EMPLOYMENT DISCRIMINATION LAW UPDATE

By

Paul Grossman

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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), and the 2014 Supplement put out by the ABA Section of Labor and Employment Law (Debra A. Millenson, Richard J. Gonzalez, and Laurie E. Leader, Executive Editors). It is organized by book chapters. The 2014 Supplement includes Court of Appeals decisions through 2012 and Supreme Court cases through June 30, 2013. With a few exceptions, this update begins with cases decided after January 1, 2013. It focuses almost exclusively on Court of Appeals and Supreme Court decisions.

Disparate Treatment (Ch. 2)

Summary Judgment Standards

Simpson v. Beaver Dam Cmty. Hosp., Inc., __ F.3d __, 126 FEP 648, 2015 WL 1046733 (7th Cir. Mar. 11, 2015) – Summary judgment affirmed against black physician denied staff privileges – comments by member of credentials committee about plaintiff’s disruptive behavior and being a “bad actor,” and that plaintiff might be a “better fit” elsewhere, are not, under the facts of this case, indicative of racial discrimination – it was undisputed that plaintiff was put on academic probation while in residency, that there were two uninsured medical malpractice claims against him, and that the credentials committee received a negative reference from a staff member at one of plaintiff’s former employers – “[R]ather than refuting the facts that underlie the [hospital’s] concerns, [plaintiff] simply argues that the concerns should not have mattered[.]” 2015 WL 1046733, at *14 – “That is his view, but the Credentials Committee is entitled to its own view, provided it is not biased on an impermissible animus such as race. And the record does not raise a reasonable inference that it was[,]” id.
Estate of Bassatt v. Sch. Dist. No. 1, 775 F.3d 1233, 125 FEP 1171 (10th Cir. 2014) – Hispanic student teacher terminated for masturbating in school parking lot – Hispanic supervisor was decisionmaker – plaintiff had previously complained of discrimination – Administrative Agency found retaliation – not binding since not reviewed by a court – summary judgment for School District – “the relevant inquiry is whether [the Hispanic decisionmaker] subjectively, but honestly, believed that [the employee] had engaged in the misconduct,” 775 F.3d at 1241 – in addition, “Sanchez is Latino, and we conclude that this undermines any suggestion of pretext,” id. – decisionmaker was a founding member of a group that advocates for Latinos in education.

Moody v. Vozel, 771 F.3d 1093, 125 FEP 261 (8th Cir. 2014) – White male employee discharged for sexual harassment – irrelevant if co-worker’s statement was motivated by racial animus since co-worker is not decisionmaker and no link between statement and employer’s decision to terminate – no evidence employer believed harassment allegations were false – other employees who engaged in harassment and were not terminated were not similarly situated.

Gosey v. Aurora Med. Ctr., 749 F.3d 603, 122 FEP 665 (7th Cir. 2014) – Race discharge summary judgment reversed – Plaintiff fired for four instances of tardiness following a warning – the company’s own record show that she was not tardy on three of the four dates – “A trier of fact could thus find that the company’s explanation for firing Gosey was not simply mistaken, but false.” 749 F.3d at 608 – Summary judgment affirmed on harassment claim even assuming harassment was of sufficient severity or pervasiveness – no evidence harassment based on race.

Lobato v. N.M. Env’t Dep’t, Envlt. 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 1294 – 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 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 1295 – 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. at 1296 – 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 Servs., LLC*, 719 F.3d 673, 118 FEP 1532 (8th Cir.), cert. denied, 134 S. Ct. 799 (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 “slanty 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 the 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.

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.” 701 F.3d at 661 (alterations omitted).
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.

Hicks v. Johnson, 755 F.3d 738, 123 FEP 473 (1st Cir. 2014) – Summary judgment affirmed in promotion case – plaintiff failed to rebut that successful candidate had better interview scores – the contention that interview panel used overly subjective questions rejected – candidates were asked the same 20 questions – three-member interview panel – each scored their answers on a three-point scale – one interviewer favored plaintiff 50-49, the other two favored the white male candidate 54-48 and 45-44.

General

Fatemii v. White, 775 F.3d 1022, 125 FEP 1138 (8th Cir. 2015) – A female doctor was terminated from neurosurgical residency and alleged sex discrimination – no woman had ever successfully completed the program – she was terminated because of multiple complaints about her behavior and professionalism which included walking out on surgeries – summary judgment affirmed – assertion that male residents had engaged in similar misconduct and had not been terminated from the program rejected – male residents had different supervisors or engaged in less serious conduct – within a week or so of being in the residency program she informed one doctor of her concern about gender discrimination – that doctor insisted that a third party be present when he spoke with plaintiff – with respect to no female ever having completed the program, only two entered the program – one was murdered when she was chief resident, and the other left voluntarily and testified that she did not feel that she was a victim of sex discrimination – comparative evidence fails – we do not require that the plaintiff produce evidence of a “clone” or that the comparators have engaged in exactly identical conduct – three of the comparators had incidents that occurred before the decisionmaker chaired the department – “they had a different ultimate supervisor who was the actual
decisionmaker,” 775 F.3d at 1044 – the only comparator whose alleged misconduct occurred under the same decisionmaker engaged in totally different conduct – it was not of comparable seriousness – with respect to her complaint about the doctor who insisted that a third party be present, simply having someone else present during a contentious or sensitive conversation is not discriminatory or hostile – plaintiff’s contention that the hospital employer gave shifting explanations for her termination rejected – the disciplinary warnings were consistent with the basis for the termination – the plaintiff lost her position because of her many professional shortcomings as a resident, not because she is a woman.

United States v. City of New York, 717 F.3d 72, 118 FEP 417 (2d Cir. 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., 718 F.3d 602 (7th Cir. 2013), cert. denied, 134 S. Ct. 525 (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-motive – each party contended there was a single motive – refusal to give a mixed-motive instruction is reviewed for abuse of discretion – “the question of when a mixed-motive instruction is appropriate has engendered considerable confusion,” 718 F.3d at 609 – several Circuits now provide a mixed
motive instruction in all Title VII cases – the District Court agreed with the employer that under the evidence the mixed-motive instruction was inappropriate – plaintiff need not concede at trial the legitimacy of the employer-stated reason to seek a mixed-motive instruction – the rule in question is not whether the plaintiff concedes that there is a legitimate reason “but whether the case overall is one where either the plaintiff or the defendant’s evidence lends itself to coexisting dual causes for an adverse employment action,” 718 F.3d at 611 – it is important to remember that a case will not always be easily identified as either “pretext” or “mixed-motive” – at some point in the proceedings the District Court must decide.

_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 “he 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).

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

_EEOC v. Freeman_, 778 F.3d 463, 126 FEP 323 (4th Cir. 2015) – The EEOC alleged that background checks had an unlawful disparate impact on black and male job applicants – district court granted summary judgment to employer after excluding the EEOC’s expert testimony as unreliable – affirmed – background checks included criminal background checks and credit history checks – under Federal Rule of Evidence 702, expert testimony is admissible if it “rests on a reliable foundation and is relevant” – “The district court identified an alarming number of errors and analytical fallacies in Murphy’s reports, making it impossible to rely on any of his conclusions” 778 F.3d at 466 – “Most troubling, the district court found a ‘mind-boggling’ number of errors and unexplained discrepancies in Murphy’s database,” id. at 467 – “The sheer number of mistakes and omissions in Murphy’s analysis renders it outside the range where experts might reasonably differ,” id. (citation and internal quotations omitted) – the concurring opinion notes that Murphy “undeniably ‘cherry-picked,’” id. at 470 – it notes that this is a “pattern of suspect work from Murphy” for the EEOC, including in _EEOC v. Kaplan_
Higher Educ. Corp., 748 F.3d 749 (6th Cir. 2014), where Murphy’s work was also excluded – “Despite Murphy’s record of slipshod work, faulty analysis, and statistical sleight of hand, the EEOC continues on appeal to defend its testimony.” 778 F.3d at 471 – the EEOC owes duties to employers as well as employees – “[A] duty reasonably to investigate charges, a duty to conciliate in good faith, and a duty to cease enforcement attempts after learning that an action lacks merit,” id. at 472 (citation and internal quotations omitted) – “That the EEOC failed in the exercise of this … duty in the case now before us would be restating the obvious,” id.

Johnson v. City of Memphis, 770 F.3d 464, 124 FEP 1741 (6th Cir. 2014) – Police promotional process – equally-weighted test components: an investigative logic test; a job knowledge test; an application of knowledge test; a grammar and clarity test; and a video-based practical test – trial court found test job related, but ruled for plaintiffs because they were less discriminatory alternatives – court of appeal affirmed finding on job relatedness, but reversed the district court’s finding on available alternatives with a lesser impact – trial court accepted plaintiffs’ “broad suggestions [of] alternative testing modalities” as satisfying their Step-Three burden – Title VII requires that plaintiffs prove the availability of equally valid less discriminatory measures, and here the district court did not find equal validity – trial court essentially believed city should have used procedures that eliminated impact in 1996, but those procedures were comprised by security flaws – furthermore, the 1996 simulation required multiple actors to portray a two-hour law enforcement scenario that took nearly three months to evaluate more than 400 applicants – the court should have considered the city’s legitimate interests in test security and practicability in considering the plaintiffs’ alternatives – district court erred by relying solely on the past success of the 1996 process in determining that the 2002 process should have incorporated a large simulation – these legal errors improperly shifted the plaintiffs’ evidentiary burden to the city – appellate court rules as a matter of law that the plaintiffs’ purported showing of equally valid, less discriminatory alternatives is inadequate, and does not even present a triable issue – one of the alternatives allows for subjectivity, which opens the door to random results and real or perceived bias – basically, the plaintiff’s Step-Three showing was no more than “broad suggestions” which is insufficient – plaintiffs’ attack on job validity rejected in an extremely detailed opinion relying on the city’s extensive job analysis.
EEOC v. Kaplan Higher Educ. Corp., 748 F.3d 749, 122 FEP 509 (6th Cir. 2014) – Federal district court properly found that EEOC’s expert attempting to show disparate impact of credit checks “flunked” all Daubert reliability tests – expert attempted to determine the applicant’s race by looking at DMV photos – no way to show that this has been tested or to show error rates – expert’s race raters just eyeballed DMV photos to determine race – EEOC itself runs credit checks on applicants for 84 of the agency’s 97 positions – EEOC’s assertion was that Kaplan’s use of credit checks causes it to screen out more African-American applicants than white applicants pleading disparate impact – EEOC relied solely on its statistical expert – we rely primarily on Daubert factors requiring that a technique for reliability be able to be tested and furthermore, that the court can consider the known or potential rate of error – the EEOC wholly failed to provide evidence to support either of these factors – another factor is whether the theory has been subjected to peer review – no evidence supported this factor – “The EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself.” 748 F.3d at 754 – the district court’s dismissal of the case was affirmed.

Adams v. City of Indianapolis, 742 F.3d 720, 121 FEP 948 (7th Cir. 2014), cert denied, 135 S. Ct. 286 (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,” 742 F.3d at 733 – “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.

**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[,]’” *id.* 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 (Kavanaugh, J., concurring).

*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.

Religion (Ch. 9)

*Yeager v. FirstEnergy Generation Corp.*, 777 F.3d 362, 125 FEP 1685 (6th Cir. 2015) – Employee for religious reasons refused to provide social security number – employer legitimately refused to hire him – regardless of employee’s beliefs federal statute and internal revenue code requires employers to collect and provide social security numbers of their employees, and accommodation for religion does not extend that far.

*Williams v. California*, 764 F.3d 1002, 124 FEP 127 (9th Cir. 2014) – Community-based organizations that have contracts with state to provide care to developmentally disabled persons can be required to accompany such persons to church services even if such church service is in contradiction to the employee’s own religious beliefs and practices.

*Davis v. Fort Bend Cnty.*, 765 F.3d 480, 124 FEP 101 (5th Cir. 2014), *pet. for cert. filed*, No. 14-847 (Jan. 14, 2015) – Employer required all technical support employees to work a weekend to install computers – Plaintiff claimed she was unable to work that Sunday morning because of a previous religious commitment – at her Pastor’s request she needed to attend a special church service to feed the community – the employer denied her request on the ground that it wasn’t based on a religious belief or practice – summary judgment for the employer was reversed 2-1 – the two judge majority found that the District Court erred because it improperly focused on “the nature of the activity itself” (feeding the poor) instead of addressing the sincerity of religious belief – the dissenting opinion found that the majority’s conclusion departed from other circuits which have held that the courts must consider both whether the belief was
religious in nature and whether it is sincerely held – the dissent also found that there would be undue hardship to have a technically sophisticated supervisor absent at a crucial time.

Nobach v. Woodland Vill. Nursing Ctr., Inc., 762 F.3d 442, 123 FEP 1565 (5th Cir. Aug. 7, 2014), pet. for cert. filed, No. 14-808 (Nov. 5, 2014) – Nursing home activities aide fired for refusing to pray the rosary with a nursing home resident – jury verdict for plaintiff reversed and judgment entered for employer – plaintiff never told employer prior to discharge that it was against her religion to perform the rosary – at that time supervisor said “I don’t care if it is against your religion . . ., it’s insubordination[.]” 762 F.3d at 445 – but management had no knowledge that there was a religious objection at the time of discharge – although post-discharge she so informed the company, “other circuits have held that an employer has no obligation to withdraw its termination decision under Title VII based on information supplied after that termination decision has been made,” id. at 446 (citing decisions by the 3rd, 4th, and 8th circuits).

EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 120 FEP 212 (10th Cir. 2013), cert. granted, 135 S. Ct. 44 (2014) – 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.
Sex (Ch. 10)

*Young v. United Parcel Service, Inc.*, ___ U.S. ___, 2015 WL 1310745 (Mar. 25, 2015) – Pregnancy Discrimination Act requires that employers treat “women affected by pregnancy … the same for all employment-related purposes … as other persons not so affected but similar in their ability and inability to work” – UPS accommodated many but not all workers with all non-pregnancy related disabilities with light duty work – claim was only disparate treatment – not disparate impact – UPS limited light duty work to (1) workers injured on the job; (2) workers with ADA covered disabilities; and (3) workers who lost their Department of Transportation (DOT) certifications – court rejects plaintiff’s claim that if the employer accommodates any subset of workers with disabling conditions, it must accommodate pregnant workers – Congress did not intend “most favored nation” status so that if the employer accommodated anybody it had to accommodate all pregnant workers – disparate treatment law normally allows an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes does harm those members, as long as the employer has a legitimate and non-discriminatory, non-pretextual reason for doing so – 2014 EEOC Guidelines adopted after *certiorari* was granted rejected – guidelines lack timing, consistency and thoroughness of consideration which is necessary to give it “power to persuade” – pregnant worker can establish a *prima facie* case by showing that employer did accommodate others “similar in their ability or inability to work” – the employer can then defend by relying on legitimate, non-discriminatory reasons for offering accommodation to some but not others – expense would not normally suffice – assuming a legitimate non-discriminatory reason, “the plaintiff may reach a jury … by providing sufficient evidence that the employer’s policies impose a significant burden on pregnant workers, and that the employer’s ‘legitimate, non-discriminatory’ reasons are not sufficiently strong to justify the burden, but rather – when considered along with the burden imposed, give rise to an inference of intentional discrimination[,]” 2015 WL 1310745, at *16 – “The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers[,]” *id.* – “This approach, although limited to the Pregnancy Discrimination Act context, is consistent with our longstanding rule that a plaintiff can use circumstantial proof to rebut an
employer’s apparently legitimate non-discriminatory reasons ....” – “[T]he continued focus on whether the plaintiff has introduced sufficient evidence to give rise to an inference of intentional discrimination avoids confusing the disparate-treatment and disparate-impact doctrines,” id. (emphasis in original) – “We do not determine whether Young created a genuine issue of material fact .... We leave a final determination of that question with the Fourth Circuit ....” id. at *17 – five Justices, including Chief Justice Roberts, joined in the Opinion of the Court – Justice Alito concurred in Judgment – he was bothered by the fact that employees who lost their DOT certification were accommodated, even when the loss was for misconduct such as drunk driving or off the job injuries – “It does not appear as though respondent has provided any plausible justification for treating these drivers more favorably than drivers who are pregnant[,]” – 2015 WL 1310745, at *21 – the three Justice dissent (Scalia, Thomas and Kennedy) contended that the majority conflated disparate impact with disparate treatment – “Where do the ‘significant burden’ and ‘sufficiently strong justification’ requirements come from? Inventiveness posing as scholarship – which gives us an interpretation which is as dubious in principle as it is senseless in practice[,]” 2015 WL 1310745, at *22 – the Court “proceeds to bungle the dichotomy between claims of disparate treatment and claims of disparate impact,” id. at *26 – but “plaintiffs in disparate-treatment cases can get compensatory and punitive damages as well as equitable relief, but plaintiffs in disparate impact cases can get equitable relief only[,]” id. – Court does claim that the new test is somehow limited to pregnancy discrimination – “Today’s decision can thus only serve one purpose: allowing claims that belong under Title VII’s disparate impact provisions to be brought under its disparate-treatment provisions instead[,]” id. at *27.

Ambat v. City and Cnty. of San Francisco, 757 F.3d 1017, 123 FEP 773 (9th Cir. 2014) – Summary judgment for city which limited supervision of female inmates in county jails to females reversed – BFOQ defense not established at summary judgment – two-part test – first part is whether employer proved that the job qualification is reasonably necessary to the essence of its business – San Francisco did that – second part of the test is employer has the substantial basis for believing that all or nearly all men lack the necessary qualifications whether it is impossible or highly impracticable to ensure by individual testing who has the qualifications – at summary judgment second prong of test not established – total deference to the sheriff’s judgment as to what is necessary to protect female inmates not appropriate – BFOQ is very narrowly construed.
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.

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), cert. denied, 134 S. Ct. 119 (2013) – 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.
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.

Age (Ch. 12)

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

Tilley v. Kalamazoo Cnty. Rd. Comm’n, 777 F.3d 303, 125 FEP 1696 (6th Cir. 2015) – Summary judgment – no age prima facie case – not replaced by younger worker – no younger employee who engaged in similar misconduct but was not terminated has been identified – furthermore, no pattern of age discrimination [“We have carefully reviewed the evidence submitted by Tilley, and we find that it falls far short of establishing a “pattern” of anything, much less a ‘pattern’ of age discrimination sufficient to satisfy the fourth prong of his prima facie case,” 777 F.3d at 308].

Widmar v. Sun Chem. Corp., 772 F.3d 457, 125 FEP 440 (7th Cir. 2014) – Summary judgment affirmed – plaintiff’s basic evidence was that he was in protected age group and supervisor unfairly blamed him for numerous workplace problems, which were really the fault of others – “The problem . . . is that even if we take each and every one of these facts in the light most favorable to [plaintiff] and even if we were to attribute a nefarious motive to [the supervisor’s] conduct in each incident, we have no way of knowing whether [the supervisor] acted this way because of [plaintiff’s] age. Each and every one of these issues could arise just as easily if [the supervisor] simply did not like [plaintiff’s] personality or his style or, for that matter, his cologne. Title VII does not protect employees from poor managers or unpleasant and unfair employers.” 772 F.3d at 462 – for summary judgment purposes plaintiff cannot create a factual dispute by stating that his job responsibilities ought to be something other than what they were – the Court cannot say whether it was reasonable for the
employer to require plaintiff to be responsible for particular functions – “This Court has repeatedly stated that it is not a super-personnel department that second-guesses employer policies that are facially legitimate” 772 F.3d at 464.

*Perret v. Nationwide Mut. Ins. Co.*, 770 F.3d 336, 124 FEP 1457 (5th Cir. 2014) – Jury verdict in favor of plaintiff in constructive discharge case reversed and JNOV granted – plaintiffs were two oldest managers in region and were placed on performance improvement plans – this is insufficient to constitute a constructive discharge – needed to show working conditions would be so intolerable that a reasonable person would have been compelled to resign – did not present evidence that they were subject to demotions, reductions in pay, menial or degrading work, harassment, humiliations, or offers of early retirement.

*Johnson v. Securitas Sec. Servs. USA, Inc.*, 769 F.3d 605, 124 FEP 1293 (8th Cir. 2014), *cert. denied*, 2015 WL 504942 (U.S. Mar. 30, 2015) – Termination of 76-year-old security guard legitimate since based on unauthorized departure from site and delay in reporting accident – insufficient evidence of pretext even though one of the three people who made the termination decision told him he was “too old” and “needed to hang up his Superman cape and retire.”

*Loyd v. St. Joseph Mercy Oakland*, 766 F.3d 580, 124 FEP 513 (6th Cir. 2014) – Summary judgment affirmed 2-1 on discharge case alleging race, sex, and age discrimination – plaintiff was on final warning for prior misconduct and hospital held an honest belief that she had committed a major infraction by not assisting staff in a confrontation with a patient – “[T]he hospital took witness statements and made a reasonable assessment . . . before terminating Loyd. The law does not require the hospital to do anything more. . . . To require otherwise would unduly frustrate an employer’s ability to terminate insubordinate employees for legitimate, nondiscriminatory reasons,” 766 F.3d at 591. “The honest belief rule provides that an employer is entitled to ‘summary judgment on pretext even if its conclusion is later shown to be mistaken, foolish, trivial or baseless[,]’” 766 F.3d at 590-91 (citation omitted).
Delaney v. Bank of Am. Corp., 766 F.3d 163, 124 FEP 317 (2d Cir. 2014) – Summary judgment in age layoff case – managers instructed to choose underperforming employees whose dismissal would have the least impact on the business – although plaintiff was the oldest member of the high-yield group and the only one to be terminated, his sales performance in that group was the worst of all employees at his level – with respect to alleged age-based comments by Bank of America managers, which were excluded as hearsay, the Second Circuit held that even if such evidence was admissible “[c]omments about another employee’s age, removed from any context suggesting that they influenced decisions regarding [plaintiff’s] own employment, do not suffice to create a genuine issue of fact as to whether age was the but-for cause of [plaintiff’s] termination[,]” 766 F.3d at 170.

Doucette v. Morrison Cnty., 763 F.3d 978, 124 FEP 1 (8th Cir. 2014) – Plaintiff contended sex plus age discrimination – although she admittedly repeatedly made billing errors, she contended the billing errors were fixable and not as serious as performance deficiencies by male co-workers who were not fired – “we do not sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination[,]” 763 F.3d at 983 (citation omitted) – alleged comparators conduct was too “different in type” and no evidence of frequency – comment by county sheriff who was decisionmaker that “old people shouldn’t be working in our profession because they get injured” was not sufficiently connected to the decisional process – inquiry by a supervisor as to when she planned to retire insufficient – “asking a question about someone’s retirement plans is not inherently discriminatory,” 763 F.3d at 986 – summary judgment affirmed.

Hutt v. AbbVie Prods. LLC, 757 F.3d 687, 123 FEP 1208 (7th Cir. 2014) – After six years under the supervisor who hired her, plaintiff was given new supervision – one of the new supervisor’s first acts as district manager was to ask for his employee’s dates of birth – this is not indicative of age discrimination – summary judgment affirmed since there is no direct evidence of age discrimination, and no circumstantial evidence under the indirect method – no comparables were “directly comparable.”
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 persuasion remains at all times with the employee,’” 704 F.3d at 1333 (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[,]” 704 F.3d at 1337.
Blizzard v. Marion Tech. Coll., 698 F.3d 275, 116 FEP 392 (6th Cir. 2012), cert. denied, 133 S. Ct. 2359 (2013) – 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.

General Issues

Burrage v. United States, ___ U.S. ___, 134 S. Ct. 881, 122 FEP 237 (2014) – Criminal case involving issue of “but-for” causation – the Supreme Court concluded that the Controlled Substances Act imposing mandatory 20-year sentence when the defendant’s conduct was the “but-for” cause of a death – where A shoots B who dies, A caused B’s death since “but-for” A’s conduct B would not have died – the same conclusion follows if the predicate act combines with other factors so long as the other factors alone would not have produced the death – “[I]f, so to speak, it was the straw that broke the camel’s back. Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived.” 134 S. Ct. at 888 – “Consider a baseball game in which the visiting team’s leadoff batter hits a home run in the top of the first inning. If the visiting team goes on to win by a score of 1 to 0 . . . [all] would agree that the victory resulted from the home run. . . . It is beside the point that the victory also resulted from a host of other necessary causes, such as skillful pitching . . . .” Id. “By contrast, it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event. If the visiting team wound up winning 5 to 2 rather than 1 to 0, one would be surprised to read in the sports page that the victory resulted from the leadoff batter’s early, non-dispositive home run.” Id. – We interpreted the word “because” in two different cases to require “but-for causation” under the retaliation provisions of Title VII or the ADEA – Price Waterhouse v. Hopkins did not dispense with but-for – it simply allowed a showing that discrimination was a motivating factor to shift the burden of persuasion to
the employer to establish the absence of but-for cause – this was later amended by the Civil Rights Act of 1991 – “In sum, it is one of the traditional background principles ‘against which Congress legislates’ . . . that a phrase such as ‘results from’ imposes a requirement of but-for causation.” – In the case at bar the decedent took lots of different drugs including the defendant’s heroin but nobody was prepared to say that he would have died from the heroin use alone – the government seeking to sustain the conviction appeals to a second line of cases under which an act or admission is considered to be a cause in fact if it was a substantial or contributing factor – we decline to adopt that permissive interpretation – Justices Ginsburg and Sotomayor concurred in the judgment, but reiterated their position in Nassar that in a retaliation case “because of” does not mean “solely because of.”

Karlo v. Pittsburgh Glass Works, LLC, 2014 WL 1317595 (W.D.Pa. Mar. 31, 2014) – In context of motions to decertify proposed collective action under the ADEA, district court discussed viability of age subgroup theories – every Court of Appeals to face the issue has declined to recognize the age subgroup theory with respect to disparate impact claims, id. at *16; all but two district courts have refused to recognize age subgroups, id. at *17.

Fulghum v. Embarq Corp., 778 F.3d 1147, 126 FEP 294 (10th Cir. 2015) – Employer terminated life insurance benefits for retirees – Summary judgment granted on disparate impact claims – ADEA disparate impact claims differ from Title VII because of the reasonable factor other than age defense – employer produced evidence showing 73% of all companies and 85% of non-manufacturing companies do not provide life insurance benefits to retirees – they further produced evidence that the cost reductions would not affect customer service but would assist the company in remaining competitive and profitable – the elimination of group life insurance benefits would result in cash savings of approximately $4 million, annual expense reductions of $9.4 million, and a reduction in accrued balance sheet liabilities of $72.4 million – these are reasonable factors other than age – there is no need under the reasonable factor other than age test to satisfy the standards set forth in 29 C.F.R. § 1625.10(a), which permits reductions in employee benefit plans if justified by significant cost considerations.
Tramp v. Associated Underwriters, Inc., 768 F.3d 793, 124 FEP 1285 (8th Cir. 2014) – Summary judgment in age RIF case reversed – employer wrote its healthcare carrier and stated that it expected lower premiums since it had gotten rid of its “older, sicker employees.”

Walczak v. Chi. Bd. of Educ., 739 F.3d 1013, 121 FEP 506 (7th Cir. 2014), cert. denied, 134 S. Ct. 2733 (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.

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.

Neely v. Good Samaritan Hosp., 345 F. App’x 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**

*Jarvela v. Crete Carrier Corp.,* 777 F.3d 822, 31 A.D. Cas. 313 (11th Cir.
2015) – Employee with alcohol problem checked himself into treatment
facility, was released, and cleared for work. The diagnosis was “alcohol
dependence” and suggested Alcoholics Anonymous meetings. There was
testimony that an alcoholic remains an alcoholic for the remainder of their
life. Despite being cleared for work, he was fired upon his return. He was
an over the road truck driver and DOT regulations require “no current
clinical diagnosis of alcoholism”. The question was whether this was a
current clinical diagnosis of alcoholism. Summary judgment was affirmed
because the diagnosis, even though he was cleared for work only one
week prior to the discharge.

*Felkins v. City of Lakewood,* 774 F.3d 647, 31 A.D. Cas. 15 (10th Cir.
2014) – Plaintiff claimed fractures were due to bone disease – summary
judgment properly granted since employee did not provide medical
evidence supporting allegation that she had such a disease or explaining
how it substantially limited major life activities – lay testimony regarding
the effects of her condition was inadmissible.

*Associated Builders and Contractors, Inc. v. Shiu,* 773 F.3d 257, 30 A.D.
Cas. 1793 (D.C. Cir. 2014) – The OFCCP’s final rule requiring federal
contractors to invite job applicants to identify themselves as qualified
individuals with disabilities and with a seven percent utilization goal for
employment of such individuals is not illegal because it does not limit
affirmative action to those individuals who have been offered jobs – rule
not arbitrary and capricious since OFCCP not required to show continuing disparity in contractor’s employment of disabled individuals – rule does not preclude construction contractors from making case-by-case hiring decisions.

*Curley v. City of N. Las Vegas*, 772 F.3d 629, 30 A.D. Cas. 1811 (9th Cir. 2014) – Hearing impaired employee who made violent threats against co-workers and engaged in other unacceptable job activities did not establish that past threats of violence were pre-textual despite medical determination from fitness for duty examination that he was not dangerous – discharge was for past threats rather than danger of future violence – City not required to show he posed direct threat given that past threats alone justified discharge – disputing only one of multiple reasons for summary judgment insufficient to defeat summary judgment.

*Taylor-Novotny v. Health Alliance Med. Plans, Inc.*, 772 F.3d 478, 125 FEP 646 (7th Cir. 2014) – Claims of disability discrimination, failure to accommodate, and race discrimination were all foreclosed by black employees repeated instances of being late or absent – contention that case law establishes that regular attendance is not an essential function for every job – plaintiff failed to establish that regular attendance was not required in someone for her position – an employer is generally permitted to treat regular attendance as an essential job requirement and need not accommodate erratic or unreliable attendance – “The ADA provides that ‘consideration shall be given to the employer’s judgment as to what functions of a job are essential.’” 772 F.3d at 490. – Here, the employer considered it essential that the employee be accessible at regular times to supervisors, staff, and customers, whether working at home or in the office.

*Weaving v. City of Hillsboro*, 763 F.3d 1106, 30 A.D. Cas. 673 (9th Cir. 2014), *pet. for cert. filed*, No. 14-766 (Dec. 29, 2014) – City police sergeant’s attention deficit and hyperactivity disorders were not ADA protected disabilities – jury award on ADA unlawful discharge claim reversed – not substantially limited in his ability to work – lack of evidence that his condition effected ability to work and his technical competence as police officer – career-long interpersonal difficulties did not constitute substantial impairment of his ability to interact with others.
Wetherbee v. Southern Co., 754 F.3d 901, 29 A.D. Cas. 1697 (11th Cir. 2014) – Tentative job offer rescinded after employee acknowledged bipolar disorder – ADA revision covering employer’s use of post-offer medical exams and inquiries have limited to those who are actually disabled as defined by the ADA – since plaintiff acknowledged that he couldn’t show he was a qualified individual with a disability, his claim that he was unlawfully excluded from employment failed.

Jones v. City of Boston, 752 F.3d 38, 122 FEP 1189 (1st Cir. 2014) – Police Department fired officers whose hair tests showed use of cocaine – ADA challenge rejected on summary judgment – “[N]o jury could reasonably conclude that the department was motivated by a perception that plaintiffs were addicted to drugs,” 752 F.3d at 59 – distinction between use of drugs and being an addict [NOTE: See the race disparate impact aspect of this case which is briefed in Chapter 35.]

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., Ltd. P’ship, 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), cert. denied, 134 S. Ct. 655 (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.

Qualified Individual with Disability/Essential Job Functions

Majors v. Gen. Elec. Co., 714 F.3d 527, 27 A.D. Cas. 1313 (7th Cir. 2013), cert. denied, 134 S. Ct. 655 (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 1235, 27 A.D. 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.
Reasonable Accommodation

*EEOC v. Kohl’s Dep’t Stores, Inc.*, 774 F.3d 127, 31 A.D. Cas. 2 (1st Cir. 2014) – Summary judgment affirmed – no constructive discharge and no violation of the ADA when employee quit after preferred accommodation of regular day shift was denied – never responded to employer’s good faith efforts to provide interactive process where employer twice requested that she reconsider her resignation to discuss possible alternative accommodations – employee primarily responsible for breakdown in process.

*Solomon v. Vilsack*, 763 F.3d 1, 30 A.D. Cas. 649, 2014 WL 4065613 (D.C. Cir. 2014) – Employee with depression requested that she be able to determine her own hours as long as she met agency deadlines – trial court ruled that such an accommodation is not required – without ruling on whether it would be a reasonable accommodation on these particular facts, the D.C. Circuit held that “nothing in the Rehabilitation Act establishes, as a matter of law, that a maxiflex work schedule is unreasonable,” 2014 WL 4065613, at *4 – a separate analysis is required as to whether an accommodation is reasonable and whether it would result in an undue hardship – in view of the technological advances that are being made in many instances it is less essential for employees in many jobs to be physically present during prescribed hours.

*Hwang v. Kan. State Univ.*, 753 F.3d 1159, 29 A.D. Cas. 1509 (10th Cir. 2014) – University had an inflexible maximum leave of absence for illness of six months. It refused to extend it for the plaintiff. A question, according to the Tenth Circuit, was “must an employer allow employees more than six months’ sick leave or face liability under the Rehabilitation Act?” Their answer: “Unsurprisingly, the answer is almost always no.” – “[I]t’s difficult to conceive how an employee’s absence for six months . . . could be consistent with discharging the essential functions of most any job in the national economy today. Even if it were, it is difficult to conceive when requiring so much latitude from an employer might qualify as a reasonable accommodation,” 753 F.3d at 1162 (emphasis in original) – Contention that all inflexible sick leave policies are illegal violates the Rehabilitation Act rejected – Inflexible leave policies providing unreasonably short sick leave periods might be subject to attack but the six month leave policy herewith does not fall within that category.
Bunn v. Khoury Enters., Inc., 753 F.3d 676, 29 A.D. Cas. 1518 (7th Cir. 2014) – Vision impaired employee at Dairy Queen could not do some of the jobs through which employees rotate – employer unilaterally decided to assign him full time to one of the jobs, which he could do, which enabled him to work full time – this was a reasonable accommodation – does not matter that he preferred other accommodations – there is no separate cause of action for failure to engage in interactive process – in effect, employer restructured the job and/or modified the job schedule to accommodate plaintiff's vision problems.

Koch v. White, 744 F.3d 162, 29 A.D. Cas. 445 (D.C. Cir. 2014) – Summary judgment affirmed for government employer – employee seeking schedule accommodations to participate in a cardiac rehabilitation program did not cooperate with the private firm that the employer had engaged to handle its EEO investigations – employee claimed concerns about privacy – but plaintiff failed to explain why the extensive privacy protections in the contract with the firm hired to handle EEO matters was insufficient.

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.
EEOC v. United Airlines, Inc., 693 F.3d 760, 26 A.D. Cas. 1431 (7th Cir. 2012), cert. denied, 133 S. Ct. 2734 (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 405]. 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.

Retaliation (Ch. 15)


Aldrich v. Rural Health Servs. Consortium, Inc., 579 F. App’x 335, 124 FEP 19 (6th Cir. 2014) – Employee not engaged in protected activity under participation clause when she forwarded e-mails containing confidential patient information to a personal account – her contention that she was preserving evidence for an age discrimination suit that had been filed by a co-worker did not bring it within protected activity – she was not directly involved in the litigation and was not responding to any request from co-worker’s attorneys.
Hamza v. Saks Inc., 533 F. App’x 34, 120 FEP 244 (2d 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 her 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 her termination to be a pretext for retaliation.” 533 F. App’x at 36.

EEOC v. Allstate Ins. Co., 778 F.3d 444, 126 FEP 77 (3d Cir. 2015) – Allstate switched all of its employee agents to independent contractor status in the year 2000. As a condition of offering an independent contractor relationship selling Allstate products, Allstate required that each former employee waive any pending discrimination claims. The EEOC sued, alleging that this constituted retaliation under the federal anti-bias laws – the Court of Appeal ruled for Allstate – the general rule was that employers may require signed releases of claims in exchange for severance pay of other enhanced benefits not normally available – “Allstate followed the well-established rule that employers can require terminated employees to waive existing legal claims in order to receive unearned post-termination benefits.” 778 F.3d at 453.

Sklyarsky v. Means-Knaus Partners, LP, 777 F.3d 892, 125 FEP 1677 (7th Cir. 2015) – Discrimination claims fail because numerous reprimands show that the employee was not meeting the employer’s legitimate expectations even though the reprimands went to attitude and not actual work performance – retaliation claims fail – first suspended six months after filing bias charges and then fired about seven months after submitting another round of charges – suspicious timing between a protected act and an adverse employment action “alone rarely establishes causation,” 777 F.3d, at 898.

Musolf v. J.C. Penney Co., 773 F.3d 916, 125 FEP 918 (8th Cir. 2014) – No prima facie case – seven month time lag between sexual harassment complaint and termination is too long – in the interim she was praised and given salary increase.
Ward v. Jewell, 772 F.3d 1199, 125 FEP 437 (10th Cir. 2014) – Screening panel, members of which had been the subject of discrimination charges filed by plaintiff, did not recommend plaintiff to be interviewed by ultimate decisionmaker – they recommended only two of the five candidates – however, unbiased decisionmaker interviewed all five candidates, and chose someone other than plaintiff – no cat’s paw liability despite bias of screening committee since decisionmaker conducted his own independent investigation.

Cox v. Onondaga Cnty. Sheriff’s Dep’t, 760 F.3d 139, 123 FEP 1185 (2d Cir. 2014) – Summary judgment affirmed against white police officers who were subjected to adverse action for filing knowingly false racial harassment charges against black officer with the EEOC – the employer conducted an investigation, the white officers gave materially inconsistent statements, and the police department concluded that the charges were knowingly false – Title VII does not confer an absolute privilege that immunizes employees who knowingly file false charges with the EEOC – however just because the charges are false does not necessarily permit adverse action – but here the sheriff’s department showed a legitimate, non-retaliatory reason for the adverse action – that the record shows that the officers’ own racial harassment claims were “false, and seemingly intentionally so” – employers have to investigate and curb racial harassment by lower-level employees – the false EEOC charges could themselves be viewed as racial harassment against the black officer they accused of labeling them “skin heads.”

Davis v. Unified Sch. Dist. 500, 750 F.3d 1168, 122 FEP 1204 (10th Cir. 2014) – Head custodian demoted to custodian after found lying naked on his stomach sunbathing on the roof of the elementary school where he worked – over the next five years he applied to be head custodian at seven different schools but was rejected by seven different decision makers – he filed multiple charges with the EEOC during that time frame and is now principally claiming retaliation – “In a nutshell the key issue is whether a common purpose to retaliate . . . must be inferred from the sheer volume of his promotion denials; we think not when seven independent and informed decision makers are involved,” 750 F.3d at 1170 – summary judgment affirmed – with respect to any individual decisions, plaintiff’s proof does not meet the “but-for” test.
Kwan v. Andalex Grp., LLC, 737 F.3d 834, 120 FEP 1805 (2d 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 one 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 with 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.”

*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 an adverse employment action can serve as the 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 permissible to draw the inference that subsequent adverse actions, taken after the employer acquires such knowledge, are motivated by retaliation[,]” *id.* (citation omitted). 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), cert. denied, 134 S. Ct. 899 (2014) – 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.

Richter v. Advance Auto Parts, Inc., 686 F.3d 847, 115 FEP 1067 (8th Cir. 2012), cert. dismissed, 133 S. Ct. 1491 (2013) – 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), cert. denied, 133 S. Ct. 313 (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.

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. at 315).

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

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

Hiring (Ch. 16)

Wilson v. Cook Cnty., 742 F.3d 775, 121 FEP 1077 (7th Cir. 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)

*Dunn v. Trustees of Boston Univ.,* 761 F.3d 63, 123 FEP 1593, 2014 U.S. App. LEXIS 14556 (5th Cir. July 30, 2014) – Layoff – two positions combined – younger employee given new position – plaintiff contended he was more qualified – no reasonable jury could find that the disparity in credentials “was so manifest that the only way [the other employee] could have been selected . . . was if age played an impermissible role[,]” 761 F.3d, at 73 (emphasis in original).

*Mulrain v. Castro,* 760 F.3d 77, 123 FEP 1591 (D.C. Cir. 2014) – Competitive promotion process terminated and promotion awarded to “superstar” white attorney that federal agency desired to retain – black attorney failed to show this was pretext for race discrimination even if black attorney was more qualified – senior agency official who made the decision had not been involved in the interview process, did not compare the attorney’s credentials to the black attorney’s or any other applicants, and did not even know the black attorney had applied for the position.

*EEOC v. Audrain Health Care, Inc.*, 756 F.3d 1083, 123 FEP 783 (8th Cir. 2014) – No adverse action since employee never submitted formal application for transfer/promotion – male registered nurse wanted operating room nurse position – was told the doctors want more female nurses – this is insufficient to show that an application would have been futile – absent a formal application he did not make a reasonable attempt to convey his interest.

*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)**

_EEOC v. Port Auth. of N.Y. & N.J._, 768 F.3d 247, 124 FEP 1071 (2d Cir. 2014) – EEOC equal pay suit on behalf of female attorneys dismissed – judgment on the pleadings affirmed – EEOC failed to compare the attorneys actual job duties to support its claim that the male and female non-supervisory attorneys were performing equal work – EEOC argument that the attorneys had the same job codes dismissed as insufficient – EEOC’s broad allegations ignored legitimate factors other than sex such as “varying workplace demands” – allegations about the same job code were “plainly insufficient to support a claim under the EPA,” 768 F.3d at 256.

_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 plaintiffs are really challenging the disparate impact of the underlying policies “their claim here is subsumed within _McReynolds I_,

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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 plaintiffs 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) – plaintiffs 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 nebulous 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.

*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**

*Rickard v. Swedish Match N. Am., Inc.*, 773 F.3d 181, 125 FEP 633, 2014 WL 6765483 (8th Cir. Dec. 2, 2014) – Summary judgment for employer in male-on-male sexual harassment case – in order to prevail on a same-sex sexual harassment claim, plaintiff had to show that the purported offensive conduct either was motivated by sexual desire or demonstrated a general hostility toward men – the conduct was “manifestly inappropriate and obnoxious” but there was no evidence of the required motivation – age comments such as “old man” and “you’ve got a lot of age on you” insufficient to establish a hostile work environment – voluntary retirement was not a constructive discharge.

*Muhammad v. Caterpillar, Inc.*, 767 F.3d 694, 124 FEP 524 (7th Cir. 2014) – Company reasonably responded to complaints of co-worker harassment which included offensive comments and graffiti and perceptions of sexual orientation – Title VII prohibits the co-workers derogatory comments about race and sexual orientation, but the claims must fail because Caterpillar took prompt action that was reasonably calculated to end the harassment, such as immediately painting over the graffiti and threatening the offending co-workers with termination – prompt response ended the harassment except for one remark that was never reported.
Adams v. Austal USA, LLC, 754 F.3d 1240, 123 FEP 485 (11th Cir. 2014) – Only incidents of harassment of which the plaintiff was aware of at the relevant time frame can be considered – reason is that courts must conduct objective assessment from perspective of reasonable person in plaintiff’s position, knowing what the plaintiff knew – this does not allow consideration of what one learns about harassment only after employment ends or through discovery – 24 African-American employees sued together alleging racial harassment, racial graffiti, nooses, Confederate flags, and racial slurs – summary judgment granted against the claims of 13 of the employees on the ground that their work environment was not objectively hostile – this appeal concerns those 13 orders as well as jury verdicts against two of the plaintiffs who went to trial – “We now hold that an employee alleging a hostile work environment cannot complain about conduct of which he was oblivious for the purpose of proving that his work environment was objectively hostile,” – 754 F.3d at 1245 – nevertheless several of the employees submitted sufficient evidence and summary judgment must be vacated against them – summary judgment affirmed against the remaining six employees and the two jury verdicts against plaintiffs – the District Court correctly applied a reasonable person standard but erred in judging the severity of the conduct for summary judgment purposes with respect to seven of the thirteen cases decided on summary judgment.

Clay v. Credit Bureau Enters., Inc., 754 F.3d 535, 123 FEP 248 (8th Cir. 2014) – Summary judgment affirmed in hostile work environment/constructive discharge case – cannot consider conduct occurring outside the statutory time frame because not similar in nature, frequency, or severity and involved different supervisors – summary judgment also affirmed on the ground that the conduct was not sufficiently severe or pervasive – the incidents “were infrequent and involved low levels of severity” – there is no allegation the environment was physically threatening.

Velázquez-Pérez v. Developers Diversified Realty Corp., 753 F.3d 265, 122 FEP 1692 (1st Cir. 2014) – Male was fired on the basis of negative job reports from female co-worker who worked in the HR department – the terminated male employee had spurned female co-worker’s advances – female co-worker began criticizing male plaintiff’s job performance – she objected to a plan to put him on a performance improvement plan and
asserted he should be terminated: “It is my recommendation this person is terminated immediately” – the First Circuit stated the issue:

“Under what circumstances, if any, can an employer be held liable for sex discrimination under Title VII . . . when it terminates a worker whose job performance has been maligned by a jilted co-worker intent on revenge? We answer that the employer faces liability if: the co-worker acted, for discriminatory reasons, with the intent to cause the plaintiff’s firing; the co-worker’s actions were in fact the proximate cause of the termination; and the employer allowed the co-worker’s acts to achieve their desired effect though it knew (or reasonably should have known) of the discriminatory motivation.”

753 F.3d at 267. Summary judgment for the employer was thus reversed, since the terminated male employee had put the company on notice of his female co-worker’s pursuit of a sexual relationship. The First Circuit noted that the Supreme Court has held that employers are liable for co-worker harassment in the hostile environment context based on a negligence standard, that it knew or should have known of the conduct and the improper motivation, and there was no reason not to extend this negligence standard to quid pro quo claims, where the co-worker goes beyond simple hostile work environment conduct and proximately causes a termination.

**Freeman v. Dal-Tile Corp.**, 750 F.3d 413, 122 FEP 995 (4th Cir. 2014) – In 2-to-1 decision, court holds that third-party harassment claims are actionable under a negligence standard – the company knew or should have known that a sales representative for a customer who had daily contact with the plaintiff was engaging in abusive racial conduct.

**Standen v. Gertrude Hawk Chocolates, Inc.**, 122 FEP 23, 2014 WL 1095129 (M.D. Pa. Mar. 19, 2014) – co-worker harassment – three harassers – Motion In Limine denied – female employee may testify about her suicide attempt even though the evidence may be prejudicial to employer – it is relevant to liability and her prima facie case and also relevant to damages – “[P]laintiff’s suicide attempt is indeed relevant to establishing liability[,]” 2014 WL 1095129 at *2 – Plaintiff must establish that the harassment “had a subjective detrimental effect on the plaintiff”
and suicide certainly is relevant – “Here, plaintiff’s suicide attempt is relevant because it is a core component of her *prima facie* case – that the sexual discrimination *detrimentally affected her.*” *Id.* (emphasis in original) – “Stated differently, the law compels plaintiff to offer testimony of her emotional distress, including her suicide attempt. Additionally, plaintiff must be permitted to introduce evidence regarding her suicide attempt to enable the jury to determine plaintiff’s damages. As such, plaintiff’s suicide attempt is relevant.” *Id.* Defendant argued that the suicide evidence would be unduly prejudicial – “Defendant cites no authority, and our research has uncovered none, to support this proposition.” *Id.* – “Additionally, while plaintiff’s suicide attempt may be prejudicial, in the sense of being detrimental to defendant’s case, the court finds nothing *unfairly* prejudicial regarding this evidence. Ergo, the probative value of plaintiff’s suicide attempt is not substantially outweighed by unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” *Id.* at *3 (emphasis in original).

*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 Kan., Inc.*, 737 F.3d 642, 120 FEP 1429 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 2664 (2014) – 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.*, 741 F.3d 635, 121 FEP 755 (5th Cir.), cert. denied, 135 S. Ct. 106 (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,” 741 F.3d at 640.

*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 a plaintiff’s co-workers, not his supervisors.” 693 F.3d at 36. 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.

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

*Ames v. Nationwide Mut. Ins. Co.*, 760 F.3d 763, 123 FEP 658 (8th Cir. 2014), *cert. denied*, 2015 U.S. LEXIS 182 (Jan. 12, 2015) – Summary judgment affirmed on constructive discharge claim by woman who just returned from maternity leave – she alleged that her department head told her she should go home to her babies – “[b]y not attempting . . . to contact human resources, [Plaintiff] acted unreasonably and failed to provide [the employer] with the necessary opportunity to remedy the problem she was experiencing.” 760 F.3d at 769.

Employers (Ch. 22)

*Love v. JP Cullen & Sons, Inc.*, __ F.3d __, 126 FEP 659, 2015 WL 1010091 (7th Cir. Mar. 9, 2015) – African American plaintiff dismissed from construction job site after physical altercation with another worker – general contractor employed a sub-contractor who in turn employed a second sub-contractor which in turn employed plaintiff – the job superintendent for the second tier sub-contractor received work instructions from the general contractor, and passed those instructions on to plaintiff – the general contractor only gave specific directions if it reviewed a finished product and found it unsatisfactory – in the event of “serious incidents,” the general contractor retained the right to investigate alleged misconduct by its subcontractors’ employees and to permanently remove them from the job site – the general ordered both combatants permanently removed from the job site – plaintiff’s employer attempted to persuade the general to reinstate plaintiff but unsuccessfully – plaintiff’s employer terminated him, since it had no other pending projects – court below granted summary judgment on the ground that the general contractor was not the de facto or direct employer – a plaintiff may have multiple employers for the purpose of Title VII liability – precedents have looked to five factors: (1) the extent of the employer’s control and supervision over the employees; (2) the kind of occupation and nature of skill required; (3) the employers responsibility for the cost of operation; (4) the method and form of payment and benefits; and (5) the length of the job commitment. Of all the factors, the employer’s right to control is the most important in determining whether an individual is an employee or independent contractor – here the control was only as to the result to be achieved – if the general reviewed a finished product and found it to be
unsatisfactory, it would communicate further instructions – “This minimal supervision is essentially limited to ‘the result to be achieved,’ which militates against a finding of control[,]” 2015 WL 1010091, at *5 – when control is examined, the key powers are hiring and firing – here the general retained the final decision regarding the continued presence of any worker on the project site – but the record lacks any evidence that the general attempted to jeopardize plaintiff’s continued employment with the sub-contractor – the fact that the sub-contractor had no other projects is unrelated – here none of the five factors support an employment relationship – our prior cases have indicated that an entity other than the direct employer may be considered a Title VII employer if it directed the discriminatory act – but the general didn’t fire him, it just directed that he be removed from its project – in any case, “evidence that a de facto employer directed the discriminatory act is not – without more – enough to establish a de facto employer-employee relationship under Title VII[,]” 2015 WL 1010091, at *8 (internal quotation marks omitted) – the general’s decision to remove plaintiff from the project is relevant but not determinative on the control issue – summary judgment affirmed.

*Sklyarsky v. Means-Knaus Partners, LP*, 777 F.3d 892, 125 FEP 1677 (7th Cir. 2015) – Terminated janitor sued both the maintenance contractor for whom he worked, and the building’s management company – summary judgment properly granted in favor of the management company – that the management company played no role in the maintenance company’s decision to fire the plaintiff – with respect to plaintiff’s claim against his actual employer, the plaintiff incurred five reprimands including two suspensions in less than three years – plaintiff’s inability to show that he was meeting the maintenance company’s legitimate expectations is fatal to his reliance on the indirect method of proof.

*EEOC v. Simbaki, Ltd.*, 767 F.3d 475, 124 FEP 713 (5th Cir. 2014) – Female bartenders, represented by counsel, brought harassment charges only against the franchisee – the EEOC served both the franchisee and the franchisor – District Court dismissed for failure to name the franchisor – circuit court decisions have allowed exceptions to the named party requirement for pro se plaintiffs, but never for plaintiffs represented by counsel – this makes no sense – remanded for determination as to whether the franchisor was adequately put on notice.
Knitter v. Corvias Military Living, LLC, 758 F.3d 1214, 123 FEP 1023 (10th Cir. 2014) – Plaintiff, a handyman, worked for a contractor that supplied handyman services to Military Living, a company that provided housing for military personnel. When a unit was vacated, the housing company paid the contractor a flat fee to send in a handyman and do all necessary repairs. The contractor then paid the handyman. The housing company was the sole client of the contractor. Plaintiff sued the housing company. Summary judgment was granted and affirmed on the ground that the housing company was not plaintiff’s employer or joint employer – under the joint employer test, the two entities must share or co-determine matters governing the essential terms and conditions of employment – both entities must exercise significant control such as promulgating work rules and day-to-day supervision – no reasonable jury could find that plaintiff was an employee of the housing company – the housing company did not have authority to terminate plaintiff, did not pay her directly, did not have authority to supervise or discipline beyond the confines of a vendor-client relationship – the housing company treated the plaintiff as a vendor providing a service rather than an employee – ability to ask that the employee not work on housing company projects is not the same as authority to terminate – although some degree of supervision and even discipline is to be expected when a vendor’s employee comes on another’s worksite, here the supervision and discipline was too limited to support a joint employer finding – the housing company exerted only the sort of control that one would expect from a client to exert over its vendors – supervising limited aspects of their work, providing them with instruction on particular tasks, and furnishing some supplies when necessary.

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)

*Marie v. Am. Red Cross*, 771 F.3d 344, 125 FEP 264 (6th Cir. 2014) – Catholic nuns who volunteered to work with the Red Cross as disaster relief helpers were not employees protected by Title VII – reliance on fact that they received no compensation or substantial benefits, they retained considerable discretion and flexibility over when and how they volunteered, and Red Cross did not exercise any real control over them.

*Bluestein v. Cent. Wis. Anesthesiology, S.C.*, 769 F.3d 944, 124 FEP 1459 (7th Cir. 2014) – Issue was whether anesthesiologist who was partner and shareholder of medical practice was employee or employer – plaintiff worked as an employee for 2½ years and then became a full partner – she had a vote in all matters – physician shareholders shared profits and losses equally – most issues were resolved by a majority vote – plaintiff participated in many votes – summary judgment affirmed – extensive analysis of non-exclusive list of 6 factors under *Clackamas* – no one factor is determinative – there were approximately 16 shareholders at the time of her termination – hire and fire decisions were by vote – indeed plaintiff voted on her own termination – “the right to cast a vote equal to that of any other board member unequivocally indicates that Bluestein was an employer rather than an employee,” 769 F.3d at 953 – the second part of the first factor, whether the organization set the rules and regulations of the individual’s work, does not assist plaintiff – it was not the organization but the physician shareholders who collectively voted on rules and regulations – the second factor, whether the organization supervises the individual’s work, undisputed that plaintiff was not supervised – third factor, whether she reports to someone higher in the organization, is essentially coextensive with the second factor on supervision – the fourth factor is to what extent the individual is able to influence the organization – she had a full vote – Bluestein’s situation was markedly different from *EEOC v. Sidley Austin* where a large law firm consisting of more than 500 partners was controlled by a small self-perpetuating executive committee – we held some shareholders may be considered employees and remanded for discovery – the fifth factor, whether the parties intended the individual to be an employee, we note that she did have an employment agreement – the language in plaintiff’s contract cannot overcome the reality of her position – as to the sixth factor, she clearly shared in profits – “Our conclusion that she was an employer is fatal to all her discrimination
claims,” 769 F.3d at 956 – summary judgment affirmed – award of attorneys’ fees against plaintiff and her lawyer also affirmed since case was frivolous – trial court found that “a reasonable amount of legal research should have alerted counsel to the implausibility of success on the merits of any of her claims,” 769 F.3d at 957. – “A reasonable jurist could conclude that [plaintiff’s] suit was frivolous, unreasonable and without foundation, and we therefore affirm the award of attorneys’ fees.” id.

Mariotti v. Mariotti Bldg. Prods., Inc., 714 F.3d 761, 118 FEP 224 (3d Cir. 2013), cert. denied, 134 S. Ct. 437 (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.

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
defense – for these and all the other reasons set forth in the
district court’s thorough opinion, Kirleis 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 F. App’x 645, 117 FEP 26 (7th Cir. 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 C.F.R. § 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 F. App’x 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. Royal Caribbean Cruises, Ltd._, 771 F.3d 757, 30 A.D. Cas. 1553 (11th Cir. 2014) – EEOC investigation of hiring and firing – EEOC subpoenaed information about both U.S. and non-U.S. citizens – EEOC subpoena power does not extend to non-U.S. citizens since their employment conditions are not relevant to the charge under investigation.

_EEOC v. Mach Mining, LLC_, 738 F.3d 171, 121 FEP 327 (7th Cir. 2013), _cert. granted_, 134 S. Ct. 2872 (2014) – 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.

Timeliness (Ch. 27)

Continuing Violation

*Bass v. Joliet Pub. Sch. Dist. No. 86*, 746 F.3d 835, 122 FEP 243 (7th Cir. 2014) – Female custodian failed to file charge within 300 days of reassignment of duties requiring her to clean more restrooms – reassignment of duties is a discrete act, and nothing about its duration or repetition changes the nature in such a way that a cumulative violation arises.

General Issues

*Castagna v. Luceno*, 744 F.3d 254, 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.

*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).
Jurisprudential Bars to Action (Ch. 28)

*Myers v. Knight Protective Serv., Inc.*, 774 F.3d 1246, 31 A.D. Cas. 1 (10th Cir. 2014) – Security guard injured on previous job applied for social security disability benefits – represented was in constant pain, could only walk or stand between 10 and 20 minutes, and could not lift more than 10 pounds – new employer noticed he seemed to be in pain and stated he could not continue without a physical exam – plaintiff never scheduled the exam but sued for disability discrimination – in law suit claimed could perform essential functions of job – *no prima facie* case since could not show was qualified in light of such “seemingly inconsistent statements” unless he could explain the “apparent contradiction,” which he failed to do.

*Huon v. Johnson & Bell, Ltd.*, 757 F.3d 556, 122 FEP 1540 (7th Cir. 2014) – Claim preclusion bars federal court discrimination suit – litigated and lost state court suit alleging defamation and intentional infliction – even though he had the right to allege discrimination in a state court complaint, he elected not to do so – he thus had a full and fair opportunity to litigate his discrimination claims in his state court suit.

*Peoples v. Radloff*, 764 F.3d 817, 124 FEP 124 (8th Cir. 2014) – Bankruptcy trustee settled Chapter 7 debtors employment discrimination claims – Bankruptcy Court approved – debtor failed to show any reasonable possibility of surplus after satisfying all debts – she therefore lacked pecuniary interest in Bankruptcy Court’s order and is not a person aggrieved.

*Dzakula v. McHugh*, 746 F.3d 399, 121 FEP 636 (9th Cir. 2014) – 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.

Salas v. Sierra Chem. Co., 59 Cal. 4th 407, 30 A.D. Cas. 17 (2014), cert. denied, 135 S. Ct. 755 (2014) – Undocumented alien may sue for discrimination under California’s FEHA – full relief can be obtained except that back pay cannot be awarded for any period of time after the employer became aware of the undocumented alien’s illegal status – it is at the point of the employer’s awareness that the employer is prohibited from continuing the individual in its employ.

Title VII Litigation Procedure (Ch. 29)

McCleary-Evans v. Maryland Dep’t of Transp., __ F.3d __, 126 FEP 640, 2015 WL 1088931 (4th Cir. 2015) – 12(b)(6) dismissal affirmed since complaint did not contain sufficient factual matter to state a plausible claim of discrimination because plaintiff was African American or female under Iqbal and Twombly – the complaint simply alleged in conclusory fashion that the decision-makers were biased with respect to her not being selected for promotion – plaintiff relies on Swierkiewicz v. Sorema, 534 U.S. 506 (2002) (prima facie case not necessary to survive motion to dismiss) – but under Iqbal and Twombly a complaint must contain factual allegations sufficient to create a non-speculative right to relief – a complaint must contain sufficient factual matter which if accepted as true states a claim to relief that is “plausible on its face” – this complaint stopped short of a line between the possibility of discrimination and the plausibility of discrimination – “the Supreme Court in Swierkiewicz applied a different pleading standard than that which it now requires under Iqbal and Twombly[,]” 2015 WL 1088931, at *4 – while Swierkiewicz remains good law, Twombly and Iqbal did alter the criteria in at least two respects – (1) it rejected the holding that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff could prove no set of facts sufficient for relief, and (2) “Iqbal and Twombly articulated a new requirement that a complaint must allege a
plausible claim for relief, thus rejecting a standard that would allow a complaint to survive a motion to dismiss whenever the pleading left open the possibility that a plaintiff might later establish some set of [undisclosed] facts to support recovery[,]” 2015 WL 1088931, at *4 (internal quotation marks omitted; emphasis in original).

Climent-Garcia v. Autoridad de Transporte Maritimo, 754 F.3d 17, 122 FEP 1543 (1st Cir. 2014) – Employer waived right to challenge jury loss on basis of sufficiency of evidence when, although it moved for directed verdicts at the close of the employee’s case and at the close of all the evidence, it failed to file a JNOV motion after the jury returned a verdict or to move for a new trial.

Gilster v. Primebank, 747 F.3d 1007, 122 FEP 527 (8th Cir. 2014) – Rebuttal closing argument by plaintiff’s counsel where she recounted her own experience of being sexually harassed basis for new trial – this was plainly calculated to arouse jury sympathy – not sufficient that court instructed the jury that statements, arguments, questions, and comments by lawyers are not evidence – “[T]he timing and emotional nature of counsel’s improper and repeated personal vouching for her client, using direct references to facts not in evidence, combined with the critical importance of [plaintiff]’s credibility to issues of both liability and damages, made the improper comments unfairly prejudicial and require that we remand for a new trial,” 747 F.3d at 1013 – where a lawyer departs from the path of legitimate argument she does so at her own peril and that of her client.

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.

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 688 n.5) – summary judgment affirmed.
EEOC Litigation (Ch. 30)

*EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 122 FEP 247 (4th Cir. 2014) – EEOC must pay $189,000 in attorneys’ fees in class type case – lawsuit dismissed under doctrine of laches because of the EEOC’s unreasonable delay – the EEOC’s class lawsuit was effectively moot by the time it was filed more than six years after the charge – when EEOC filed its complaint it failed to identify a class of victims who could be entitled to money and injunctive relief – the EEOC acted unreasonably in initiating this litigation.

*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.

*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.
Federal Employee Litigation (Ch. 32)

Kannikal v. Attorney General, 776 F.3d 146, 125 FEP 1475 (3d Cir. 2015) – Six-year statute of limitations for suits against the United States does not apply to Title VII actions – Title VII provides no limit to how long employees can await the conclusion of the administrative process.

Toy v. Holder, 714 F.3d 881, 118 FEP 229 (5th Cir. 2013), cert. denied, 134 S. Ct. 650 (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.

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 – “[i]f anything, Rule 23(b)(3)’s predominance criterion is even more demanding than Rule 23(a). Rule 23(b)(3), as an adventurous innovation, 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[,]” *Id.* 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.

*Stockwell v. City and Cnty. of San Francisco*, 749 F.3d 1107, 122 FEP 795 (9th Cir. 2014) – San Francisco moved from a 1998 qualifying exam for promotion to a new Sergeant’s Exam – individuals who had passed the 1998 exam but either refused to take the new exam or did not pass it sued alleging disparate impact age discrimination under California’s FEHA – District Court denied certification because of inadequacies in the plaintiffs’ statistical showing – the regression analysis did not account for numerous alternative explanations other than age for the alleged statistical disparity – Ninth Circuit reversed – District Court engaged in an improper merits analysis – “[C]ourts must consider merits issues only as necessary to determine a pertinent Rule 23 factor, and not otherwise[.]” 749 F.3d at 1113 – It may be that the defects in the statistics will bar 23(b)(3) certification and this is remanded – Disparate impact under FEHA is parallel to under the ADEA – the officers produced a statistical study purportedly showing a disparate impact – whatever its failings the class’s statistical analysis affects each class members’ claims uniformly and thus is similar to the Supreme Court’s decision in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S.Ct. 1184 (2013), where the court held that merits questions need be considered only to the extent that they
are relevant to determining Rule 23 prerequisites – “The district court . . . critiqued that study as inadequate for—among other reasons—failing to conduct a regression analysis to take account of alternative explanations, unrelated to age, for any statistical imbalance. But whatever the failings of the class’s statistical analysis, they affect every class member’s claims uniformly, just as the materiality issue in Amgen affected every class member uniformly[.]” 749 F.3d at 1115 – “To so recognize is in no way to approve of the statistical showing the officers have made as adequate to make out their merits case,” 749 F.3d 1116 – “The defects the City has identified may well exist, but they go to the merits of this case, or to the predominance question[.]” id.

Odle v. Wal-Mart Stores, Inc., 747 F.3d 315, 122 FEP 532 (5th Cir. 2014) – Odle is a member of the original Dukes case, but was eliminated when the Ninth Circuit en banc ruled that former employees could not participate in the 23(b)(2) certification – however, the Ninth Circuit remanded to the district court to consider whether or not former employees could be part of a 23(b)(3) class – Supreme Court then granted review, and decertified the entire class – the issue was whether Odle will receive the benefit of American Pipe tolling running from the Supreme Court decision, or whether she had to take action when the Ninth Circuit en banc eliminated her from the case – district court dismissed on the ground that once the Ninth Circuit eliminated her, she had to take action to preserve her rights – Fifth Circuit reverses – since the Ninth Circuit remanded for the district court, which had originally certified the action, to consider (b)(3) certification, it was not clear after the Ninth Circuit en banc decision that she would not be a member of a Dukes class – her suit filed in a timely fashion after the Supreme Court decertified everything can thus proceed.

Scott v. Family Dollar Stores, Inc., 733 F.3d 105, 120 FEP 473 (4th Cir. 2013), cert. denied, 134 S. Ct. 2871 (2014) – 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 – “[T]he 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), aff’d, 577 F. App’x 870 (10th Cir. 2014) – 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 1217 – 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.
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 896 - “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 show 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 had a 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.

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.).

Discovery (Ch. 34)

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 sanction of dismissal with prejudice all the more appropriate.” (id. at 80).
**Statistical and Other Expert Proof (Ch. 35)**

*Jones v. City of Boston*, 752 F.3d 38, 122 FEP 1189 (1st Cir. 2014) – Summary judgment for employer in disparate impact hair drug test reversed – during an eight-year period, black police officers and cadets tested positive for cocaine 1.3% of the time, while white officers and cadets tested positive under .3% of the time – Court rejects contention that even though statistical significance, there was no practical significance – “With no objective measure of practical significance, the label may mean that simply the person applying it views a disparity as substantial enough that a plaintiff ought to be able to sue over it.” 752 F.3d at 50. “Courts would find it difficult to apply such an elusive, know-it-when-you-see-it standard . . . . *Id.* – The statistics definitely demonstrate that the result was not due to chance – Plaintiffs also offered evidence that blacks tend to have higher levels of melanin in their hair and that melanin causes cocaine to bind to hair at a higher rate and that cocaine can show up on the hair of non-users who are nearby – however the plaintiffs did not claim that they were exposed to cocaine prior to their tests – since the statistics are unrebutted, “We therefore reverse the district court’s decision to deny partial summary judgment to the plaintiffs on that component [*prima facie* case] of their Title VII disparate impact case[,]” *id.* at 53 – Court of Appeal declined to address whether the drug testing program is job related and consistent with business necessity or whether plaintiffs have offered an adequate alternative – no one contests that the abstention from illegal drugs is an important element of police officer behavior – the issue is whether the Department’s testing procedures are “predictive of or significantly correlated with” drug use – plaintiffs say that hair testing is not sufficiently reliable – Appellate Court declined in the first instance to assess business necessity since trial court granted summary judgment based solely on *prima facie* case – Americans with Disabilities Act challenge rejected – “no jury could reasonably conclude that the department was motivated by a perception that plaintiffs were addicted to drugs[,]” *id.* at 59.

*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’ 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.

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.
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.

Maraschiello v. City of Buffalo Police Dep’t, 709 F.3d 87, 117 FEP 665 (2d Cir. 2013), cert. denied, 134 S. Ct. 119 (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.

Monetary Relief (Ch. 41)

Johnston v. Nextel Commcn’s, Inc., __ F.3d __, 126 FEP 473, 2015 WL 897653 (2d Cir. Mar. 4, 2015) – Company and law firm representing over 500 employees entered into agreement to set up a dispute resolution process and drop lawsuits – total payout to employees was $3.9 million – approximately double that amount went to the law firm – class action suit versus company and class malpractice suit versus law firm – class certification reversed – claims were under state law, and laws of different states differed on relevant issues – punitive damages trial plan unacceptable – in Simon II Litigation v. Philip Morris U.S.A., Inc., 407 F.3d 125 (2d Cir. 2005), the court rejected a trial plan that called for the jury to determine a lump sum of punitive damages for the entire class, prior to any determination of actual injury to individual plaintiffs – such a trial plan might conflict with State Farm Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003), which held that punitive damage awards
must be tethered to compensatory damages in order to comply with due process – plaintiffs attempted to avoid this problem by proposing that the phase two jury determine only a punitive damages ratio that would then be applied to each class member’s compensatory damages – under the specific facts of this case, determining a punitive damages ratio without any grounding in a compensatory damages award is impracticable and fails to give the jury an adequate basis for determining what measure of punitive damages is appropriate – as State Farm explained, while there is no rigid upper limit on a ratio of punitive damages to compensatory damages, the propriety of the ratio can be meaningfully assessed only when comparing the ratio to the actual award of compensatories – a larger punitive to compensatory ratio might be appropriate where there were particularly egregious acts but little damages – similarly, “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee[.,]” 2015 WL 897653, at *16 (quoting State Farm, 538 U.S. at 425) – under plaintiff’s trial plan the phase two jury would determine a ratio based on an amalgam of the actual damages to only the named plaintiffs yet based on the defendants’ conduct toward the entire class – “This one-size-fits-all punitive damages ratio would therefore be no more tethered to compensatory damages than the lump sum we disapproved of in Simon II[,]” 2015 WL 897653, at *16 – “Plaintiffs’ trial plan therefore suggests that … the punitive damages inquiry in this case fails to meet the predominance and superiority requirements of Rule 23(b)(3)[.,]” id.

EEOC v. N. Star Hospitality, Inc., 777 F.3d 898, 125 FEP 1681 (7th Cir. 2015) – Proper to award 15% tax component increase to retaliation claimant to offset tax burden and he will face as a result of a lump sum back pay award – because of a lump sum award he will be bumped into a higher tax bracket.

Turley v. ISG Lackawanna, Inc., 774 F.3d 140, 125 FEP 895 (2d Cir. 2014) – Punitive damage award of $5 million in racial harassment case required further reduction despite extremely egregious conduct – compensatory award of $1.32 million is particularly high, so 4-to-1 ratio serves neither predictability nor proportionality – 2-to-1 ratio is maximum allowable under these circumstances.
Arizona v. Asarco LLC, 773 F.3d 1050, 125 FEP 753 (9th Cir. Dec. 10, 2014) (en banc) – A $300,000 punitive damage award under Title VII is constitutionally permissible even though the prevailing plaintiff recovered only $1 in nominal damages on her sexual harassment claim – the due process analysis set forth by the U.S. Supreme Court in BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996), must be modified in the Title VII context – Gore’s ratio analysis has little applicability in the Title VII context – Title VII places a consolidated cap on both compensatory and punitive damages – Under Title VII when compensatory damages are awarded that decreases the punitive damages.

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.
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.

McKelvey v. Sec’y of U.S. Army, 768 F.3d 491, 30 A.D. Cas. 1142 (6th Cir. 2014) – Lodestar cut in half before successful plaintiff – rejected Rule 68 offer that was more favorable than final result – most of attorney’s fees were accrued after offer was rejected.

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.

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 – 2d 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 presumptively for courts to decide. [Id. at 2068 n.2.] 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].

**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 exist at 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 decision 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).

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,” (559 U.S. at 685) – 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 687) – 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).
Davis v. Nordstrom, Inc., 755 F.3d 1089, 22 W.H. Cas. 2d 1432 (9th Cir. 2014) – Original arbitration agreement in employee handbook did not prohibit class claims – employer sent employees a letter telling them that under the provision in the handbook allowing updates it was unilaterally amending the arbitration agreement to prohibit class actions – under California Supreme Court precedent it is permissible to tell employees that continued employment indicates consent to revised agreement.

Johnmohammadi v. Bloomingdale’s, Inc., 755 F.3d 1072, 22 W.H. Cas. 2d 1428 (9th Cir. 2014) – Class overtime claim barred by arbitration agreement – Bloomingdales announced the arbitration pact and gave employees thirty days to opt out – plaintiff did not opt out – plaintiff is bound by arbitration agreement – “Bloomingdale’s merely offered her a choice: resolve future employment-related disputes in court, in which case she would be free to pursue her claims on a collective basis; or resolve such disputes through arbitration, in which case she would be limited to pursuing her claims on an individual basis.” 755 F.3d at 1076.

Santoro v. Accenture Fed. Servs., LLC, 748 F.3d 217, 122 FEP 1208 (4th Cir. 2014) – Dodd-Frank Act holds that agreements to arbitrate whistleblower claims are not “valid or enforceable” – this does not invalidate an arbitration agreement between an employer and employee who is claiming age discrimination – invalidation is limited to Dodd-Frank claims – nothing suggests that Congress sought to bar arbitration of every claim if the agreement in question did not exempt whistleblower claims.

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 455.
Richards v. Ernst & Young, LLP, 744 F.3d 1072 (9th Cir. 2013), cert. denied, 135 S. Ct. 355 (2014) – District Court improperly denied motion to compel individual arbitration – did not matter that employer failed to move to compel arbitration until after there had been some rulings, discovery, and expense – expenses employee incurred were as a result of her deliberate choice of an improper forum and does not establish prejudice – argument that Ninth Circuit should follow NLRB D.R. Horton decision rejected since that was not argued below – However, footnote “without deciding the issue” noted that two courts of appeal and the overwhelming majority of district courts have determined not to defer to D.R. Horton.

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, 737 F.3d 344 (5th Cir. 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[,]” 737 F.3d at 362 – “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. (citations to Second, Eighth, and Ninth Circuits).
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; emphasis in original).

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