughts of killing her supervisor – comparators were two white male employees at the same facility who had threatened another employee at knife point yet received only one-week suspensions from the same manager who fired plaintiff – summary judgment reversed – issue is how alike the comparators must be to be considered similarly situated – similarly situated inquiry is flexible – it simply asks if there are enough common features to allow a meaningful comparison – proposed comparator must be similar enough to permit a reasonable jury to infer that an impermissible animus motivated the decision – this case involved the same decisionmaker subject to the same code of conduct and that is close enough – comparative evidence can demonstrate pretext – In the usual case the plaintiff must show that the comparators dealt with the same supervisor, were subject to the same standards, and engaged in similar conduct – but this is not a magic formula – the supervisor believed that the knife incident was just horseplay. The direct supervisor of the two men was not the same as the plaintiff’s supervisor but the decisionmaker, the operations manager, was the same – “When two grown men hold a person down while brandishing a knife . . . not only is a ‘particular threat[ ] . . . involved’ – [but] a jury could reasonably conclude that it was a far more immediate one than an employee confiding in her psychiatrist in a private therapy session that she was having thoughts about killing her boss.” (667 F.3d at 851) – “We have noted with some concern the tendency of judges in employment discrimination cases ‘to require closer and closer comparability . . . .’ The purpose of the similarly situated requirement is to ‘provide plaintiffs the “boost” that the McDonnell Douglas framework intended.’ . . . Demanding nearly identical comparators can transform this evidentiary ‘boost’ into an insurmountable hurdle.” (667 F.3d at 851-52 (citations and footnote omitted). – As to pretext we doubt that the plaintiff’s statements to her psychiatrist constituted a true threat at all and the comparator evidence shows that her managers did not enforce the rule against threats evenhandedly – arbitration decision in favor of plaintiff is not entitled to preclusive effect in discrimination litigation.
Johnson v. Holder, 700 F.3d 979, 116 FEP 821 (7th Cir. 2012) – Summary judgment affirmed in race, sex and age case – comparators not similarly situated – they did not share “a similar record of misconduct, performance, qualifications or disciplining supervisors such that their different treatment reflects a discriminatory intent on the part of the [employer],” 700 F.3d at 982.

Autry v. Fort Bend Indep. Sch. Dist., 704 F.3d 344, 116 FEP 1582 (5th Cir. 2013) – White woman without college degree hired from outside in lieu of promoting African-American plaintiff with college degree – decision based on subjective ranking of multiple interviewers – in order to infer discrimination the unsuccessful plaintiff must be “clearly better qualified” - two allegedly racial comments about President Obama – one was purely political – the other “was without force in the face of a motion for summary judgment,” 704 F.3d at 349.

Chappell v. Bilco Co., 675 F.3d 1110, 114 FEP 1089 (8th Cir. 2012) – Issue is comparative evidence – summary judgment against employee terminated for violating point count attendance policy affirmed – for comparative evidence, there have been two standards in the Eighth Circuit – one is that the employees are involved in or accused of the same or similar conduct and are disciplined in different ways – the other requires that the employees be similarly situated in all material respects – summary judgment affirmed because plaintiff did not demonstrate that similarly situated employees were treated more favorably – cat’s paw argument rejected because initiating supervisor, who did not make the decision, not shown to be biased.

Davis v. Jefferson Hosp. Ass’n, 685 F.3d 675, 115 FEP 705 (8th Cir. 2012) – Black cardiologist had hospital privileges revoked because of abuse of staff, poor record of patient care, and failure to maintain proper medical records – alleged white comparators who also behaved inappropriately toward staff but were not disciplined not comparably situated, since no evidence they provided poor patient care or kept insufficient medical records.

Bone v. G4S Youth Serv., LLC, 686 F.3d 948, 115 FEP 1077 (8th Cir. 2012) – Summary judgment affirmed against white special education supervisor terminated for misconduct – contention that 19 young black employees received progressive discipline for similar misconduct rejected – alleged comparators had different immediate supervisors, did not engage in the same conduct, and were not similar to the plaintiff “in all relevant respects.”

Espinal v. Nat’l Grid NE Holdings 2, LLC, 693 F.3d 31, 115 FEP 1418 (1st Cir. 2012) – Gas company employee suspended for failing to respond to pages – issue was not whether he did it but whether employer reasonably believed he did it – “[i]n assessing whether an adverse employment decision is pretextual, we do not sit as a super-personnel department that reexamines an entity’s business decisions,” 693 F.3d at 35 (citations and internal quotation marks omitted) – alleged comparator not “similarly situated to him in all relevant respects,” id. – summary judgment affirmed

Good v. Univ. of Chi. Med. Ctr., 673 F.3d 670, 114 FEP 903 (7th Cir. 2012) – White plaintiff was discharged for misconduct similar to that for which three non-white individuals were merely demoted – Eighth Circuit agrees with plaintiff that the three were comparable in all material respects – however, different treatment for comparables must lead “directly to the conclusion that an employer was illegally motivated, without reliance on speculation” (673 F.3d at 676) (emphasis in original) – this requirement “can be a high threshold, particularly in a reverse discrimination case” (id. at 676-77) – “This record simply does not contain a hint of race-based animus. A jury could not reasonably conclude that [plaintiff] was treated differently because of her race without relying on speculation.” (id. at 677) – no evidence anyone had an anti-white bias.
Othman v. City of Country Club Hills, 671 F.3d 672, 114 FEP 804 (8th Cir. 2012) – Summary judgment affirmed against part-time police officer not hired for full-time position who alleged cat’s paw liability – allegedly biased supervisor was a police captain – the unbiased decisionmaker was the police chief – the captain conducted background investigations and provided recommendations – plaintiff failed to establish that the allegedly biased captain was a decisionmaker – no evidence that the captain recommended that the successful candidates be hired or that the captain had any influence on the chief’s decision to exclude plaintiff – the captain’s discriminatory animus was simply not a proximate cause of the chief’s decision not to consider the part-time plaintiff for a full-time position.

Harris v. Warrick Cnty. Sheriff’s Dep’t, 666 F.3d 444, 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,” 666 F.3d at 449 – 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 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. Ill. State Univ.*, 667 F.3d 800, 114 FEP 1 (7th Cir. 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 by 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 Chi., 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 decision makers 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.

**General**

**United States v. City of New York,** 717 F.3d 72, 118 FEP 417 (2d Cir. May 14, 2013) – Trial court granted summary judgment against New York in disparate treatment pattern-or-practice case – trial court held that conceding disparate impact of written examinations for entry level firefighters warranted summary judgment because under the Supreme Court *Teamsters* case unless the statistics can be rebutted the defendant loses – the trial court disregarded evidence that the exams were facially neutral and complied with acceptable test development methods – summary judgment reversed and case remanded for trial – in disparate treatment pattern-or-practice case employer may properly defend by accepting plaintiff statistics but producing non-statistical evidence that it lacked discriminatory intent – City fire commissioner not entitled to qualified immunity where trier of the fact could find that he undertook discriminatory course of action by continuing to use the results of exams despite awareness of the disparate impact – case remanded for trial before a different judge since original trial court’s rejection of City’s evidence as
“either incredible or inapposite” might cause an objective observer to question his impartiality.

*Rapold v. Baxter Int’l, Inc.*, 708 F.3d 867, 117 FEP 129 (7th Cir. 2013), amended on denial of reh’g and reh’g en banc, 718 F. 3d 602 (7th Cir. June 3, 2013) – Federal District Court properly denied plaintiff’s request for a mixed motive instruction – plaintiff alleged an adverse employment action because of his national origin – the employer asserted that it acted because of the plaintiff’s misconduct which included yelling and screaming at co-workers – no evidence of mixed motives – each party contended there was a single motive – the plaintiff need not concede that the employer had a permissible as well as an impermissible motive to request a mixed motive instruction, but the “District Court was within its considerable discretion to conclude that neither [parties’] evidence warranted giving a mixed motive instruction,” 708 F.3d at 876.

*Ponce v. Billington*, 679 F.3d 840, 115 FEP 1 (D.C. Cir. 2012) – Issue was burden of proof in disparate treatment – jury was instructed that plaintiff must prove that illegal discrimination “was the sole reason” but this was clarified by stating “[H]e must prove that but for his race . . . national origin . . . or . . . his sex, he would have been hired . . . .” (679 F.3d at 843) – “sole” was in error, but the error was harmless because of the but for instruction – “[W]e hereby banish the word ‘sole’ from our Title VII Lexicon.” (id. at 846).

*Twiggs v. Selig*, 679 F.3d 990, 115 FEP 173 (8th Cir. 2012) – Female and male employee both lied – only female terminated – not comparably situated because male employee immediately confessed his lie, whereas female employee stood by her lie for a substantial period of time.

*Chin v. Port Auth. of NY & NJ*, 685 F.3d 135, 115 FEP 720 (2d Cir. 2012) – Eleven Asian-Americans sued for promotion discrimination – 7 won, 4 lost – they asserted three theories – individual disparate treatment, pattern or practice disparate treatment, and disparate impact – pattern or practice theory inapplicable in individual disparate treatment case – court also erred in applying a continuing violation doctrine to disparate impact allowing damages for harms pre-dating the onset of the statute of limitations – remanded to recalculate damages limited to the appropriate time frame without reference to continuing violations.
Hampton v. Vilsack, 685 F.3d 1096, 115 FEP 854 (D.C. Cir. 2012) – African-American employee discharged for expense reimbursement fraud claimed that racially biased supervisor infected the decision – although the supervisor initiated the investigation, he did so only after the reimbursement processor discovered suspicious hotel receipts – the supervisor took no part in the investigation – the deciding official was not depending upon a biased subordinate’s opinion or unable to independently assess the basis for the decision – the decision maker gave the claimant a chance to respond to the proposed discharge and when questions were raised the decision maker ordered additional investigation – nothing in the record suggests that the expense fraud was not the actual reason for the discharge. Staub was quoted for the proposition that “[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” 685 F.3d at 1102 (quoting Staub v. Proctor Hosp., 131 S. Ct. 1186, 1193 (2011)).

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.

**Adverse Impact (Ch. 3 & Ch. 4)**

*Adams v. City of Indianapolis*, ___ F.3d ____, 121 FEP 948, 2014 WL 406772 (7th Cir. Feb. 4, 2014) – Judgment on the pleadings in disparate impact case challenging promotion procedure affirmed – no right to amend – District Court wrong in relying on lack of facially neutrally employment policy since disparate impact claims may be based on any employment policy, not just facially neutral – allegations of intentional discrimination do not defeat disparate impact claims – the judgment on the pleadings proper because the amended complaint fails to state a plausible claim through disparate impact – the amended complaint must satisfy the *Twombly/Iqbal* plausibility standard – but the amended complaint alludes to disparate impact in wholly conclusory terms – words like “disproportionate” “impermissible impact” are legal conclusions, not facts – “There are no allegations about the number of applicants and the racial makeup of the applicant pool as compared to the candidates promoted or as compared to the police or fire department as a whole,” 2014 WL 406772, at *10 – “There are no factual allegations tending to show a causal link between the challenged testing protocols and a statistically significant racial imbalance . . . .” id. – no abuse of discretion in denying plaintiff’s second motion for leave to amend – summary judgment granted in disparate treatment claims – better scores on the test is a legitimate non-discriminatory reason.

*Howe v. City of Akron*, 723 F.3d 651, 119 FEP 165 (6th Cir. 2013) – Injunction following trial but before final decision requiring promotion of African-American and older candidates for a fire department promotion affirmed – proper to compare promotion rates rather than exam pass rates – proper to use 4/5ths test to determine adverse impact – all that is required is a substantial likelihood of success on the merits for a preliminary injunction even though no final verdict – irreparable harm present since time in new position helps qualify for future promotions – promotion delays constitute irreparable injury.
EEOC v. Freeman, ___ F. Supp. 2d ___, 119 FEP 861, 2013 WL 4464553 (D. Md. 2013) – EEOC failed to establish *prima facie* case of disparate impact with respect to employer’s consideration of credit history and conviction records – conducting a criminal history or credit record background check on a potential employee is a rational and legitimate component of a reasonable hiring process – this case is one of a series of cases the EEOC has brought against employers who consider convictions and/or credit history – since African-Americans are incarcerated at a higher rate than Caucasians, the higher incarceration rate might cause one to fear that any use of criminal history would violate Title VII – this is simply not the case – careful and appropriate use of criminal history information is important – “As Freeman points out, even the EEOC conducts criminal background investigations as a condition of employment for all employees, and conducts credit background checks on approximately 90 percent of its positions,” 119 FEP at 862 – a disparate impact case must be carefully focused on a specific practice with an evidentiary foundation showing that it has a disparate impact because the prohibited factor – the Supreme Court in *Watson* made it clear that the inevitable focus on statistics in disparate impact cases results in a very high standard of proof which can be difficult for plaintiffs to meet – summary judgment granted because the EEOC failed to produce reliable information – the application form asked about criminal history and then asked for an explanation of circumstances – background check normally not run until after the applicant was offered and accepted a position but before he or she began work – considered only convictions or incarcerations within seven years – first, defendant considered whether the applicant was truthful about criminal convictions – misrepresentations were disqualifying – next, the company considered outstanding arrest warrants – if they existed, the applicant was given a reasonable opportunity to resolve the matter or explain – defendant evaluated whether the conduct underlying a particular conviction made the applicant unsuitable – generally disqualifying were claims involving violence, destruction of property, sexual misconduct, felony drug convictions, or job-related misdemeanors – initial decisions by an office manager not to hire an applicant because of a conviction were reviewed by the head of HR – the EEOC sued on behalf of both a “credit class” of 51 African-Americans and a criminal class of 83 African-Americans – Freeman moved to preclude the testimony of EEOC experts Kevin Murphy and Beth Huebner, pointing to an overwhelming number of inaccuracies in the underlying data – the summary judgment motion was based on the EEOC’s failure to present reliable statistical data – “there appear to be
such a plethora of errors and analytical fallacies underlying Murphy’s conclusions to render them completely unreliable, and insufficient to support a finding of disparate impact,” 119 FEP at 867 – report was not based on a random sample of data – Murphy had access to almost 60,000 applicants but his testing database included only about 2,000 – the database did not cover the entire relevant time period – in “an egregious example of scientific dishonesty, Murphy cherry-picked certain individuals from the other discovery materials in an attempt to pump up the number of ‘fails’ in his database[,]” 119 FEP at 868 – Murphy’s database omitted all data from half of the offices – “[t]he mind-boggling number of errors contained in Murphy’s database could alone render his disparate impact conclusions worthless[,]” id. at 869 – national statistics alone cannot prove disparate impact for a particular employer – the EEOC failed to isolate specific employment practices but rather lumped together credit and criminal screening policies as a whole – “[t]he story of the present action has been that of a theory in search of facts to support it[,]” id. at 874.

*M.O.C.H.A. Soc’y, Inc. v. City of Buffalo, 689 F.3d 263, 115 FEP 929 (2d Cir. 2012)* – Promotional exam for firefighters has disparate impact but is job-related and consistent with business necessity – City relied on statewide job analysis in which it barely participated, but analysis was based on reliable statistics showing that fire lieutenants across state and nation share the same critical tasks and skills – employer established (1) a suitable job analysis; (2) reasonable competence in constructing the test; (3) content of test related to content of job; (4) content of test was representative of content of job; and (5) scoring system selected from among applicants those who can better perform – after employer met its burden, plaintiffs failed to show that a different test with a lower impact would serve the employer’s legitimate interest.

*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.
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.

Young v. Covington & Burling LLP, 846 F.Supp.2d 141, 114 FEP 876 (D.D.C. 2012) – Allegation that law firm’s policy of refusing to promote staff attorneys to associate positions had an adverse impact – 50% of staff attorneys, hired primarily because of their experience in conducting document reviews, were black – only one in 15 of the firm’s regular attorneys were black – refusal to promote could not be attacked under the disparate impact theory – candidates for associate positions were hired on various criteria not applicable to staff attorneys, including their legal research and writing abilities.

Race and Color (Ch. 6)

Ayissi-Etoh v. Fannie Mae, 712 F.3d 572, 117 FEP 1551 (D.C. Cir. 2013) – Summary judgment in racial hostile environment case reversed – a single incident of the employer’s vice-president using the “n” word when he yelled at the employee to get out of his office “might well have been sufficient” by itself for a jury to find harassment severe or pervasive enough, according to two members of the three-member panel – “[P]erhaps no single act can more quickly alter the conditions of employment’ than ‘the use of an unambiguously racial epithet such as [the “n” word] by a supervisor,’” 712 F.3d at 577 (citation omitted) – the concurring member of the panel would have found that the single use of the “n” word was sufficient in and of itself to establish a hostile environment claim – although “cases in which a single incident can create a hostile work environment are rare. . . . [n]o other word in the English language so powerfully or instantly calls to mind our country’s long and brutal struggle to overcome racism,” id. at 579-80.
Ondricko v. MGM Grand Detroit, LLC, 689 F.3d 642, 115 FEP 1300 (6th Cir. 2012) – Black casino employee terminated – her attorney alleged white female co-worker had also been guilty of a “bad shuffle” at the blackjack table – employer therefore fired white female, commenting that it did not want to do so but “how can I keep the white girl?” – racial balancing is evidence of a discriminatory motive.

National Origin and Citizenship (Ch. 7)

Cortezano v. Salin Bank & Trust Co., 680 F.3d 936, 115 FEP 77 (7th Cir. 2012) – Summary judgment affirmed on claim that plaintiff fired because spouse was undocumented immigrant from Mexico – assuming without deciding that Title VII prohibits employer bias based on the race or national origin of the spouse, here the motivating factor was the illegal status of the spouse – that is not a protected Title VII category.

Guimaraes v. SuperValu, Inc., 674 F.3d 962, 114 FEP 1032 (8th Cir. 2012) – No national origin discrimination despite fact that supervisor said she was “targeting” the claimant and would attempt to stop her from getting her “green card” – citizenship discrimination is not illegal under Title VII – allegations of mocking her Brazilian accent provides some evidence but without additional support or evidence that the supervisor actually referenced the plaintiff’s accent derisively it is insufficient to avoid summary judgment.

Hernandez v. Yellow Transp., Inc., 670 F.3d 644, 114 FEP 545 (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.

Religion (Ch. 9)

EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 120 FEP 212 (10th Cir. 2013) – No duty to accommodate wearing a hijab – Abercrombie has a “look policy” which requires all of its employees to dress in clothing that is consistent with the clothing sold in its stores – policy explicitly prohibits employees from wearing black clothing and caps – claimant during job interview never indicated she wore the headscarf for religious reasons and that she felt obligated to do so and would need an accommodation – interviewer consulted district manager and decision was to lower the claimant’s interview score on appearance to bring her below the level that would lead to employment – District Court denied summary judgment – Court of Appeals granted summary judgment because employer was not put on notice that headwear was for religious reasons and accommodation needed.

Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 116 FEP 513 (5th Cir. 2012) – Ministerial exception determinative under Supreme Court Hosanna-Tabor decision – employee claimed he was a mere music director who just played piano at mass, and never sang himself – reliance on testimony from priests that “music in the liturgy is sacred and has ritual and spiritual dimensions” and the music “allows the congregation to act together in celebration by singing praises and hymns to the Lord,’” 700 F.3d at 177 n.5.
Porter v. City of Chi., 700 F.3d 944, 116 FEP 705 (7th Cir. 2012) – Plaintiff originally had Sundays and Mondays off which allowed her to attend Sunday morning church services – after a leave she had Fridays and Saturdays off, which conflicted – employer asked for volunteers to trade, received none, and then offered a 3:30 p.m. to 11:30 p.m. Sunday shift which would allow plaintiff to attend her church services – plaintiff never followed up, took another leave of absence and never returned – summary judgment granted – reasonable accommodation as a matter of law – City did not have to grant plaintiff's preferred accommodation as long as it proposed an accommodation that eliminated the conflict between work requirements and her religious beliefs – “Had changing [shifts] affected Porter’s pay or other benefits, a much more rigorous inquiry would be required” – “That is not the case before us, however. Porter simply did not want to work the later [shift], but that does not make the proposed accommodation unreasonable.” 700 F.3d at 952.

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.

Sanchez-Rodriguez v. AT&T Mobility P.R., Inc., 673 F.3d 1, 114 FEP 912 (1st Cir. 2012) – Summary judgment against Seventh Day Adventist who claims inadequate accommodation – employer offered two positions that did not require Saturday work and allowed employee to swap shifts.

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. Univ. of N.C.-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.

Sex (Ch. 10)

EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 118 FEP 891 (5th Cir. 2013) – Female plaintiff after giving birth informed employer that she was breast feeding and asked if there was a backroom that she could use to pump milk – she apparently did not “demand” this as an accommodation but merely asked – employer discharged her – summary judgment for employer reversed – discharge because of lactation is discharge because of a medical condition related to pregnancy – this is not the same as requiring an accommodation – “Houston Funding contended [plaintiff] was fired because she inquired about whether she would be allowed to use a breast pump. Simply posing this question is not alleged to be a terminable offense. But nothing in this opinion should be interpreted as precluding an employer’s defense that it fired an employee because that employee demanded accommodations,” 717 F.3d at 430 n.7.
Covington v. Int’l Ass’n of Approved Basketball Officials, 710 F.3d 114, 117 FEP 925 (3rd Cir. 2013) – female high school basketball referee may pursue Title VII sex discrimination claim – she was excluded from officiating boys games – the Association of Referees may be deemed either employer or employment agency.

Young v. United Parcel Serv., Inc., 707 F.3d 437, 116 FEP 1569 (4th Cir. Jan. 9, 2013) – Employer limited light duty to employees injured on the job who were disabled as defined under the ADA, or who had lost their DOT certification – plaintiff claimed pregnancy discrimination – Pregnancy Discrimination Act amendment to Title VII requires employers to treat pregnant employees the same as “other persons not so affected but similar in their ability or inability to work” (quoting 42 U.S.C. § 2000e(k)) – no violation – “[b]y limiting accommodations . . . UPS has crafted a pregnancy-blind policy,” 707 F.3d at 446 – “Such a policy is at least facially a ‘neutral and legitimate business practice,’ and not evidence of UPS’s discriminatory animus toward pregnant workers,” id.

Morales-Cruz v. Univ. of P.R., 676 F.3d 220, 114 FEP 1185 (1st Cir. 2012) – Female law school professor terminated for failing to report that a colleague had impregnated a student has no claim of sex discrimination because of gender stereotyping – there is no common stereotype that women are more or less willing to report the sexual foibles of their coworkers.

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.

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

**EEOC v. Boh Bros. Constr. Co., LLC.**, 731 F.3d 444, 120 FEP 15 (5th Cir. 2013) – Jury properly found harassment because of sex in same-sex harassment case – the harassee, a male iron worker, was viewed as not sufficiently masculine – co-workers and male supervisor taunted him tirelessly and used sexual epithets, often two to three times per day, approached him from behind and “humped him” two to three times per week, and male supervisor exposed his genitals to him on about ten different occasions.

**Dixon v. Univ. of Toledo**, 702 F.3d 269, 116 FEP 1604 (6th Cir. 2012) – Black HR official for state university terminated after writing Op Ed piece taking “great umbrage at the notion that those choosing the homosexual lifestyle are ‘civil rights victims’” (702 F. 3d at 272) – No violation of free speech or equal protection in her termination – she was not similarly situated to other University officials who spoke publicly on the issue of gay rights because of the nature of her job.
**Wasek v. Arrow Energy Servs., Inc.**, 682 F.3d 463, 115 FEP 384 (6th Cir. 2012) – Extreme anti-gay taunting on job site – not actionable under Title VII unless because of sex – to establish because of sex must establish harasser was homosexual – speculation insufficient so summary judgment affirmed.

**Walden v. Ctrs. for Disease Control & Prevention**, 669 F.3d 1277, 114 FEP 454 (11th Cir. 2012) – Employee assistance program counselor refused to provide counseling to employee in a same-sex relationship – counselor described herself as a “devout Christian who believes it is immoral to engage in same-sex sexual relationships” (669 F.3d at 1280) and that her religion precluded her from encouraging such a relationship – her discharge did not constitute religious discrimination.

**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.]

**Age (Ch. 12)**

**Summary Judgment, Directed Verdict, JNOV, and Reversals of Jury Verdicts**

**Teruggi v. CIT Grp./Capital Fin., Inc.**, 709 F.3d 654, 117 FEP 773, (7th Cir. 2013) – Summary judgment in age case – no reasonable fact finder could find for plaintiff – “The bits of evidence [plaintiff] offers, which are essentially isolated events or comments with no apparent connection to the termination decision, do not support a reasonable inference of discrimination or retaliatory discharge, either individually or collectively,” 709 F.3d at 656-57 – comments by decisionmaker about his retirement
plans, being “old,” and being on drugs, were insufficient since they pre-dated his termination by at least 18 months and were not in reference to adverse employment action.

Sims v. MVM, Inc., 704 F.3d 1327, 117 FEP 1 (11th Cir. 2013) – Proximate causation standard for cat’s paw liability set forth in Staub v. Proctor Hosp. is not applicable to the ADEA – under Title VII and USERRA plaintiffs need only show discrimination was a “motivating factor” or a proximate cause – ADEA plaintiffs must show “but-for” causation which requires more than mere proximate causation – summary judgment affirmed in age discrimination case – McDonnell Douglas framework continues to be applicable after Gross – “It is important to note . . . the ultimate burden of persu[a]sion remains at all times with the [employee],” 117 FEP at 4 (citation omitted) - regardless of the analytical framework, a plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer’s discriminatory intent – there is virtually no evidence that the decisionmaker who was 61-years old had age bias – every supervisor other than the plaintiff thought that plaintiff was one of the two weakest performers and should be laid off – plaintiff also argued that the decisionmaker acted as a mere cat’s paw for the immediate supervisor – even assuming that the immediate supervisor had animus there is no evidence from which this animus could be concluded to be a “but-for” cause of the termination – “[I]n light of the unanimous opinion of all persons consulted (except for [plaintiff]), we conclude that a reasonable juror could not find that Davis’s animus was a ‘but-for’ cause of [plaintiff’s] termination,” 117 FEP at 7.

Blizzard v. Marion Tech. Coll., 698 F.3d 275, 116 FEP 392 (6th Cir. 2012) – Summary judgment affirmed – although alleged comparable made the same type of mistake, the consequences of the plaintiff’s mistakes were much more serious – replacement was 6½ years younger which falls between age difference of six years or less which is not significant and age difference of 10 or more years which is generally considered significant – employer honestly believed that she was not capable of using new software and had made serious mistakes.
Fleishman v. Cont’l Cas. Co., 698 F.3d 598, 116 FEP 400 (7th Cir. 2012) – Summary judgment affirmed – Offer of severance pay and retirement to poorly performing employee does not create an inference of age discrimination – ambiguous ageist comments not made by decisionmaker – 54-year old staff attorney relied in part on the departure of ten older lawyers from the office – “One would expect older employees to naturally leave their employers. Without more, this occurrence is not evidence of discrimination,” 698 F.3d at 606.

Lefevers v. GAF Fiberglass Corp., 667 F.3d 721, 114 FEP 385 (6th Cir. 2012) – Summary judgment in RIF upheld – record reflected dissatisfaction with performance and economic necessity for RIF – general statements about age and impending retirement made by certain managers immaterial since no evidence that decisionmaker made the statements or considered them – only arguably probative statement was ageist comment by HR representative but that was two years before RIF.

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.

*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.

*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.

**General Issues**

**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.
Walczak v. Chi. Bd. of Educ., __ F.3d __, 121 FEP 506, 2014 WL 92234 (7th Cir. Jan. 10, 2014) – Public school teacher sued for wrongful discharge, and lost in state court – her subsequent federal court ADEA suit was dismissed – claim preclusion – both suits involved the same parties and the causes of action in both cases arose from a single group of operative facts regardless of different theories.

Northwest Airlines, Inc. v. Phillips, 675 F.3d 1126, 114 FEP 1215 (8th Cir. 2012) – Money purchase retirement plan upheld against claim of age discrimination – age is simply one of many factors used to calculate pilots’ benefits – it does not reduce older pilots’ benefits in violation of federal law – many factors could reduce an older pilot’s projected final average earnings, including seniority and number of pay increases – it is natural that a younger pilot who remains with the airline until retirement would receive more promotions and pay increases than an older pilot hired at the same time.

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.

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.

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.

Disability/Handicap (Ch. 13)

General

Summers v. Altarum Inst., Corp., 740 F.3d 325, 29 A.D. Cas. 1 (4th Cir. 2014) – Temporary impairment may be covered under the ADA Amendments Act if sufficiently severe to substantially limit a major life activity – Plaintiff was fired shortly after sustaining serious temporary injuries to both legs that prevented him from walking normally for at least seven months – argument that temporary disabilities cannot provide ADA coverage rejected.
**Brumfield v. City of Chicago**, 735 F.3d 619, 28 A.D. Cas. 1328 (7th Cir. 2013) – Allegations of job discrimination cannot be brought under Title II governing public services, only under Title I which directly addresses job bias – regulations promulgated by the Justice Department which stated that Title II also covered disability bias in the public workplace were not entitled to deference – deference is granted only when a statute is not clear, and the ADA is clear.

**Neely v. PSEG Tex., LP**, 735 F.3d 242, 28 A.D. Cas. 1325 (5th Cir. 2013) – Even after the ADA Amendments Act (“ADAAA”), proper to instruct jury plaintiff must prove he was a “qualified person with a disability” – purpose of amendments may have been to broaden the definition of a disability, but the term remained in the statute – changes made to harmonize the ADA with similar language in Title VII.

**Shirley v. Precision Castparts Corp.**, 726 F.3d 675, 28 A.D. Cas. 609 (5th Cir. 2013) – Two failures to complete entire inpatient drug treatment program required under employer’s substance abuse policy is legitimate grounds for discharge.

**Owusu-Ansah v. Coca-Cola, Co.**, 715 F.3d 1306, 27 A.D. Cas. 1583 (11th Cir. 2013) – Employee was lawfully required to undergo mental health fitness for duty evaluation – he banged his fist on a table and said that someone was “going to pay for this” while complaining about alleged harassment – evaluation was job-related and consistent with business necessity – company had objective basis for concern about potential threat to his co-workers’ safety under EEOC Enforcement Guidance.

**Casias v. Wal-Mart Stores, Inc.**, 695 F.3d 428, 27 A.D. Cas. 18 (6th Cir. 2012) – Employee discharged for marijuana use after failing drug test has no claim under state law prohibiting disability discrimination – does not matter that he was qualifying patient under state medical marijuana act – medical marijuana act only provides potential defense to criminal prosecution or other adverse state action – extending this through public policy to private employers would be excessively broad.
EEOC v. Thrivent Fin. for Lutherans, 700 F.3d 1044, 27 A.D. Cas. 129 (7th Cir. 2012) – Company’s disclosure of former employee’s history of migraines to prospective employers did not violate the ADA because it was not learned about through a medical inquiry – employee revealed history of migraines to supervisor who inquired about unexpected absence – only “medical inquiries” are covered with respect to medical confidentiality, not all “job related” inquiries.

Steffen v. Donahoe, 680 F.3d 738, 25 A.D. Cas. 1825 (7th Cir. 2012) – Postal employee had back injury – 25-pound lifting restriction and inability to stand for over two hours – not disabled and not regarded as disabled – deposition testimony of employer official that she believed he received disability accommodation was insufficient to establish he was regarded as having a substantial limitation – impairments colloquially referred to as disabilities may not meet legal definition of disabilities – deposition question centered on past accommodation and testimony did not indicate mistaken belief that he was substantially impaired.

Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 26 A.D. Cas. 11 (9th Cir. 2012) – Attendance is an essential job function for a neonatal intensive care unit nurse – difficult to find replacements – she was discharged for absenteeism after her request for an attendance policy exemption was denied – her failure to quantify the number of additional unplanned absences she was seeking amounted to a request for the accommodation of an open-ended schedule.

Regan v. Faurecia Auto. Seating, Inc., 679 F.3d 475, 26 A.D. Cas. 257 (6th Cir. 2012) – The ADA does not require an accommodation with respect to an employee’s commuting problems – employee requested leave to start work an hour later in order to avoid heavy traffic – joining several other circuits Sixth Circuit holds that commuting problems did not justify a request for a modified work schedule – reasonable accommodations must be provided to eliminate barriers in the workplace, but not to eliminate barriers that exist outside the workplace.

Ryan v. Capital Contractors, Inc., 679 F.3d 772, 26 A.D. Cas. 385 (8th Cir. 2012) – Intellectually impaired construction worker discharged after fight with working foreman – no disparate treatment despite retention of foreman under zero tolerance policy against fighting – not similarly situated since worker twice escalated the incident and engaged in higher levels of physical aggression – hostile environment claim also rejected despite derogatory disability-based comments from the working foreman – foreman’s lack of supervisory authority barred the imposition of vicarious liability – moreover the name-calling was not objectively offensive given the worker’s participation in generalized workplace name-calling and his continued ability to do his job.

St. Martin v. City of St. Paul, 680 F.3d 1027, 26 A.D. Cas. 516 (8th Cir. 2012) – City fire captain with bad knee repeatedly denied promotion to District Chief – no ADA claim – since he was physically capable of doing the fire captain job he was physically capable of doing the promotional positions so he simply was not disabled – he was not regarded as disabled since he was perceived as fully able to do his present job – 2-1 decision.

Hanson v. Caterpillar, Inc., 688 F.3d 816, 26 A.D. Cas. 1034 (7th Cir. 2012) – Assembler injured neck and could not perform assembler job – given three light duty jobs temporarily while neck injury being treated – prognosis was that she could not return to assembler job, and was terminated – did not show that company regarded her as unable to perform a broad range of jobs.

Rosebrough v. Buckeye Valley High School, 690 F.3d 427, 26 A.D. Cas. 1025 (6th Cir. 2012) – One-handed woman qualified to be a bus driver trainee.
Palmquist v. Shinseki, 689 F.3d 66, 26 A.D. Cas. 1038 (1st Cir. 2012) – “But-for” standard governs Rehabilitation Act retaliation claim.

McDonough v. Donahoe, 673 F.3d 41, 25 A.D. Cas. 1697 (1st Cir. 2012) – Letter carrier claiming disability discrimination failed to show that her neck and back problems substantially limited her in any of the five major life activities she alleged or that she was regarded as disabled.

Griffin v. United Parcel Serv., 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, 2011 WL 3663199 (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 Wis. 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., 681 F.3d 312, 26 A.D. Cas. 389 (6th Cir. 2012) – Issue was whether mobility-impaired nurse was terminated because she yelled and used profanity in criticizing her supervisors or whether it was because of her medical condition – she proposed a jury instruction where she needed to prove only that her disability was a “motivating factor” – the employer proposed and the court accepted a jury instruction that a finding in her favor required a determination that she was discharged “solely” because of her disability – this was error and she is entitled to a new trial – neither proposed jury instruction was correct for a mixed-motive claim under the ADA – it would be error to read the “motivating factor” language from Title VII into the ADA – the ADA and the ADEA share language and therefore the proper test is “but for” – judgment for employer reversed and remanded for new trial.
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. Pac. 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.
Qualified Individual with Disability/Essential Job Functions

**Majors v. Gen. Elec. Co.,** 714 F.3d 527, 27 A.D. Cas. 1313 (7th Cir. 2013) – Employee with 20-pound lifting restriction requested as accommodation assignment of co-worker to perform heavy lifting – this was not reasonable as a matter of law.

**McMillan v. City of New York,** 711 F.3d 120, 27 A.D. Cas. 929 (2d Cir. 2013) – Summary judgment for employer reversed in chronic tardiness case – punctuality may not be an essential job function for a schizophrenic employee whose medicine made him groggy in the morning – accommodation such as working through lunch or staying late may have been possible – it is not a given that punctuality is essential for every job – on remand court will have to inquire into the reasonableness of such accommodations.

**Lawler v. Montblanc N. Am., LLC,** 704 F.3d 1265, 27 AD Cas. 545 (9th Cir. 2013) – Retail store manager discharged after requesting four months of medical leave because of arthritis – summary judgment affirmed – on site presence is an essential job duty at a retail store – request a shorter work week and four months of leave as accommodations would not have allowed her to perform the job’s essential functions – retaliation claim rejected – discharge decision was based not on her filing a charge but on her inability to perform the job.

**Young v. United Parcel Serv., Inc.,** 707 F.3d 437, 27 AD Cas. 560 (4th Cir. 2013) – Pregnant package delivery driver temporarily could not lift over twenty pounds – claim of being unlawfully placed on unpaid leave because she was regarded as disabled properly dismissed – no duty to engage in interactive process with non-disabled employee – no evidence she was perceived as substantially limited in a major life activity given the temporary nature of her relatively manageable lifting restriction.
Povey v. City of Jeffersonville, 697 F.3d 619, 26 A.D. Cas. 1633 (7th Cir. 2012) – City animal shelter employee had wrist injury which prevented her from lifting more than five pounds – discharged because could not perform essential job functions – not disabled within meaning of ADA or regarded as disabled – no evidence shelter regarded her as unable to perform a broad range or class of jobs.

EEOC v. The Picture People, Inc., 684 F.3d 981, 26 AD Cas. 776 (10th Cir. 2012) – Deaf worker’s case failed – verbal communication an essential job function.

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).

Reasonable Accommodation

Feist v. Louisiana, 730 F.3d 450, 28 A.D. Cas. 813 (5th Cir. 2013) – State Department of Justice attorney with chronic knee condition denied reserved on-site parking spot – summary judgment for employer reversed – need not establish that the accommodation was necessary to perform an essential job function – sufficient that the accommodation made the
workplace more accessible even though not tied to an essential job
function – summary judgment affirmed on later discharge retaliation claim
– temporal proximity to the EEOC charge insufficient – no showing that
reason given - mishandling cases - was a pretext for retaliation.

*Basden v. Prof’l Transp., Inc.*, 714 F.3d 1034, 27 A.D. Cas. 1580 (7th Cir. 2013) – Summary judgment affirmed on ADA claim of employee who
was discharged for excessive absenteeism – does not matter that employer
failed to engage in interactive process and denied her accommodation
request for a thirty-day leave – failure to engage in interactive process is
not a separate violation – reliance on the fact that her limited attendance at
subsequent jobs following her discharge negates any argument that a leave
and medication would have enabled her to regularly attend work – regular
attendance is an essential job function.

*Kallail v. Alliant Energy Corp. Servs. Inc.*, 691 F.3d 925, 26 A.D.
Cas. 1281 (8th Cir. 2012) – Diabetic requested all day shifts instead of
rotating between shifts as an accommodation – accommodation not
reasonable – rotating shifts listed in job description as an essential
function – morale issues if made exception – engaged in interactive
process and offered several alternative jobs which were rejected – plaintiff
turned down for one job but that would have been a promotion – no
obligation to promote employee as an accommodation.

*Robert v. Bd. of Cnty. Comm’rs of Brown Cnty.*, 691 F.3d 1211, 26 A.D.
Cas. 1300 (10th Cir. 2012) – County felony offender supervision officer
who could not do field work discharged when medical leave expired – no
violation – not qualified person – in-person field work was essential job
function – fact that County allowed her to work at home for several
months as an unrequired accommodation did not render field work non-
essential – only possible accommodation was indefinite leave which was
not reasonable.

*EEOC v. United Airlines, Inc.*, 693 F.3d 760, 26 A.D. Cas. 1431 (7th Cir.),
cert. denied , 133 S. Ct. 2734 (May 28, 2013) – The issue was the
obligations of the employer with respect to reassignment as an ADA
accommodation – does a minimally qualified disabled applicant have to be
given preference over more qualified non-disabled applicants – 7th Circuit
precedent was that no such preference need be given – the 7th Circuit has now reversed its position, now believing that the U.S. Supreme Court’s decision in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2001), requires such reversal [Note: Barnett held that normally violating a seniority system is not a reasonable accommodation, but that in particular cases the employee “remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested ‘accommodation’ is ‘reasonable’ on the particular facts,” 535 U.S. at 401]. 7th Circuit remands the case to allow the EEOC to attempt to show that an exception from United’s seniority system would under the facts of the case be a reasonable accommodation. The Seventh Circuit drew a distinction between a “best qualified selection policy” and a “seniority policy” – the Supreme Court in *Barnett* found that accommodation through appointment to a vacant position is reasonable absent a showing of undue hardship such as violation of a seniority system.

*Sanchez v. Vilsack*, 695 F.3d 1174, 26 A.D. Cas. 1540 (10th Cir. 2012) – Summary judgment reversed – visually-impaired federal agency employee was able to perform the essential job functions without accommodation – however, her request for a transfer to another state job to facilitate medical treatment for her visual impairment might be a reasonable accommodation under the Rehabilitation Act – that issue and the issue of undue burden was for the jury.

*Jones v. Walgreen Co.*, 679 F.3d 9, 26 A.D. Cas. 261 (1st Cir. 2012) – Doctor’s restriction following knee surgery that employee was permanently restricted with respect to bending, kneeling, climbing and walking meant employee could not perform essential job functions – ability to delegate does not render these functions non-essential – no duty to engage in interactive process where there was no possible accommodation.

*Magnus v. St. Mark United Methodist Church*, 681 F.3d 331, 26 A.D. Cas. 1029 (7th Cir. 2012) – No association discrimination when Church employer refused to accommodate Plaintiff’s unwillingness to work on weekends because she brought her mentally disabled daughter home from a residential care facility on weekends – association discrimination theory rejected.
Effect of Representations in Applying for Disability Benefits

Mathews v. Denver Newspaper Agency, 649 F.3d 1199, 112 FEP 432 (10th Cir. 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.” (649 F.3d at 1209-10).

Retaliation (Ch. 15)

Hamza v. Saks Inc., 533 F. App’x 34, 120 FEP 244 (2nd Cir. 2013) – Summary judgment affirmed against Muslim employee who claimed she was terminated in retaliation for her decision to leave early during Ramadan – “Saks proffered highly persuasive evidence that Hamza was terminated because of deficiencies in her performance, her inadequate customer service skills, her inability to work well with others and a failure to comply with Saks’s company policies . . . Hamza has failed to show that any reasonable juror could find Saks’s legitimate, non-retaliatory reasons for a termination to be a pretext for retaliation.” 533 F. App’x at 36.

Kwan v. Andalex Group, LLC, 737 F.3d 834, 120 FEP 1805 (2nd Cir. 2013) – Summary judgment on retaliation claim reversed – “But-for” test of Univ. of Tex. Sw. Med. Ctr. v. Nassar does not require proof that retaliation was the “sole” cause of the employer’s actions – only that the adverse action would not have occurred in the absence of a retaliatory motive – there can be multiple but-for causes, each of which may be sufficient to support liability – in this case terminated female employee
had sufficient evidence for a jury to conclude that the employer’s poor performance rationale was a pretext for retaliation – she presented evidence of her employer’s shifting explanations, including its position statement to the EEOC in which it focused on a change in the business rather than her performance – furthermore there was close temporal proximity between her complaint and her termination – thus a reasonable jury could find but-for causation.

*Cook & Shaw Found. v. Billington*, 737 F.3d 767, 120 FEP 1665 (D.C. Cir. 2013) – The Plaintiff Foundation is composed of current and former employees of the Library of Congress, and it helps them pursue allegations of racial discrimination against the Library – the Library recognizes certain employee organizations and gives them meeting space and other benefits – it refused recognition to the Plaintiff Foundation, which sued for retaliation under Title VII – case dismissed – Title VII protects only “employees or applicants for employment” – there was no allegation that a particular employee engaged in statutorily protected activity and then suffered materially adverse action – the Foundation does not fall within the “zone of interests” protected by the retaliation claims – “[r]etaliation by an employer is unlawful only if that retaliation occurred because of actions by ‘employees or applicants for employment,’” 737 F.3d at 772 – to survive a motion to dismiss Plaintiff’s complaint had to contain factual matter under *Ashcroft v. Iqbal* to the effect that a particular Library employee engaged in protected activity and then suffered a materially adverse action – the complaint contains no such allegations.

*Wright v. St. Vincent Health Sys.*, 730 F.3d 732, 119 FEP 1717 (8th Cir. 2013) – Plaintiff was discharged 45 minutes after she called the hospital’s HR Department to complain of racial discrimination – the court characterized the timing as “incredibly suspicious” – nevertheless, it affirmed the trial court’s dismissal following a bench trial – the hospital’s evidence was that the decision to discharge her was made the day before, multiple individuals had been advised of the decision, and the protected conduct occurred after the discharge decision had been made – no error in the discharge decision not being racially motivated despite the fact that the decisionmaker had discharged three other African-American employees and no Caucasians during her tenure.
Univ. of Tex., Sw. Med. Ctr. v. Nassar, 570 U.S. __, 133 S. Ct. 2517, 118 FEP 1504 (2013) – The mixed motive amendments to Title VII are not applicable to retaliation cases – the burden of proof in a retaliation case is “but-for” – 5 to 4 decision – status-based discrimination after 1991 amendments is governed by a motivating factor analysis – this is not applicable to retaliation, which was not covered by the amendments – “Causation in fact – i.e., proof that the defendant’s conduct did in fact cause the plaintiff’s injury – is a standard requirement of any tort claim . . . .” 133 S. Ct. at 2524-25. But-for causation is the default unless Congress indicates a different test – Congress has not done so – case is actually governed by Gross, which found a “but-for” test under a statute that prohibited discrimination “because of age” – the two retaliation subsections of Title VII both use the “because of” language – the number of retaliation claims filed with the EEOC have outstripped every type of status-based discrimination except race – “Lessening the causation standard could also contribute to the filing of frivolous claims . . . .

Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation.”

Id. at 2531-32. A mixed motive causation standard “would make it far more difficult to dismiss dubious claims at the summary judgment stage,” id. at 2532 – “Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in [the mixed motive amendments]. This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer,” id. at *2533 – contrary interpretation in the EEOC Guidance Manual rejected as lacking persuasive force – dissent contended that majority seizes upon the 1991 amendments, designed to strengthen Title VII, to weaken retaliation protection – dissent suggests reversing this case and Vance through “another Civil Rights Restoration Act.”
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.

Laing v. Fed. Express Corp., 703 F.3d 713 (4th Cir. 2013) – FMLA retaliation case – summary judgment affirmed despite joking related to leaves of absence – “[T]here is a danger in allowing law to squeeze all informality from workplace interactions: every offhand expression of attempted humor need not plant the seed for a discrimination suit. While some such remarks may be hurtful and decidedly not funny, neither should a worksite become a dour place to be,” 703 F.3d at 718.

Pearson v. Mass. Bay Transp. Auth., 723 F.3d 36, 119 FEP 1 (1st Cir. 2013) – Opinion by Associate Justice Souter sitting by designation – “The District Court correctly held that there was no causal link between [plaintiff’s protected conduct] and his termination, the reason being obvious: [employer] officials recommended firing [plaintiff] before he wrote the letter. Causation moves forward, not backwards, and no protected conduct after adverse employment action can serve as a predicate for a retaliation claim.” 723 F.3d at 42 – quotation from state
court decision that “[w]here, as here, adverse employment actions or other problems with an employee pre-date any knowledge that the employee has engaged in protected activity, it is not permissable to draw the inference that subsequent adverse actions, taken after the employer acquires such knowledge, are motivated by retaliation[,]” id. Recommendation had not reached the General Manager prior to the protected conduct, but no evidence that recommendation would have been rejected if no one had known of the protected conduct – quotation from prior First Circuit case – “‘Were the rule otherwise, then a disgruntled employee, no matter how poor his performance or how contemptuous his attitude toward his supervisors, could effectively inhibit a well-deserved discharge by merely filing, or threatening to file, a discrimination complaint[,]’” id. (citation omitted)

Benes v. A.B. Data, Ltd., 724 F.3d 752, 119 FEP 509, (7th Cir. 2013) – Summary judgment affirmed against employee fired for outburst during mediation session – EEOC conducted mediation session – each side instructed to remain in their room with a third party relaying offers back and forth – upon receipt of employer’s offer, employee barged into employer’s room and shouted: “You can take your proposal and shove it up your ass and fire me and I’ll see you in court” – he was promptly fired, and he sued for retaliation, alleging that he was fired for having “participated in any manner” in Title VII proceedings – held fired not for participating but for the outburst – if the employer would have fired an employee who barged into a superior’s office in violation of instructions and made a similar comment, it was entitled to fire someone who did the same thing during a mediation.

Colon v. Tracey, 717 F.3d 43, 118 FEP 777 (1st Cir. 2013) – Employee, HR Generalist, alleged she was demoted in retaliation for having prepared an affirmative action plan that analyzed compensation data and purported to find compensation discrimination – summary judgment for employer affirmed – alleged demotion was not an adverse employment action – it was a reassignment designed to create a more flexible human resources workforce which involved cross-training – multiple individuals other than plaintiff had the same sort of temporary reassignment – disciplinary suspension also affirmed – employee admittedly faxed confidential compensation information outside the company and had it on her home computer. Suspension was with pay and result was that upon return to work she was to receive a final warning.
**Northington v. H & M Int’l**, 712 F.3d 1062, 117 FEP 1053 (7th Cir. 2013) – Female plaintiff and female co-worker both dated same man – co-worker harassed plaintiff – plaintiff complained to company – plaintiff later terminated for refusing drug test – plaintiff claimed retaliation – summary judgment affirmed – the co-worker’s “behavior toward Northington . . . was personal and based on Northington’s involvement with [the male employee]. There is nothing in the record which indicates that [the co-worker] . . . was motivated by anything but personal conflict,” 712 F.3d at 1065 – Therefore, there was no purported violation of Title VII and plaintiff’s complaints do not qualify as a protected activity.

**Alam v. Miller Brewing Co.**, 709 F.3d 662, 117 FEP 653 (7th Cir. 2013) – Employee settled Title VII suit with former employer – former employer created joint venture with second company – former employee formed his own company, and sought to do business with the joint venture – joint venture refused because of prior lawsuit – no Title VII violation – joint venture could not be held liable as an employer because plaintiff sought to work for it as an independent contractor, not as an employee.

**Grosdidier v. Broad. Bd. of Governors, Chairman**, 709 F.3d 19, 117 FEP 946 (D.C. Cir. 2013) – Denial of promotion alleged to be retaliation for reporting circulation of sexually suggestive image and excessive hugging and kissing between a female co-worker and male co-workers and visitors – the conduct was not protected because a reasonable employee would not believe that the conduct constituted a hostile work environment that violated Title VII.

**McGrory v. Applied Signal Tech., Inc.**, 212 Cal. App. 4th 1510, 117 FEP 184 (Cal. App. 6th Dist. 2013) – Male employee accused of sexual harassment was untruthful and uncooperative with investigator – refusal to participate or cooperate in an internal investigation of alleged discriminatory conduct is not protected activity under Federal or state anti-retaliation provisions – employer may discipline employee for misbehavior during investigation such as attempting to deceive investigator – immunity from participating is limited to sincere participation – public policy does not protect lying in the course of an investigation and it is a legitimate reason to terminate.
Brown v. Advocate S. Suburban Hosp., 700 F.3d 1101, 116 FEP 1059 (7th Cir. 2012) – Summary judgment affirmed in race discrimination/retaliation case – claimants made numerous complaints to the hospital – many were investigated, action taken on some – plaintiffs then alleged race discrimination because some complaints were ignored – supervisor called plaintiffs “cry babies” and “troublemakers” and gave them the “cold shoulder” and unfairly criticized them – with respect to retaliation claim, there was never any formal discipline, discharge, or loss of pay or benefits – the conduct did not constitute a material adverse employment action – failure of proof on discrimination claims either under the indirect method (no comparators) or the direct method (the comments were not racial).

Townsend v. Benjamin Enters, Inc., 679 F.3d 41, 114 FEP 1537 (2d Cir. 2012) – Plaintiff was HR official who investigated a sexual harassment allegation prior to the filing of any charge – she claimed retaliation when she was terminated – she conceded that the opposition clause was not applicable since she had no good faith belief that the sexual harassment actually occurred – in a question of first impression, the Second Circuit ruled that the participation clause was not applicable – the participation clause is limited to actions taken “under this subchapter” and is thus limited to an investigation which occurs in conjunction with the filing of an EEOC charge.

Gowski v. Peake, 682 F.3d 1299, 115 FEP 163 (11th Cir. 2012) – Eleventh Circuit joins all other circuits in recognizing a Title VII cause of action for retaliatory hostile work environment – “This court has yet to recognize a retaliatory hostile work environment claim. But every other circuit does.” (682 F.3d at 1311) – “We now join our sister circuits and recognize th[at] cause of action.” (id. at 1312) – jury properly determined that retaliation was the “but for” cause of the hostile work environment – but because the case was mixed motive and the jury found the hospital would have made the same decision even in the absence of protected activity injunctive relief is not available – jury properly concluded that supervisors created a workplace filled with intimidation and ridicule that was sufficiently severe and pervasive to alter working conditions.
Richter v. Advanta Auto Parts, Inc., 686 F.3d 847, 115 FEP 1067 (8th Cir. 2012) – Employee filed charge alleging race and sex discrimination and was subsequently terminated – retaliation claim barred by failure to file separate retaliation charge – reasonably related to exception not applicable – Supreme Court in Morgan held that retaliation is a separate employment practice – the statute requires a charge to be filed “after” the alleged unlawful practice.

Gibson v. Am. Greetings Corp., 670 F.3d 844, 114 FEP 927 (8th Cir. 2012) – Summary judgment affirmed against African-American husband and wife who were both power truck operators – both received extensive progressive discipline – both after receiving several warnings claimed discrimination – she sued alleging discriminatory and retaliatory denial of transfer – he alleged discrimination and retaliation in discharge – wife failed to make a prima facie case of retaliation – husband was terminated shortly after his discrimination claim – citations to Hervey v. County of Koochiching, 527 F.3d 711, 723 (8th Cir. 2008), and Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 95 (2d Cir. 2011), for proposition that when timing is the only basis for a claim of retaliation and gradual adverse job actions began well before the protected activity there is no inference of retaliation.

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 Cnty., 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, 2011 WL 886402 (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. 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 \textit{Burlington} standard was met – remanded for trial.

\textit{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.

\textit{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” (\textit{id.} at 988).
Hiring (Ch. 16)

*Wilson v. Cook Cnty.*, ___ F.3d ___, 121 FEP 1077, 2014 WL 503673 (7th Cir. Jan. 9, 2014) – Low-level administrative assistant at county hospital conducted phony interview with plaintiff, provided her with an application form, and told her if she really wanted the job she must provide sex, which she did – there was no job – the interview was phony – no Title VII claim because she cannot show any employment relationship existed, current or prospective – Title VII does cover job applicants and prospective employees – but in this case the hospital had no job opening and that dooms the Title VII claim – even if the wrongdoer’s conduct could be attributed to the employer he did not “refuse to hire” the plaintiff for the simple reason that he was wholly unable to hire her at all – to proceed on a refusal hire to claim a plaintiff must at a minimum establish that she suffered some adverse employment action such as being passed over for a job – but when no job exists there can be no adverse employment action – a plaintiff must at least have been passed over for a job that actually existed.

Promotion, Advancement, and Reclassification (Ch. 17)

*Dass v. Chi. Bd. of Educ.*, 675 F.3d 1060, 114 FEP 1288 (7th Cir. 2012) – Assignment of third grade teacher to teach seventh grade not adverse employment action – plaintiff contended she was denied position for which she was best suited and put in a more difficult position that impaired her ability to succeed for discriminatory reasons – her subjective belief that seventh grade was more difficult to teach than third grade does not make that assignment materially adverse.

Compensation (Ch. 19)

*McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873, 115 FEP 1668 (7th Cir. 2012) – In *McReynolds I* the Seventh Circuit reversed a denial of class certification – the African American class alleged that the firm’s “teaming” and account-distribution policies had the effect of steering black brokers away from the most lucrative assignments and prevented them from earning appropriate compensation – three years after that suit
was filed Bank of America acquired Merrill Lynch, and the companies
introduced a retention incentive program that would pay bonuses to
brokers corresponding to their previous levels of production – this new
class action alleged that the bonuses incorporated previous production
levels which were the product of discrimination – defendants moved to
dismiss for failure to state a claim, arguing that the retention program was
race neutral and exempt from challenge under Section 703(h) ("a system
which measures earnings by quantity or quality of production") – motion
to dismiss granted – under 703(h) protected from challenge unless adopted
with intent to discriminate – conclusory allegations of intent to
discriminate insufficient under Ashcroft v. Iqbal – entire case dismissed
with prejudice – affirmed – not enough to allege that the bonuses
incorporated the past discriminatory effect of Merrill Lynch’s underlying
employment practices – disparate impact of those employment practices is
the subject of the first lawsuit – motion granted before ruling on class
certification – 12(b)(6) motion tests the sufficiency of the complaint not
the merits – insufficient to be aware that the program would disfavor black
brokers – had to be adopted with that intent – no requirement that the court
defer ruling on 12(b)(6) motion until after class certification – to the extent
that the plaintiff’s are really challenging the disparate impact of the
underlying policies “their claim here is subsumed within McReynolds I,
and if successful will be remedied there” – import of section 703(h) is that
disparate racial impact is insufficient to invalidate a system that measures
earnings by quantity or quality production – Teamsters case on seniority
determinative – “[t]o the extent that the program incorporated the effects
of past discrimination, the same was true of the seniority system in
Teamsters,” 694 F.3d 881 – just like in Teamsters (successful plaintiff’s
could obtain retroactive seniority), plaintiff’s in McReynolds I if they
succeed can prove they would have received larger bonuses but for past
discrimination and “that loss may be incorporated in the remedy in
McReynolds I” – but the retention program itself is shielded from
challenge under 703(h) – plaintiff’s contend that system is not “bona fide”
but those words modify only seniority and merit systems and not
production based compensation systems – interpretative question is largely
irrelevant because even if the “bona fide” modifier applies, the concept is
inherently built into what it means for a system to measure quantity or
quality of production – dismissal mandated unless intent to discriminate
adequately pleaded – under Twombly, the facts asserted must state a claim
that is “plausible” – Iqbal clarified that allegations in the form of legal
conclusions are insufficient to survive a 12(b)(6) motion – allegations that
Merrill Lynch knew that the system had a disparate impact are legally
insufficient – complaint must allege enough facts to support an inference that the retention program was adopted because of its effect on black brokers – all the complaint says is that Merrill Lynch intentionally designed the program based on production levels that incorporated the effects of past discrimination and it did so with the intent to discriminate – the assertion is merely a conclusion unsupported by facts – Lilly Ledbetter Act affects only the question of timing – but under 703(h) there is no Title VII violation in the first place.

Sexual and Other Forms of Harassment (Ch. 20)

Cases Interpreting Faragher/Ellerth

Vance v. Ball State Univ., 570 U.S. __, 133 S. Ct. 2434, 118 FEP 1481 (2013) – Under Faragher and Ellerth, if the harasser is a co-worker, the employer is judged by a negligence standard – however, if a “supervisor,” and the harassment culminates in a tangible employment action, the employer is strictly liable – but if there is no tangible employment action, the employer may escape liability with an affirmative defense that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities provided – it therefore matters whether the harasser is a supervisor or a co-worker – “We hold that an employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim . . . .” 133 S. Ct. at 2439.

– Under the Restatement, masters are generally not liable for the torts of their servants if the torts are outside the scope of employment – there is however an exception where the servant was “aided in accomplishing the tort by the existence of the agency relation” – we adapted this to Title VII in Ellerth and Faragher – neither party challenges the application of Faragher/Ellerth to race-based hostile environment claims and we assume that it does apply – lower courts have divided on the test for supervisor – some have followed the EEOC’s Guidance which ties the supervisor’s status to the ability to exercise significant direction over daily work – “[w]e hold that an employer may be vicariously liable for an employee’s unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect a ‘significant change in employment status, such as hiring, firing,
failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.’ 133 S. Ct. at 2443 (quoting Ellerth, 524 U.S. at 761). “We reject the nebulus definition of ‘supervisor’ advocated in the EEOC Guidance . . . .” 133 S. Ct. at 2443– Under test set forth herein “supervisory status can usually be readily determined, generally by written documentation,” id. – the test we adopt “is easily workable; it can be applied without undue difficulty at both the summary judgment stage and at trial,” id. at 2444.

– In responding to the dissent’s contention that one of the supervisors in Faragher would not have qualified under this test, even though the harasser could impose discipline, the Court responded “If that discipline had economic consequences (such as suspension without pay) then [the harasser in Faragher] might qualify as a supervisor under the definition we adopt today,” 133 S. Ct. at 2447 n.9 – In Faragher, the harassing lifeguard threatened the plaintiff to “[d]ate me or clean the toilets for a year” – “That threatened reassignment of duties likely would have constituted significantly different responsibilities for a lifeguard, whose job typically is to guard the beach. If that reassignment had economic consequences, such as foreclosing Faragher’s eligibility for promotion, then it might constitute a tangible employment action,” 133 S. Ct. at 2447 n.9 – In determining supervisory status, “[t]he ability to direct another employee’s tasks is simply not sufficient. Employees with such powers are certainly capable of creating intolerable work environments . . . but so are many other co-workers. Negligence provides the better framework . . . .” Id. at 2448.

– “The interpretation of the concept of a supervisor that we adopt today is one that can be readily applied. In a great many cases it will be known even before litigation is commenced whether an alleged harasser was a supervisor, and in others, the alleged harasser’s status will become clear to both sides after discovery. . . . [S]upervisor status will generally be capable of resolution at summary judgment,” id. at 2449 – “[E]ven where the issue of supervisor status cannot be eliminated from the trial (because there are genuine factual disputes about an alleged harasser’s authority to take tangible employment actions), this preliminary question is relatively straightforward,” id. at 2450 – “Contrary to the dissent’s suggestions . . . this approach will not leave employees unprotected against harassment by co-workers who possess the authority to inflict psychological injury by assigning unpleasant tasks or altering the work environment in objectionable ways. In such cases the victims will be able to prevail
simply by showing that the employer was negligent . . . and the jury should be instructed that the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent,” id. at 2451.

– If an employer has a very small number of individuals who can make decisions involving tangible job actions, they “will likely rely on other workers who actually interact with the affected employee,” and “[u]nder those circumstances, the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies,” id. at 2452 – Even under the negligence standard “[e]vidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant,” id. at 2453 – “We hold that an employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim,” id. at 2454 – 5 to 4 decision – Justice Ginsburg’s dissent included “[t]he ball is once again in Congress’ court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today.” Id. at 2466.

Townsend v. Benjamin Enters, Inc., 679 F.3d 41, 114 FEP 1537 (2d Cir. 2012) – Faragher/Ellerth defense not available because harasser was alter ego of employer – harasser owned 5% of corporate stock, and was second in command to his wife – wife and two children held all the remaining corporate shares – alter ego doctrine makes employer liable in its own right rather than vicariously liable for actions of its agents.

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 Kan._, 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.

**General**

*Ellis v. Houston*, 742 F.3d 307, 121 FEP 733 (8th Cir. 2014) – Five black correctional officers sued for racial hostile environment harassment – even if viewed objectively no individual officer experienced acts that were sufficient to establish liability, can aggregate – each individual instance of harassment was experienced by officers as part of a larger pattern of hostile conduct – District Court erroneously dismissed because it failed to consider the cumulative effect of the evidence that supervisors made or condoned racist comments in a group setting on a nearly daily basis.

*Debord v. Mercy Health Sys, of Kansas, Inc.*, 737 F.3d 642, 120 FEP 1429 (10th Cir. 2013) – Summary judgment against female employee who complained of sexual harassment – no retaliation – she posted inflammatory material about her supervisor on the internet, saying that he was a “snake” who “needs to keep his creepy hands to himself” – she also sent text messages to her co-workers containing such allegations – her contention that she was merely trying to gather evidence rejected – properly terminated for improper postings and lying about them – company policy dictates that investigation should be confidential.

*Williams-Boldware v. Denton Cnty.*, 714 F.3d 635, 121 FEP 755 (5th Cir. 2014) – Racial harassment judgment reversed – employer took prompt action – reprimand and requirement to attend diversity training sufficient – “Employers are not required to impose draconian penalties upon the offending employee in order to satisfy this court’s prompt remedial action standard,” 714 F.3d at 640.

*EEOC v. KarenKim, Inc.*, 698 F.3d 92, 116 FEP 385 (2d Cir. 2012) – District Court erred in denying EEOC request for injunction barring harasser, a former store manager, from being reemployed or being present at the store.
Bertsch v. Overstock.com, 684 F.3d 1023, 115 FEP 745 (10th Cir. 2012) – Summary judgment properly granted on hostile environment claim – employer took proper remedial action by conducting investigation and issuing written warning to alleged harasser – plaintiff contended that employer did not “follow up” to ensure that the harassment had ended – that is not the employer’s burden – it is the claimant’s burden to seek relief if the harassing conduct continues after the discipline.

Espinal v. Nat’l Grid NE Holdings 2, LLC, 693 F.3d 31, 115 FEP 1418 (1st Cir. 2012) – co-worker harassment – “The standard for imposing liability on an employer for workplace harassment is heightened where the perpetrators of that harassment were plaintiff’s co-workers, not his supervisors.” 115 FEP at 1422. Plaintiff must prove that after having adequate notice of the harassment the employer failed to take prompt and appropriate action – prompt action taken here – plaintiff refused to disclose details of the incidents – summary judgment for employer affirmed.

Hernandez v. Yellow Transp., Inc., 670 F.3d 644, 114 FEP 545 (5th Cir. 2012) – Summary judgment against Hispanic employees claiming hostile work environment affirmed – only four incidents of racially motivated conduct over 10 years – incident involving knife threat by coworker not racial – cannot consider harassment of black employees to establish hostile environment against Hispanics – cross category evidence may be relevant if sufficient correlation but here incidents alleged were not physically threatening or humiliating to claimants – discharge summary judgment also affirmed – plaintiff’s threat more serious than coworker’s derogatory remarks.

Berryman v. SuperValu Holdings Inc., 669 F.3d 714, 114 FEP 808 (6th Cir. 2012) – Eleven African-American employees alleged a racially hostile work environment spread over 25 years – district court properly considered each of the claims separately – summary judgment properly awarded on each of the claims on the ground that the conduct was not sufficiently severe or pervasive – district court properly considered only conduct directed at the plaintiff or of which the plaintiff was aware – cannot aggregate experiences of which a particular individual was not aware.
Cherry v. Shaw Coastal, Inc., 668 F.3d 182, 114 FEP 323 (5th Cir. 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), aff’d, 133 S. Ct. 2434 (2013) – 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., 643 F.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 & 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.

**Discharge and Reduction in Force (Ch. 21)**

_Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448, 114 FEP 986 (5th Cir. 2012)_ – Doctor of Middle Eastern descent harassed on the job and quit – no constructive discharge – viewed most favorably to him evidence of racial harassment established no more than the minimum required to prove a hostile work environment” (114 FEP at 990) (citation omitted) – but proof of more extreme behavior than that evidencing a hostile work environment is needed to prove a constructive discharge – a jury’s finding that he was retaliated against because his firing by an affiliated hospital was blocked in retaliation for his bias complaints was affirmed.

_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.
**Employers (Ch. 22)**

*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.

**Unions (Ch. 23)**

*Green v. Am. Fed’n of Teachers Local 604*, 740 F.3d 1104, 121 FEP 619 (7th Cir. 2014) – Union liable if it refuses to process a grievance for a terminated employee because of his race.
Charging Parties and Plaintiffs (Ch. 25)

*Mariotti v. Mariotti Bldg. Prods., Inc.*, 714 F.3d 761, 118 FEP 224 (3d Cir. 2013) – plaintiff who was officer, board member and shareholder of closely held family corporation was not a Title VII employee – *Clackamas* Supreme Court decision, although arising under the ADA, governs the test under Title VII also.

*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.

*Kirleis v. Dickie, McCamey & Chilcote, PC*, 107 FEP 1121, 2009 U.S. Dist. LEXIS 100326 (W.D. Pa. Oct. 28, 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. 26)**

*EEOC v. Aerotek, Inc.*, 498 Fed. Appx. 645, 2013 WL 136013, 117 FEP 26 (7th Cir. Jan. 11, 2013) (non-precedential) – The EEOC regulations state that any recipient of an EEOC subpoena who does not intend to fully comply must petition for revocation or modification and that such petitions must be mailed “within five business days . . . after service of the subpoena.” 29 CFR § 1601.16(b). – Here the petition to revoke or modify was submitted six business days later, one business day late. “The EEOC argues that Aerotek has waived its right to challenge the enforcement of the subpoena. We agree. . . . Aerotek has provided no excuse for this procedural failing . . . .” 498 Fed. Appx. at 647-48 – No other Circuit Court has ruled on the question of whether an employer’s failure to timely challenge before the EEOC precludes a later challenge to the enforcement of the subpoena in the Title VII context – two District Courts allowing such challenges are not particularly instructive – other District Courts have found that an employer waives its objections by simply failing to file a timely petition – “EEOC may enforce its subpoena because Aerotek has waived its right to object.” *Id.* at 649.

*EEOC v. Mach Mining, LLC*, 738 F.3d 171, 121 FEP 327 (7th Cir. 2013) – There is no implied affirmative defense based on the EEOC’s alleged failure to make good faith efforts to conciliate – no judicial review is available of the EEOC’s efforts at conciliation after the agency has found probable cause – Title VII’s language precludes judicial inquiry into whether or not there has been adequate conciliation efforts – split with seven other circuits which have ruled that Title VII permits at least some judicial review of the EEOC’s conciliation efforts.
**EEOC v. Kronos, Inc.**, 694 F.3d 351, 26 A.D. Cas. 1409 (3d Cir. 2012) – District Court on remand from prior Third Circuit order again improperly restricted the scope of an EEOC administrative subpoena – on first appeal District Court held to have abused its discretion by placing geographic, temporal, and topical restrictions on the attempt to obtain information about the testing company’s validation data on the test – on remand the District Court again placed improper restrictions on the subpoena for validation studies – limiting the evidence to information specific to the supermarket’s use of the test excluded relevant evidence of other validation studies – no basis for disability-related limitation since the EEOC may properly inquire into how the tests work in other contexts – the confidentiality order was too restrictive – District Court ordered to strike provisions that would limit the EEOC’s use of the information to only the instant charge.

**EEOC v. Burlington N. Santa Fe R.R.**, 669 F.3d 1154, 25 A.D. Cas. 1572 (10th Cir. 2012) – EEOC is not entitled to subpoena railroad company’s nationwide employee data system in course of investigating ADA charges by two rejected conductor applicants – claim that there are other claimants who have filed additional charges rejected since subpoena did not refer to them – overbroad request for national data was not relevant to initial two charges – while Supreme Court has described the relevance requirement for EEOC subpoenas as not particularly constraining, it has also stated that courts should not “render that requirement a nullity” (669 F.3d at 1157) – determination must be made on the basis of the original two charges which led to the issuance of the subpoena and not on the basis of four subsequent charges since only the two charges were the charges under investigation – EEOC’s allegations of pattern or practice rejected – “Any act of discrimination could be part of a pattern or practice of discrimination, but not every charge of discrimination warrants a pattern or practice investigation” (id. at 1157-58) (emphasis in original) – EEOC cites authorities for proposition that a single allegation of discrimination may warrant a pattern or practice investigation – only the Kronos case involved a case of disability discrimination and that turned on the use of a test – nothing stops the EEOC from aggregating information in a Commissioner’s charge – “But nationwide recordkeeping data is not ‘relevant to’ charges of individual disability discrimination filed by two men who applied for the same type of job in the same state . . . .” (id. at 1159).
EEOC v. Loyola Univ. Med. Ctr., 823 F. Supp. 2d 835, 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.

Timeliness (Ch. 27)

Continuing Violation

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.

**General Issues**

*Lewis v. City of Chi.*, 560 U.S. 205, 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, Lorance, 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.

Castagna v. Luceno, ___ F.3d. ___, 121 FEP 1533 (2d Cir. 2014) – A
timely EEOC charge does not toll the statute of limitations with respect to
tort claims – both the Seventh and Ninth Circuits have already so held.

Loubriel v. Fondo del Seguro del Estado, 694 F.3d 139, 26 A.D.
Cas. 1537 (1st Cir. 2012) – Plaintiff’s attorney is presumed to have
received right-to-sue notice within a “reasonable time” after the date on
the letter and that is constructive receipt to the individual plaintiff – case
dismissed for failure to file within 90 days of presumed receipt –
continuing violation doctrine not available to toll 90-day suit filing period.

Dyson v. District of Columbia, 710 F.3d 415, 117 FEP 277 (D.C. Cir.
2013) – No equitable tolling with respect to charge not filed within 300
days even though intake questionnaire was filled out within 300-day time
limit and EEOC did not send a draft charge until after deadline – intake
questionnaire is not a charge – no discussion of Federal Express Corp. v.
Holowecki, 552 U.S. 389, 102 FEP 1153 (2008) (questionnaire can
constitute a charge under the ADEA if it contains an allegation of
discrimination, names the employer, and reasonably can be construed to
request the agency to take remedial action).

Daniels v. United Parcel Serv., Inc., 701 F.3d 620, 116 FEP 1281
(10th Cir. 2012) – Statute of limitations bars failure to promote claim –
time to file charge began to run when she became aware she would not
receive the promotion, not when she learned facts indicating discrimination – failure to promote was not compensation decision subject to Ledbetter Act – Ledbetter Act did not overrule cases holding that failure to promote is a discrete act with limitations period beginning on the date employee learns of the 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.

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.

Jurisprudential Bars to Action (Ch. 28)

Dzakula v. McHugh, 737 F.3d 633, 120 FEP 1818 (9th Cir. 2013) – Case dismissed because Plaintiff failed to list discrimination claim as an asset in Chapter 7 Bankruptcy – only after Defendant moved to dismiss did she amend her Bankruptcy schedules – no evidence suggested that the omission was inadvertent or mistaken – while appeal pending Ninth Circuit decided Ah Quin v. County of Kauai Department of Transportation, 733 F.3d 267 (9th Cir. 2013) – in that case the District Court applied a narrow interpretation to the terms “inadvertent or mistaken” – the trial court in Ah Quin held that since the Plaintiff knew about the claim and had a motive to conceal it, that barred the claim as a matter of law – we reversed and held that mistake and inadvertence should be interpreted using the ordinary understanding of the terms – in that case there had been some facts supporting the conclusion that the omission may have been inadvertent – in that case viewing the facts most favorably to plaintiff we remanded for further facts – Ah Quin is distinguishable – the District Court did not apply the wrong legal standard – the District Court interpreted inadvertent or mistaken under the ordinary understanding of those terms – Plaintiff presented no evidence explaining her initial failure to include the action on her Bankruptcy schedules – Plaintiff seems to argue that our Ah Quin decision mandates an evidentiary hearing every
time a plaintiff debtor omits a claim – *Ah Quin* is applicable only when a reasonable jury could conclude based on the factual record that the failure to list the asset was inadvertent – argument that the District Court abused its discretion in assessing the three principle factors that one relies on in these cases rejected – as to the first factor, by failing to list the claim while at the same time pursuing the claim Plaintiff clearly asserted inconsistent positions – as to the second factor the Bankruptcy Court was misled by Plaintiff’s omission – on the third factor, Plaintiff derived an unfair advantage in Bankruptcy Court by failing to list the claim – summary judgment affirmed.

*Ah Quin v. Cnty. of Kauai Dep’t of Transp.*, 733 F.3d 267, 119 FEP 321 (9th Cir. 2013) – 2-1 decision – Ninth Circuit refuses to dismiss lawsuit based on omission from bankruptcy schedule – “inadvertence or mistake” exception to judicial estoppel might apply when the debtor reopens her bankruptcy case and amends her schedule to include a previously omitted claim after the employer moved for summary judgment – District Court had dismissed the case on the ground that the employee knew about her claims and had a motive to conceal them from creditors – District Court should have determined whether her bankruptcy filing was in fact inadvertent or mistaken as those terms are commonly understood – knowledge of the claim and motive to conceal it are factors but not enough by themselves – relevant inquiry is plaintiff’s subjective intent when she was filling out the bankruptcy schedule.

*Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 27 A.D. Cas. 1697 (4th Cir. 2013) – Unlike Chapter 7, Chapter 13 Bankruptcy does not preclude debtor from maintaining lawsuit – Fourth Circuit joins five other Circuits that have so concluded – under Chapter 7, assets are liquidated and paid to creditors – under Chapter 13, the debtor remains in possession of the property and cures his indebtedness under the supervision of a trustee by way of regular payments to creditors.

*Love v. Tyson Foods, Inc.*, 677 F.3d 258, 114 FEP 1189 (5th Cir. 2012) – Judicial estoppel bars discrimination claims – employee failed to disclose claim as assets in Chapter 13 bankruptcy – when employer brought nondisclosure to light and moved for dismissal, plaintiff did amend his Chapter 13 schedules to include those claims and asserted that his creditors would be paid from any moneys recovered – dismissal nevertheless warranted because there was no showing of inadvertence.
Abner v. Ill. Dep’t of Transp., 674 F.3d 716, 114 FEP 961 (7th Cir. 2012) – State agency employee was fired and challenged the discharge through administrative proceeding alleging no just cause, and lost – at no time during the proceedings did he argue that the real reason for the termination was to retaliate against him because he had filed a charge of race discrimination – thereafter he filed a Title VII retaliation claim – district court dismissal on grounds of res judicata affirmed by Seventh Circuit – retaliation could have been raised as a defense in the earlier proceedings.

Slater v. Energy Servs. Grp. 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).
Title VII Litigation Procedure (Ch. 29)

*Caudle v. District of Columbia*, 707 F.3d 354, 117 FEP 525 (D.C. Cir. 2013) – $1 million award set aside and new trial ordered because of “golden rule” and “send a message” statements by plaintiff’s counsel during closing argument – golden rule arguments are impermissible regardless of whether they address liability or damages – “put yourselves in the plaintiff’s shoes” is also impermissible – “send a message” might not have warranted reversal by itself, but when coupled with the other comments which followed three sustained objections a new trial is necessary – a jury has a duty to decide the case based on facts and law instead of emotion – even though District Court sustained the employer’s objections and gave the jury a curative instruction and gave it a general instruction to decide the case without prejudice these measures failed to mitigate the prejudice caused by four impermissible statements.

*Conroy v. Vilsack*, 707 F.3d 1163, 117 FEP 385 (10th Cir. 2013) – Two of plaintiff’s experts properly excluded – female claimed Forest Service refused to promote her because she is a woman and that re-advertising the position with a college degree requirement was discriminatory – first expert proposed to testify on “sex stereotyping” and how it affected the decision to select a male employee over the plaintiff – the second wanted to testify that the decision to re-advertise the position to include the requirement of a college degree was “purposefully designed to deny [her] the position,” 707 F.3d at 1170 - District Court properly found stereotyping expert to be unqualified even though she had previously testified as an expert in discrimination cases – she had never researched or written about sex stereotyping, and became familiar with the topic only after being retained for this case – she could not recall articles or relevant cases supporting the application of sex stereotyping research to disparate treatment cases – the second witness was excluded as unreliable because he “demonstrated a lack of knowledge” and “failed to provide a meaningful analysis of how he came to conclude what he did while showing that his testimony reliably applied to the facts of this case,”” id. (citation and alteration omitted) - the expert was “oblivious to . . . key facts,” including the fact that the job as re-advertised required either a college degree or equivalent professional experience.
Begolli v. Home Depot U.S.A. Inc., 701 F.3d 1158, 116 FEP 1057 (7th Cir. 2012) – Factual dispute about when applicant told would not get job was erroneously resolved by court at evidentiary hearing - this was error – statute of limitations is an affirmative defense that has to be resolved by a jury.

Birabent v. Hudiburg Auto Group, Inc., 2012 U.S. Dist. LEXIS 57826, 114 FEP 1363 (W.D. Okla. Apr. 25, 2012) – Affirmative defenses are also subject to the Twombly standard – standard not met and affirmative defenses stricken – employer’s affirmative defense read that it “had a reasonable and legitimate basis to terminate” (2012 U.S. Dist. LEXIS 57826, at *3) – insufficient under Twombly because it did not plead enough facts.

Keys v. Humana, Inc., 684 F.3d 605, 115 FEP 588 (6th Cir. 2012) - complaint need not allege prima facie case – this is simply an evidentiary standard – a complaint must meet the “plausibility” standard set forth in Twombly and Iqbal – neither case altered Swierkiewicz v. Sorema – the complaint provided sufficient details to meet the plausibility standard.

Martin v. Atlanti-Care, 2011 WL 5080255, 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.

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.

*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. 30)

*EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 120 FEP 181 (6th Cir. 2013) – $751,942 attorney and expert witness fees award against EEOC for frivolous lawsuit – claim that agency had a blanket companywide policy of denying jobs to applicants with felony records groundless – decision was 2 to 1 – EEOC unreasonably continued to litigate once discovery revealed that no such policy existed – case was not groundless when filed but became groundless.

*Serrano v. Cintas Corp.*, 699 F.3d 884, 116 FEP 801 (6th Cir. 2012) – EEOC suit – Section 707 specifically references the EEOC’s right to bring a pattern-or-practice case – here, EEOC sued under Section 706 – trial court dismissed, holding that pattern-or-practice cases could be brought by the EEOC only under Section 707 – reversed – 707 is not the sole source of the EEOC’s “pattern-or-practice” authority – when the EEOC sues under Section 706 it may still take advantage of the Supreme Court *Teamsters* case which sets forth a bifurcated system of proving a pattern-or-practice of intentional discrimination – under *Teamsters*, if the EEOC meets its initial burden of showing that “unlawful discrimination has been a regular practice or policy followed by the employer,” a presumption of discrimination arises, and the employer has the burden to prove the individual applicants were not denied employment for unlawful reasons.

*EEOC v. Serv. Temps, Inc.*, 679 F.3d 323, 26 A.D. Cas. 129 (5th Cir. 2012) – Employer waived defense of lack of conciliation because it did not plead the defense in its answer.

*EEOC v. CRST Van Expedited Inc.*, 679 F.3d 657, 114 FEP 1566 (8th Cir. 2012) – 2-1 decision affirming dismissal of most of a section 706 sexual harassment class action – District Court reversed on holding that EEOC could not seek individual relief under § 706 – However, EEOC had failed to investigate and conciliate the claims of each putative class member – EEOC cannot proceed on behalf of class members for whom there was no adequate investigation and conciliation – 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 – individual plaintiff who did not disclose
claims in bankruptcy estopped.

_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. 32)**

_Toy v. Holder_, 714 F.3d 881, 118 FEP 229 (5th Cir. 2013) – Female
former intelligence analyst terminated after FBI revoked her access to the
regional office in which she had worked as a contract employee – plaintiff
contended that new FBI office director “had problems with women” –
case dismissal affirmed based on the plain language of the statute creating
an exception to Title VII where granting “access to the premises” of a
secure location is related to national security.

_Diggs v. HUD_, 670 F.3d 1353, 113 FEP 1170 (Fed. Cir. 2011) – Federal
Circuit has no jurisdiction because Title VII allows retaliation cases to be
brought by federal employees against the federal government.

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 – case remanded to allow agent to pursue retaliation theory that did not require analysis of security division action.

**Class Actions (Ch. 33)**

*Comcast Corp. v. Behrend, __ U.S. ___, 133 S. Ct. 1426 (2013)* – Anti-trust case – no credible theory as to how to award damages if liability found – therefore, class improperly certified under Rule 23(b)(3) – class certification requires a method by which damages can be measured classwide – “if anything, Rule 23(b)(3)’s predominance criterion is even more demanding than Rule 23(a). Rule 23(b)(3), is an adventureous innovation, it is designed for situations in which class action treatment is not as clearly called for.” 131 S. Ct. at 1432 (citation and internal quotation marks omitted). “Without [an adequate] methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class.” *Id.* at 1433. “Calculations need not be exact . . . but at the class certification stage (as at trial), any model supporting a plaintiff’s damages case must be consistent with its liability case . . . .” *Id.* (internal citation and quotation marks omitted) – “The first step in a damages study is the translation of the legal theory of the harmful event into individual analysis of the economic impact of that event,” *id.* at 1435 (citing the Federal Judicial Center Reference Manual on Scientific Evidence; emphasis in original) – decision was 5 to 4 – dissent contended that since plaintiffs conceded they did not have an adequate damages model therefore “the Court’s ruling is good for this day and case only.” *Id.* at 1437. [Note: Shortly following the decision, the Court remanded an employment case to the 7th Circuit for reconsideration in light of Comcast.]

*Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 20 W.H. Cas. 2d 801 (2013)* – FLSA collective action – sole individual plaintiff rejected Rule 68 offer that provided full relief – under Third Circuit precedent this mooted her action – Third Circuit held that although her action was mooted (which she did not contest) that a collective action remained viable because defendant should not be allowed to “pick off” named plaintiffs – Supreme Court reversed – Supreme Court did not decide Circuit split as to whether an unaccepted Rule 68 offer moots the action –
“We . . . assume, without deciding, that petitioners’ Rule 68 offer mooted respondent’s individual claim,” – 133 S. Ct. at 1529 – Rule 23 authority inapposite to FLSA – since individual plaintiff’s claim moot, this mooted the entire action – plaintiff had no economic stake in the case – 5-4 decision – dissent stated that the premise of the majority’s decision, its assumption a rejected offer of settlement moots anything – is clearly erroneous – “An unaccepted settlement offer – like any unaccepted contract offer – is a legal nullity, with no operative effect,” id. at 1533.

Scott v. Family Dollar Stores, Inc., 733 F.3d 105, 120 FEP 473 (4th Cir. 2013) – Original complaint alleging subjective decisionmaking dismissed in light of Dukes – amended complaint reversed course and alleged four company-wide policies and high-level corporate decisionmaking – by 2 to 1 vote District Court denial of leave to amend reversed – these allegations are substantively different from those rejected in Dukes – dissenting judge argued that “plaintiffs in this case played fast and loose with the district court, offering not an ‘amended complaint,” but rather a completely contradictory one,” 733 F.3d at 135.

Wang v. Chinese Daily News, Inc., 737 F.3d 538 (9th Cir. 2013) – This supersedes the opinion reported at 709 F.3d 829 – this exemption, off the clock, meal and rest period case was certified, tried, and a substantial judgment entered – the Ninth Circuit affirmed – the Supreme Court remanded for reconsideration in light of Wal-Mart – prior certification had been under (b)(2) and this is reversed in light of Wal-Mart – remanded to the District Court to consider whether injunctive relief could proceed under (b)(2) and to reconsider its analysis in light of Wal-Mart under Rule 23(a) and 23(b)(3) – this case is much smaller than Wal-Mart – “nonetheless, there are potentially significant differences among the class members,” 737 F.3d at 544 – on remand plaintiffs need not show that every question in the case or even a preponderance of questions is capable of class-wide resolution – Wal-Mart indicated that so long as there is “even a single common question,” commonality could be satisfied – (b)(2) certification reversed – Wal-Mart made it clear that individualized monetary claims belong in (b)(3) – Wal-Mart left open the question of whether incidental monetary claims could remain in (b)(2) but did not answer that question – it is possible that an injunctive class could remain under (b)(2) – even though none of the named plaintiffs remain employed, it is possible that an injunctive claim could survive if there are identifiable
class members still employed – on (b)(3), this becomes relevant only if there is first a determination that 23(a) commonality is satisfied – next, the District Court relied on the fact that all reporters were classified as exempt in finding common questions, which is clearly erroneous – the District Court abused its discretion in relying on a uniform internal exemption policy to find common questions – another (b)(3) consideration is the California Supreme Court Brinker decision – the employer need not ensure that employees take meal breaks – the employer is liable for compensation only if it knew or should have known that workers were working through an authorized meal period – but an employer cannot undermine a policy by creating incentives to skip breaks – in deciding (b)(3) certification the District Court should consult the entire record.

Davis v. Cintas Corp., 717 F.3d 476, 118 FEP 903 (6th Cir. 2013) – Nationwide female job applicant class certification denial affirmed – hiring system had both objective and subjective elements – percent female between 1999 and 2002 never rose above 7 percent – efforts to increase female hiring raised it in following years to 7.8 percent, 10.9 percent, and 20.8 percent – hiring done at individual locations – heavy reliance on Dukes – “Dukes, in many ways, is similar to this case. Each involves a challenge to a national corporation’s employment practices. In each, the allegedly discriminatory employment decisions are ascribed to a corporate culture allegedly unfavorable to women. In each, applicants had to meet a basic set of criteria, but managers retained significant discretion. . . . And in each, the class representative sought to prove her discrimination claim with a combination of statistical and anecdotal evidence.” 717 F.3d at 486 - statistical evidence found by District Court to be unpersuasive, and District Court found equally unconvincing Dr. Barbara Reskin’s expert opinion that Cintas had a white-male dominated business culture which replicated itself in hiring decisions

– “Davis claims that . . . her ‘short-fall-based model’ is distinguishable from the ‘trial-by-formula’ system the Supreme Court expressly rejected in Dukes.” 717 F.3d at 490 – the court would calculate a short-fall, order Cintas to hire class members randomly to eliminate the short-fall, calculate class-wide back pay liability, and distribute it pro-rata among eligible class members – this if anything is worse than the Dukes’ trial-by-formula system – therefore, class certification properly denied for failure to meet commonality under 23(a)(2) and for failure to satisfy 23(b)(2) with respect to any method of calculating damages – individual summary
judgment reversed with respect to hiring rejection in 2003 but affirmed with respect to hiring rejection in 2004 – individual disparate impact claim summary judgment affirmed – plaintiff wishes to amalgamate numerous steps of the hiring system into one – plaintiff did not identify a “particular employment practice” within the meaning of Title VII by pointing to all the subjective elements in the hiring system – and she did not satisfy the 1991 amendments by explaining why the well-defined discreet elements of the hiring system were not capable of separation for analysis – “the simple fact remains: Davis did not isolate the specific practices that caused the disparate impact . . . .” 717 F.3d at 497.

Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 20 W.H. Cas. 2d 298, (7th Cir. 2013) – FLSA case decertified because of inability to calculate damages – Rule 23 requirements of efficiency comparable to those under FLSA – technicians were paid on piece rate system – many did not work more than 40 hours a week – others may work more than 40 hours a week – variance would also result from different technicians doing different tasks – “[T]o determine damages would, it turns out, require 2341 separate evidentiary hearings, which might swamp the Western District of Wisconsin with its two district judges,” 705 F.3d at 773 – “[E]ven if the 42 [representative plaintiffs scheduled to testify], though not a random sample, turned out by pure happenstance to be representative in the sense that the number of hours they worked per week on average when they should have been paid (or paid more) but were not was equal to the average number of hours of the entire class, this would not enable the damages of any members of the class other than the 42 to be calculated,” 705 F.3d at 774. – “They continue on appeal to labor under the misapprehension that testimony by 42 unrepresentative ‘representative’ witnesses, supplemented by other kinds of evidence that they have been unable to specify, would enable a rational determination of each class member’s damages. They must think that like most class action suits this one would not be tried – that if we ordered a class or classes certified, DirectSat would settle. That may be a realistic conjecture, but class counsel cannot be permitted to force settlement by refusing to agree to a reasonable method of trial should settlement negotiations fail. Essentially they asked the district judge to embark on a shapeless, freewheeling trial that would combine liability and damages and would be virtually evidence-free so far as damages were concerned,” 705 F.3d at 776. – “[I]f class counsel is incapable of proposing a feasible litigation plan though asked to do so, the judge’s duty is at an end. And that’s what happened.”
Id. – Plaintiffs opposed bifurcation of liability and damages and subclasses – if liability was established on a group basis damage claims could usually be settled with the aid of a special master – Posner opinion.

*Tabor v. Hilti, Inc.*, 703 F.3d 1206, 117 FEP 157 (10th Cir. 2013) – Two female inside sales employees who were denied promotions to more lucrative outside sales jobs were properly denied certification of a nationwide class action – In the individual case the plaintiffs contended there were inappropriate sexist comments made during their interviews for the outside jobs, comments such as women had “inferior knowledge of tools,” 703 F.3d at 1218 – The nationwide class alleged excessive subjectivity – but *Dukes* rejected the use of “discretionary practices” as the basis of such claims – *Dukes* emphasized that different considerations are at issue in a class certification analysis compared with an individual disparate impact claim – summary judgment reversed with respect to individual disparate impact claims – at least one of the claimants stated a prima facie disparate impact claim based on statistical evidence indicating a sizeable disparity between male and female promotions.

*Reynolds v. Barrett*, 685 F.3d 193, 115 FEP 738 (2d Cir. 2012) – Minority prison inmates working in a prison print shop brought individual disparate treatment claims and then sought to amend to allege a class action – trial court granted summary judgment on the individual disparate treatment claims, and therefore denied class certification. – The equal protection claims are based on Section 1983 and cannot be based on an adverse impact theory – pattern of practice framework of Title VII (Teamster’s analysis) cannot be utilized against the government under Section 1983 – summary judgment properly granted under McDonnell Douglas – denial of class certification affirmed.

*McReynolds v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 672 F.3d 482, 114 FEP 710 (7th Cir. 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,” (672 F.3d at 490) 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. at 491) 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.) 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.) 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.)

_Bolden v. Walsh Constr. Co._, 688 F.3d 893, 115 FEP 1153 (7th Cir. 2012) — Black employees claim that by granting discretion to job site supervisor company allowed discrimination against them with respect to assigning overtime and in working conditions — no commonality — class members worked on at least 262 different construction sites having different superintendents and foremen — the sites had materially different working conditions — the only policy being protested was the policy of affording discretion to each job site superintendent — commonality is the basis of the _Wal-Mart v. Dukes_ case — “when multiple managers exercise independent discretion, conditions at different stores (or sites) do not present a common question,” 688 F.3d at 898 - “the sort of statistical evidence that plaintiffs present has the same problem as the statistical evidence in _Wal-Mart:_ it begs the question,” _id._ - “[i]f [the company] had 25 superintendents, 5 of whom discriminated in awarding overtime, aggregate data would hold that
black workers did worse than white workers – but that result would not imply that all 25 superintendents behaved similarly, so it would not demonstrate commonality,” id. - “[a]ccording to plaintiffs – in Wal-Mart and this case alike – local discretion created disparate impact that justified class treatment,” id. at 897 – but Wal-Mart rejected that proposition – in Wal-Mart the court recognized that discretion might facilitate discrimination (Watson v. Fort Worth Bank & Trust) but it also observed that some managers will take advantage of the opportunity to discriminate while others won’t – “One class per store may be possible; one class per company is not,” id. – the District Court relied on McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012) – in that case we remarked that the class in Wal-Mart would not have been manageable – in McReynolds we held that a national class could be certified to contest the policy allowing brokers to form and distribute commissions within teams and to determine who would be on a team – this single national policy was the missing ingredient in Wal-Mart – plaintiffs contend McReynolds supports their position – “it doesn’t.” While plaintiff’s brief on appeal contends Walsh has 14 policies that present common questions, they all boil down to affording discretion – “Wal-Mart tells us that local discretion cannot support a company-wide class no matter how cleverly lawyers may try to repackage local variability as uniformity,” 688 F.3d at 898 – this is applicable to both the overtime class and the hostile work environment class – “[t]he order certifying two multi-site classes is reversed.” Id. at 899.

Puffer v. Allstate Ins. Co., 675 F.3d 709, 114 FEP 1025 (7th Cir. 2012) – Class certification denied on claim that salary administration system had a disparate impact on female employees – the original named plaintiff, Puffer, who settled her individual claims after class certification denied, relied on a theory of “pattern or practice” in district court – disparate impact claim was not developed before district court – three intervenors who appealed the denial of class certification therefore cannot rely on disparate impact theory – pattern or practice claims require proof of intentional bias – this was the basis of the district court’s ruling that class certification was inappropriate – although Seventh Circuit did not reach the merits of adverse impact claim, footnote at the end indicated disparate impact “would fall short on its merits” – court further noted that class certification would be improper because plaintiff’s expert’s report failed to show commonality since it failed to consider all relevant variables or to analyze whether variations in performance levels explained variations in earnings.
Ellis 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.


**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.).

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).

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.)

**Discovery (Ch. 34)**

*Bobo v. United Parcel Serv., 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.
Apsley v. Boeing Co., 691 F.3d 1184, 26 A.D. Cas. 1439 (10th Cir. 2012) – Boeing sold a division, and Boeing supervisors recommended which of its employees be hired by the successor – plaintiff’s experts say that their non-discriminatory model predicted that out of the approximately 10,000 employees, 8,028 employees over the age of 40 should be recommended, more than the actual number recommended, 7,968 – aggregating these statistics yielded five standard deviations and only a 1 in 50,000 chance that the results were random – similarly with respect to hires the model predicted 7,285 hires over the age of 40, and the actual number, 7,237 was over four-and-a-half standard deviations less – again only a 1 in 50,000 chance – summary judgment affirmed on age pattern of practice – quoting Kaye & Freedman, the District Court reasoned that “when practical significance is lacking – when the size of the disparity or correlation is negligible – there is no reason to worry about statistical significance,” 691 F.3d at 1199 (citation omitted) – another treatise criticized the District Court’s analysis – concerns about ignoring statistical significance are not wholly baseless – nevertheless, summary judgment affirmed – pattern or practice requires a jury to conclude that discrimination was the standard operating procedure – but the statistics suggested at most isolated or sporadic instances of age discrimination – plaintiffs’s own figures showed that the company’s recommended and hired over 99 percent of the older workers they would have been expected to recommend and hire – these statistics would not permit a jury to find that discrimination was the company’s standard operating procedure – furthermore, the percentage of older workers before and after the divestiture was almost the same – it declined only from 87.4% to 86.6% – for the same reason the disparate impact claim fails – beyond a requirement of statistical significance the court may require that the disparity be substantial.

Schechner v. KPIX-TV, 686 F.3d 1018, 115 FEP 307 (9th Cir. 2012) – Layoff for lack of work – district court granted summary judgment on disparate treatment claim holding that plaintiff did not make out a prima facie case because statistical analysis must account for defendant’s legitimate nondiscriminatory reason – not so – plaintiffs who rely on statistical evidence to establish a prima facie case bear a relatively low burden of proof – but summary judgment affirmed because plaintiffs have not carried their pretext burden – for prima facie case statistics must show
a stark pattern of discrimination unexplainable on grounds other than age
– Ninth Circuit reviews age statistical proof cases – employer’s
explanation was that it laid off reporters based on the date of their contract
expirations – this was not shown to be a pretext – moreover, the
decisionmaker was the same person who had repeatedly given the
plaintiff’s new contracts – employer “is entitled to a favorable ‘same-actor
inference.’” (686 F.3d at 1026) – “The inference applies to favorable
employment actions, other than hiring, such as promotion. . . . It also may
arise when the favorable action and termination are as much as a few years
apart.” (id.).

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. 36)

Burton v. Ark. Sec’y of State, 737 F.3d 1219, 120 FEP 1793 (8th Cir.
2013) – State Police Chief can be individually liable under Section 1983
for alleged racial discrimination in termination – however, qualified
immunity for retaliation claim brought under the Equal Protection Clause
– right to be free from retaliation is a First Amendment right, but this
complaint alleged only the Equal Protection Clause.

Sayger v. Riceland Foods, Inc., 735 F.3d 1025, 120 FEP 1241 (8th Cir.
2013) – Retaliation verdict under Section 1981 affirmed – white may
bring a Section 1981 claim if he or she suffered discrimination or
retaliation for attempting to vindicate the rights of minorities who are
protected by the Act – here the white plaintiff was a witness to racist
language, and so informed the HR Rep – that constituted protected
conduct.
Levin v. Madigan, 692 F.3d 607, 115 FEP 1281 (7th Cir. July 30, 2012) – ADEA does not preclude state employees from pursuing claims under 42 U.S.C. § 1983 – 7th Circuit disagrees with all other Circuits that have considered the issue, the 1st, 5th, 9th, 10th, and DC Circuits.

Smith v. Bray, 681 F.3d 888, 115 FEP 81 (7th Cir. 2012) – Cat’s paw theory that biased supervisor and HR rep caused discharge – employer bankrupt – individual supervisor settled – five circuits have held that the cat’s paw theory would support imposing individual liability under § 1983 on a subordinate government employee – no reason why the same theory should not apply to private employees under § 1981 – however, summary judgment affirmed for HR rep since no genuine issue of fact as to whether the HR rep intentionally caused the discharge for retaliatory motives.

Okwu v. McKim, 682 F.3d 841, 26 A.D. Cas. 513 (9th Cir. 2012) – State employee’s action under § 1983 for alleged violation of the Americans with Disabilities Act properly dismissed – Title I of ADA provides exclusive remedies for workplace bias based on disability.

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.

Reverse Discrimination and Affirmative Action (Ch. 38)

Fisher v. Univ. of Tex. at Austin, 570 U.S. __, 133 S. Ct. 2411, 118 FEP 1459 (2013) – University automatically admitted top ten percent of each high school graduating class – of the remaining slots, race was one of
many plus factors – program upheld by Fifth Circuit – Court reaffirms *Bakke, Grutter v. Bollinger, and Gratz v. Bollinger* – diversity can be taken into account – however, a strict scrutiny standard applies – Fifth Circuit should have required University to prove there was no alternative to considering race in order achieve the objective of diversity – case remanded to Fifth Circuit – decision was 7 to 1 – Ginsburg dissent contended University had carefully followed the teachings of the Supreme Court’s prior strict scrutiny decisions.

*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.

Maraschiello v. City of Buffalo Police Dep’t, 709 F.3d 87, 117 FEP 665, (2nd Cir. 2013) – White police captain had highest score on exam – city replaced exam with new exam designed to increase minority representation – white police captain chose not to take new exam – evidence that city was in part concerned about disparate impact of prior exam insufficient to show that the purpose of the new exam was to achieve racial balance.

Hanners v. Trent, 674 F.3d 683, 114 FEP 965 (7th Cir. 2012) – White police sergeant disciplined for sending a racially and sexually offensive email to coworkers using his work computer – he claimed reverse discrimination, alleging that if he had been black he would have been
more leniently disciplined – he listed 18 state police employees whom he alleged were treated more leniently for similar infractions – but he failed to identify a similarly situated non-white employee was an apt comparator – he “failed to demonstrate that individuals outside the protected class received systematically better disciplinary treatment” (674 F.3d at 692) – his claim he would have been treated more favorably “had he been an African American amounts to mere speculation, which this court has consistently held is insufficient to avoid summary judgment.” (id.).

_Cleveland Firefighters for Fair Hiring Practices v. City of Cleveland_, 669 F.3d 737, 114 FEP 398 (6th Cir. 2012) – 31-year-old consent decree had goal of one-third minority entry-level firefighters – percentage rose from 4% to 26% - improper to terminate consent decree without making finding as to whether it continued to be necessary and could survive a strict scrutiny analysis.

_Everett v. Cook Cnty.,_ 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), _cert. denied_, 132 S. Ct. 2741 (2012) – 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.

**Monetary Relief (Ch. 41)**

*Arizona v. Asarco LLC, ___ F. App’x __, 120 FEP 665, 2013 WL 5755495 (9th Cir. 2013)* – In sexual harassment case jury awarded only $1 in nominal damages and over $800,000 in punitive damages, reduced by the trial court to the Title VII maximum of $300,000 – record supported the imposition of a very large punitive award – however, no court has ever upheld a ratio of punitive to compensatory of greater than $125,000 to $1 – therefore, punitive award remitted to $125,000.

*Miller v. Raytheon Co., 716 F.3d 138, 118 FEP 212 (5th Cir. 2013)* – employee terminated because of his age is not entitled to both liquidated damages under ADEA and punitive damages under state law – liquidated damages under ADEA were higher than punitive damages which could be awarded under state law, so liquidated damages but not punitive damages allowed.

*May v. Chrysler Group, LLC, 716 F.3d 963 (7th Cir. 2013)* – horrific harassment over lengthy period of time against Cuban-Jewish employee – jury awarded $3.5 million in punitive damages – District Court reversed, finding that Chrysler could have done more to stop the harassment but did make an effort – that Chrysler’s failure to comply with Title VII by
preventing the harassment was not malicious or reckless – Seventh Circuit originally reversed the denial of punitive damages (692 F.3d 734), but on reconsideration amended its opinion and affirmed the denial of punitive damages – “To be sure, Chrysler could have done more to stop the harassment. But given the situation that it faced – an anonymous harasser, an assembly plant covering four million square feet, and a three-shift-a-day operation, Chrysler’s response was enough as a matter of law to avoid punitive damage liability.” 716 F.3d at 975-76.

Trainor v. HEI Hospitality, LLC, 699 F.3d 19, 116 FEP 615 (5th Cir. 2012) – Jury awarded $1 million in emotional distress damages – trial court reduced it to $500,000 – Appellate Court found that grossly excessive and reduced it to $200,000 or a new trial – no evidence that employee received any medical treatment, counseling, or other attention for despondency – reduced amount is consistent with awards upheld in similar cases.

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.

Attorney’s Fees (Ch. 42)

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., 559 U.S. 542, 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.

Muniz v. United Parcel Service, Inc., 738 F.3d 214, 120 FEP 1549 (9th Cir. 2013) – Ninth Circuit 2 to 1 in opinion written by District Court judge sitting by designation approved $697,971.80 in attorneys’ fees in a case where the plaintiff recovered only $27,280 – District Court judge reduced lodestar by 10% to account for lack of success – did not explain reasoning why the number was 10% – plaintiff originally sought $2 million in fees – unreasonably inflated – under state law would qualify as a special circumstance that would have justified a substantial reduction in total denial of fees – but majority holds that this is discretionary.

Diaz v. Jiten Hotel Mgmt., Inc., 704 F.3d 150, 116 FEP 411 (1st Cir. 2012) – Lodestar properly reduced because claimant prevailed on only one claim in a multi-claim cause of action – however, court erred in further reducing lodestar because plaintiff’s counsel rejected a “reasonable” settlement offer – jury verdict was less than $8,000 and pre-trial $75,000 settlement offer had been rejected – defendant should have made a Rule 68 Offer – “Under Rule 68, a party who rejects a formal Rule 68 Offer and then fails to obtain greater relief cannot recover any fees and costs which accrue after the date of rejection.” 704 F.3d at 154 (citing Marek v. Chesney, 473 U.S. 1, 11-12 (1985)) – “[T]his limitation on recovery is only available where Rule 68 has been formally invoked,” id. – Because Jiten did not avail itself of this option, it cannot now use its informal offer to limit fees.
EEOC v. Great Steaks, Inc., 667 F.3d 510, 114 FEP 289 (4th Cir. 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.

Alternative Dispute Resolution (Arbitration) (Ch. 43)

Am. Express Co. v. Italian Colors Rest., 570 U.S. __, 133 S. Ct. 2304 (2013) – American Express arbitration agreement with the restaurant barred class actions, barred joinder or consolidation of claims for parties, required confidentiality, and precluded any shifting of costs to American Express even if Italian Colors prevailed, 133 S. Ct. at 2316 (dissent); maximum recovery for anti-trust violation when trebled was $38,549 – in order to establish the anti-trust violation, use of economic experts would cost hundreds of thousands and perhaps more than a million dollars – plaintiff opposed arbitration on the ground that as a practical matter precluding class actions in the arbitration agreement absolutely prevented vindication of statutory rights under the anti-trust laws – District Court ordered arbitration – Court of Appeals reversed, Supreme Court remanded for reconsideration in light of Stolt-Nielsen – also reconsidered in light of Concepcion – 2nd Circuit stood by its reversal – en banc review was denied with five judges dissenting – “[C]ourts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom [the parties] choose to arbitrate their disputes, and the rules under which that arbitration will be conducted . . . .” 133 S. Ct. at 2309 (citations and internal quotation marks omitted; emphasis and second alteration in original). “[T]he antitrust laws do not guarantee an affordable procedural path to the vindication of every claim[,]” id. – “Nor does congressional approval of [FRCP] 23 establish an entitlement to class proceedings for the vindication of statutory rights[,]” id. – “The Rule [23] imposes stringent requirements for certification that in practice exclude most claims[,]” id. at 2310. Plaintiff’s major reliance was on a line of
cases that hold that an arbitration agreement cannot be enforced if it bars “effective vindication” of statutory rights – this is dicta – the dicta would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights – it might cover excessive filing or administrative fees that make arbitration impracticable – “[B]ut the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy[.]” *id.* at 2311 (emphasis in original) – “The class-action waiver merely limits arbitration to the two contracting parties[.]” *id.* This result is all but mandated by *AT&T Mobility* – “[T]he switch from bilateral to class arbitration’, we said, ‘sacrifices the principle advantage of arbitration’ – its informality[,]” *id.* at 2312 (citation omitted; first alteration in original) –

“We specifically rejected the argument that class arbitration was necessary to prosecute claims that might otherwise slip through the legal system[,]” *id.* (citation and internal quotation marks omitted) – Court of Appeals theory would require federal courts to litigate the cost of proving a case, and then decide whether that precluded effective enforcement of rights – “Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution[,]” *id.* at 2312 – Decision was 5 to 3 (Justice Sotomayor took no part) – Kagan dissent for three dissenting Justices stated “AmEx has insulated itself from antitrust liability – even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse,” *id.* at 2313.

*Oxford Health Plans LLC v. Sutter,* __ U.S. __, 133 S. Ct. 2064 (2013) – Supreme Court refused to overturn arbitrator’s decision that arbitration agreement allowed class action – relevant agreement language was: “No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration . . . pursuant to the rules of the American Arbitration Association . . . .” 133 S. Ct. at 2067. “The parties agreed that the arbitrator should decide whether their contract authorized class arbitration . . . .” *id.* – Arbitrator reasoned that clause sent to arbitration anything that could have been filed in court – “Under the FAA, courts may vacate an arbitrator’s decision only in very unusual circumstances,” *id.* at 2068 (citation and internal quotation marks omitted) – serious errors of fact and law do not matter – key is the parties’ agreement that the arbitrator should decide whether or not the arbitration agreement allowed
class action litigation –

“We would face a different issue if Oxford had argued below that the availability of class arbitration was a so-called ‘question of arbitrability.’ Those questions – . . . ‘whether a concededly binding arbitration clause applies to a certain type of controversy’ – are presumably for courts to decide.

Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 . . . (2003) (plurality opinion). A court may therefore review an arbitrator’s determination of such a matter de novo absent clear and unmistakable evidence that the parties wanted an arbitrator to resolve the dispute. [Citations, quotation marks and alterations omitted.]

Stolt-Nielsen made clear that this Court has not yet decided whether the availability of class arbitration is question of arbitrability. See 559 U.S. at 680 . . . . But this case gives us no opportunity to do so because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures.”

133 S. Ct. at 2068 n.2 – Oxford relies on Stolt-Nielsen – but there “the parties in Stolt-Nielsen had entered into an unusual stipulation that they had never reached an agreement on class arbitration,” id. at 2069 – so there the arbitrator could not have construed the contract – here the arbitrator did construe the contract – “[Section] 10(a)(4) bars . . . overturn[ing the arbitrator’s] decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly.” – “Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator’s contract interpretation, or any quarrel with Oxford’s contrary reading. All we say is that convincing a court of an arbitrator’s error – even his grave error – is not enough.” 133 S. Ct. at 2070. – Concurring opinion of Justices Alito and Thomas pointed out that “unlike petitioner, absent members of the plaintiff class never conceded that the contract authorized the arbitrator to decide whether to conduct class arbitration. It doesn’t.” Id. at 2071. Not clear that absent class members will be bound unless the class arbitration is opt-in – “In the absence of concessions like Oxford’s, this possibility [the absent class members would not be bound but could unfairly claim a benefit from a favorable judgment without subjecting themselves to the binding effect of
an unfavorable one] should give courts pause before concluding that the availability of class arbitration is a question the arbitrator should decide.” *Id.* at 2072. [NOTE: Essentially, the court is saying it has not yet decided a normal case – no stipulations – arbitration agreement is silent on class actions – employer takes the position that a court must decide arbitrability of a class action – arbitrator nevertheless orders class arbitration].

*Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 34 I.E.R. Cas. 961 (2012) – State Supreme Court violated FAA by striking down an employee non-competition agreement as invalid rather than allowing arbitrator to decide the validity of the clause – unanimous decision – court simultaneously granted review and vacated the state court’s ruling in per curiam opinion – while a court can initially decide the validity of an arbitration agreement, the validity of the remainder of the contract if the arbitration agreement is valid is for the arbitrator.

*Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (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.” (132 S. Ct. at 1203-04) – 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., 559 U.S. 662, 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).
**Tillman v. Macy’s, Inc.**, 735 F.3d 453, 120 FEP 998 (6th Cir. 2013) – Arbitration ordered – no signed agreement – employee notified of arbitration program at mandatory meeting – watched video on arbitration – provided with informational brochure – received three separate mailings at her home that reiterated need to opt-out if did not want to be bound by agreement – had more than two months to review agreement and over a year to opt-out which she did not do – “Arbitration should therefore have been required, notwithstanding the absence of an employee-signed written agreement to arbitrate;” 735 F.3d at 454.

**Richards v. Ernst & Young, LLP**, 734 F.3d 871, 21 Wage & Hour Cas. 2d 21 (9th Cir. 2013) – FLSA overtime class action – District Court improperly denied motion to compel arbitration – did not matter that employer failed to move to compel arbitration until after there had been some rulings and discovery – expenses employee incurred as a result of her deliberate choice of improper forum does not establish prejudice – Ninth Circuit refuses to follow NLRB *D.R. Horton* decision – Eighth Circuit and overwhelming majority of Federal District Courts have refused to follow it because it conflicts with U.S. Supreme Court precedent holding that courts must rigorously enforce arbitration agreements unless overridden by contrary Congressional command – that command was not given by the NLRA – initial certification of FLSA class vacated since arbitration agreement precludes class arbitration.

**Kilgore v. Keybank, N.A.**, 718 F.3d 1052 (9th Cir. 2013) (en banc) – Non-employment case – arbitration agreement prohibited class actions – District Court refused to order arbitration – *en banc* 9th Circuit reversed – California law governed – “Plaintiffs claimed below that the [arbitration agreement’s] ban on class arbitration is unconscionable under California law, but that argument is now expressly foreclosed by *Concepcion* . . . . Plaintiff’s assertion that students may not be able to afford the arbitration fees fairs no better. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90-91 . . . (2000) (‘The “risk” that [a plaintiff] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.’).” 718 F.3d at 1058 – Confidentiality Agreement not a reason to find an arbitration clause unconscionable – “[T]he enforceability of the confidentiality clause is a matter distinct from the enforceability of the arbitration clause in general. Plaintiffs are free to argue during arbitration that the confidentiality clause is not enforceable,” *id.* at 1059 n.9.
Parisi v. Goldman, Sachs & Co., 710 F.3d 483, 117 FEP 1055 (2d Cir. 2013) – District Court which refused to honor arbitration agreement’s prohibition of class claims reversed – plaintiff claimed that since “pattern or practice” cases could proceed only on a class basis and that she had a statutory right to bring such a case, this rendered the arbitration agreement’s prohibition on class actions unenforceable – the 2nd Circuit reversed – “[T]here is no substantive statutory right to pursue a pattern-or-practice claim,” 710 F.3d at 486 – that term simply refers to a method of proof and does not create a separate cause of action.

D.R. Horton, Inc. v. NLRB, ___ F.3d ___, 2013 WL 5231617 (5th Cir. Dec. 3, 2013) – NLRB held that D.R. Horton violated the NLRA by requiring its employees to sign an arbitration agreement that prohibited a collective or class action – by a 2 to 1 vote, the Fifth Circuit holds that the Board did not give proper weight to the Federal Arbitration Act – Board upheld on requiring Horton to clarify with its employees that the arbitration agreement did not eliminate their right to file unfair labor practice charges with the NLRB – the Board held that Section 7 of the National Labor Relations Act protected the right of employees to join together to pursue workplace grievances including through litigation and arbitration – the Board has not been commissioned to effectuate the policies of its Act so single-mindedly that it may wholly ignore other and equally important congressional objectives – the Federal Arbitration Act has equal importance – arbitration has been deemed not to deny a party any statutory right – class action procedure is not a substantive right – the Board determined that invalidating restrictions on class or collective actions would not conflict with the FAA – basically the NLRB concluded that the policies behind the NLRA trumped the different policy considerations supporting the FAA – under the FAA arbitration agreements must be enforced according to their terms – there are only two exceptions: (1) the FAA saving clause; and (2) application of the FAA may be precluded by another statute – the Board relied on the FAA saving clause but analysis of Concepcion leads to the conclusion that the Board’s rule does not fit within the FAA saving clause – in Concepcion the court found that California’s prohibition on class action waivers did not fall within the saving clause – like the statute in Concepcion, the Board’s interpretation prohibits class action waivers – Concepcion held that requiring class actions under arbitration agreements interferes with the fundamental attributes of arbitration – the NLRA does not contain a congressional command to override the FAA – there is no basis in the
wording of the statute to override the FAA – there is no evidence in legislative history of an intent to override the FAA – “[b]ecause the Board’s interpretation does not fall within the FAA’s ‘saving clause,’ and because the NLRA does not contain a congressional command exempting the statute from application of the FAA, the Mutual Arbitration Agreement must be enforced according to its terms,” 2013 WL 6231617, at *13 – “Every one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB’s rationale,” id. at *14 (citations to Second, Eighth, and Ninth Circuits).

*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, 649 F.3d 1199, 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” (649 F.3d at 1205) – summary judgment nevertheless affirmed because of total disability representations made on social security application – summary judgment on retaliation claim reversed.

Settlement (Ch. 44)

Sanchez v. Prudential Pizza, Inc., 709 F.3d 689, 117 FEP 966 (7th Cir. 2013) – Accepted Rule 68 covered “all . . . claims for relief” but did not specify that it covered attorney’s fees – plaintiff was entitled to attorney’s fees in addition to Rule 68 judgment amount – “[T]he offering defendant bears the burden of any silence or ambiguity concerning attorney fees [and] ‘must make clear whether the offer is inclusive of fees when the underlying statute provides fees for the prevailing party,’” 709 F.3d at 692 (citation omitted).

Quesada v. Napolitano, 701 F.3d 1080, 116 FEP 1158 (5th Cir. 2012) – Title VII plaintiff’s attorney offered to settle for $5,000 – employer accepted the offer – settlement binding – plaintiff cannot rely on e-mails objecting to settlement offer that he sent to his attorney after offer was accepted – attorney of record is presumed to have authority to settle litigation on behalf of his client.

Gerner v. Cnty. of Chesterfield, 674 F.3d 264, 114 FEP 976 (4th Cir. 2012) – Males and female terminated – female alleged that comparable males were offered more attractive severance packages – district court dismissal reversed – there is no requirement that severance benefits be a contractual entitlement to be subject to the discrimination laws – relying on Hishon v. King & Spalding, 467 U.S. 69 (1984), court held that the
viability of such a claim depends on whether the benefit is part and parcel of the employment relationship – if so it may not be doled out in a discriminatory fashion.

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.

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