

EMPLOYMENT DISCRIMINATION LAW UPDATE

By

Paul Grossman

TABLE OF CONTENTS

	<u>Page</u>
Disparate Treatment (Ch. 2)	
Summary Judgment Standards.....	1
General	6
Race and Color (Ch. 6).....	9
National Origin and Citizenship	10
Religion (Ch. 9)	11
Sex (Ch. 10).....	12
Sexual Orientation and Gender Identity (Ch. 11).....	14
Age (Ch. 12)	
Summary Judgment, Directed Verdict, JNOV, and Reversals of Jury Verdicts.....	14
General Issues.....	17
Disability/Handicap (Ch. 13)	
General	21
ADA-Covered Disability.....	25
Qualified Individual with Disability/ Essential Job Functions.....	25
Reasonable Accommodation.....	25
Effect of Representations in Applying for Disability Benefits.....	26
Retaliation (Ch. 14).....	27
Sexual and Other Forms of Harassment (Ch. 19)	
Cases Interpreting <i>Faragher/Ellerth</i>	33
General	35
Discharge and Reduction in Force (Ch. 21).....	39
Charging Parties and Plaintiffs (Ch. 24)	39
EEOC Administrative Process (Ch. 25).....	40

Timeliness (Ch.26)	
Continuing Violation	42
General Issues.....	43
Jurisprudential Bars to Action (Ch. 24)	45
Title VII Litigation Procedure (Ch. 28).....	45
Federal Employee Litigation (Ch. 31).....	47
Class Actions (Ch. 32).....	48
Discovery (Ch. 33).....	57
Statistical and Other Expert Proof (Ch. 34)	57
The Civil Rights Acts of 1866 and 1871 (Ch. 35)	58
Reverse Discrimination and Affirmative Action (Ch. 37)	59
Monetary Relief (Ch. 40)	60
Attorney’s Fees (Ch. 41)	62
Alternative Dispute Resolution (Ch. 42)	
Arbitration.....	65
Settlement (Ch. 43).....	67

***EMPLOYMENT DISCRIMINATION LAW* UPDATE**

By

Paul Grossman *

This is a supplement to Lindemann & Grossman, *Employment Discrimination Law* (4th ed. 2007) (C. Geoffrey Weirich, Editor-in-Chief), and the 2009 Supplement (Debra A. Millenson, Richard J. Gonzalez, and Laurie E. Leader, Executive Editors). It is organized by book chapters. The 2009 Supplement includes court of appeals decisions through mid-2008. This update begins with cases decided after January 1, 2008. It focuses almost exclusively on court of appeals and Supreme Court decisions.

Disparate Treatment – Summary Judgment Standards (Ch. 2)

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

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

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

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

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

Hendricks v. Geithner, 568 F.3d 1008, 106 FEP 843 (D.C. Cir. 2009) – Summary judgment affirmed against black Treasury employee denied promotion allegedly because of her race and sex – alleged comparator had received higher performance review scores – plaintiff claimed that she was graded incorrectly – undisputed that under any scenario she would not have been “significantly” or “markedly” more qualified – plaintiff presented evidence of biased statements made by decisionmaker to other women [“It was the downfall of Inspection when they hired women.” (568 F.3d at 1011)] – assume without deciding that under *Sprint v. Mendelson* this type of evidence would be admissible – plaintiff’s “case relies almost exclusively on circumstantial evidence that one manager . . . is difficult and prone to misogynist comments” (*id.* at 1014) – “[T]his is not sufficient evidence from which a reasonable jury could conclude that [the] asserted reason for selecting [the other candidate] was not the actual reason, much less that [plaintiff] was not selected because of her sex.” (*id.*) – 2-1 decision with Janice Brown dissenting.

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

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

Casamento v. Mass. Bay Transp. Auth., 550 F.3d 163, 104 FEP 1800 (1st Cir. 2008) – Promotional position posted – plaintiff among others applied – posting was rescinded – allegedly, one month later, the promotion was awarded to a male – factual dispute as to whether or not the male did receive the promotional position – factual dispute irrelevant – court refused to resolve that dispute but nevertheless granted summary judgment – even assuming position was filled that merely creates a prima facie case – “To reach a jury, there must be evidence that would permit a jury to [find a forbidden motive].” (550 F.3d at 165) – the dispute over whether the male received the promotion is irrelevant because there is “no evidence suggest[ing] that the posting was withdrawn because of gender discrimination” (*id.*) – alleged falsity of employer’s explanation irrelevant if there is no evidence of discrimination – “Possibly in some contexts a showing of a false explanation can add weight to a discrimination claim supported by evidence; but it is hard to imagine such a case where there is *no* evidence of a discriminatory motive” (*id.*) (emphasis in original).

Mathirampuzha v. Potter, 548 F.3d 70, 104 FEP 1159 (2d Cir. 2008) – India-born employee asserted his supervisor physically assaulted him at a postal facility because of his national origin – summary judgment affirmed – while the alleged assault was “unprofessional and boorish” it does not amount to an adverse employment action – “Only in limited circumstances does a single, acute incident of abuse qualify as an adverse employment action.” (548 F.3d at 78-79) – for a single incident to qualify, “we require that the incident constitute an intolerable alteration of the plaintiff’s working conditions . . . so as to substantially interfere with or impair his ability to do his job.” (*id.* at 79) (citation and internal quotation marks omitted) – after the assault plaintiff continued to work in the same position at the same pay with the same responsibilities – there was no lasting harm – “The physical encounter itself, while understandably upsetting, was not so severe as to alter materially the plaintiff’s working conditions – unlike, for example, a rape . . . or an obscene and humiliating verbal tirade that undermines the victim’s authority in the workplace.” (*id.*) (citations omitted) – contention that assault was the culmination of a long pattern of harassment is barred because not set forth in EEOC charge.

Lightner v. City of Wilmington, 545 F.3d 260, 104 FEP 1155 (4th Cir. 2008) – Summary judgment affirmed – police officer pleaded himself out of court – lawsuit alleged race and gender bias – however, at deposition, police officer stated his belief that reason for his suspension was retaliation for internal affairs investigation dealing with failure to report automobile accidents, which was totally unrelated to any Title VII protected

category – “His admissions during litigation are binding” (545 F.3d at 264) – Title VII is not a general whistleblower statute.

Shockley v. HealthSouth Cent. Ga. Rehab. Hosp., 104 FEP 883 (11th Cir. 2008) (unpublished) – Summary judgment affirmed in suit by black nurse – alleged comparators not similarly situated – next two persons hired into her job category also black.

Clack v. Rock-Tenn Co., 105 FEP 139 (6th Cir. 2008) (unpublished) – Discharge decisionmaker not “cat’s paw” for racist foreman who reported the insubordination that led to the discharge – manager conducted an independent investigation that included obtaining the employee’s side of the story – summary judgment affirmed – no basis for concluding that decisionmaker lacked honest belief that employee was insubordinate – 2-1 decision.

Loeb v. Best Buy Co., 537 F.3d 867, 104 FEP 15 (8th Cir. 2008) – Summary judgment affirmed – decisionmakers testified that employee was terminated because Phase I of the project was complete, and that plaintiff was not well suited for Phase II – however, in writing, two company human resources executives attributed his termination to cost-cutting and the elimination of his position – statements in letter should not be considered since the letter senders did not make the termination decision – in context, there was no inconsistency – the position was initially eliminated.

Garcia v. Bristol-Myers Squibb Co., 535 F.3d 23, 103 FEP 1685 (1st Cir. 2008) – Female senior project engineer did not provide sufficient evidence to create jury questions of disparate treatment with respect to a male co-worker – factual circumstances differ with respect to their performance deficiencies – reliance on the fact that supervisor who made the decision had previously promoted other women.

Petts v. Rockledge Furniture LLC, 534 F.3d 715, 103 FEP 1348 (7th Cir. 2008) – Summary judgment affirmed in layoff case – insufficient evidence of sex discrimination under either direct or indirect methods of proof – alleged comments by decisionmaker are no more than stray remarks in the workplace – to raise an inference of discrimination remarks must be made by the decisionmaker around the time of the decision in reference to the adverse employment action – these were remarks in passing some time ago unrelated to the decision – with respect to indirect method, plaintiff must prove that her duties were absorbed by someone not in the protected class – here the duties were absorbed by both men and women – does not matter that only two employees were let go so that this was a “mini-RIF.”

McCann v. Tillman, 526 F.3d 1370, 103 FEP 367 (11th Cir.), *cert. denied sub nom.*, *McCann v. Cochran*, 129 S. Ct. 404 (2008) – Summary judgment affirmed against jail employee disciplined for misconduct – she misused her uniform by wearing it to a neighboring jail where her son was incarcerated and behaving in an irrational manner – alleged comparable misconduct which resulted in lesser discipline not comparable – did not involve use of official position to achieve a personal goal.

Soto v. Core-Mark Int'l, Inc., 521 F.3d 837, 102 FEP 1855 (8th Cir. 2008) – Employer had “good faith belief” plaintiff was sleeping on the job – plaintiff argued he was merely resting on the floor to stretch his back – even if he was not actually sleeping defendant believed it occurred – summary judgment affirmed against discrimination and retaliation claims.

Maclin v. SBC Ameritech, 520 F.3d 781, 102 FEP 1839 (7th Cir. 2008) – Summary judgment affirmed – title change that resulted in mere loss of prestige not adverse action – inability to sit for more than two hours does not limit major life activity – denial of wholly discretionary bonus is not an adverse employment action – receiving smaller raise than co-worker fails because co-worker not similarly situated – “[A]n action must be ‘significant’ to be cognizable” (520 F.3d at 787) – the actions in question were “a mere inconvenience or an alteration of job responsibilities” (*id.*).

Atanus v. Perry, 520 F.3d 662, 102 FEP 1655 (7th Cir. 2008) – Summary judgment affirmed against African-American employee contesting disciplinary suspension and “letter of instruction” – no prima facie case on suspension because of lack of comparators and no direct evidence – letter of instruction is not an actionable adverse action because plaintiff was neither discharged nor demoted nor were her responsibilities changed.

Brady v. Office of the Sergeant at Arms, 520 F.3d 490, 102 FEP 1815 (D.C. Cir. 2008) – Once the employer asserts a legitimate, nondiscriminatory reason for its actions, a federal district court considering a summary judgment motion should not look into whether or not a prima facie case was established – that is unnecessary “sideshow” which spawns “enormous confusion” – the summary judgment motion should focus on the central question of whether the plaintiff has produced sufficient evidence for a reasonable jury to find that the proffered reason is pretextual – summary judgment affirmed on the ground that a reasonable jury could not find the employer’s reason (the plaintiff grabbed his crotch in front of three other employees) was pretextual.

Jackson v. Gonzales, 496 F.3d 703, 101 FEP 471 (D.C. Cir. 2007) – Summary judgment affirmed in promotion case – employer explained that it selected a Caucasian woman over the African-American male plaintiff because she had experience with the employer’s main data management tool – the job description did not refer to this tool – summary judgment affirmed – reliance on a factor not expressly listed in the job description does not create any inference of impropriety – “[P]laintiff must prove that a reasonable jury could infer that the employer’s given explanation was pretextual and that this pretext shielded discriminatory motives.” (496 F.3d at 707) – “[W]e have repeatedly disclaimed” that the courts are a “super-personnel department that reexamines an entity’s business decisions” (*id.*) (citation omitted) – “Particularly given the dynamic nature of the hiring process, moreover, we have also stated that we will not second-guess how an employer weighs particular factors in the hiring decision.” (*id.* at 709) – “[A]n employer may select a ‘candidate who on paper is less qualified for other reasons, such as subjective reactions that emerge in the interview’” (*id.*) (citation omitted) – “[C]ourts must be sensitive to the necessary and appropriate realities of hiring

processes. Reasonable employers . . . ‘do not ordinarily limit their evaluation of applicants to a mechanistic checkoff of qualifications required by the written job descriptions.’” (*id.*) (citation omitted) – “[W]e are aware of no previous case from this or any other circuit suggesting that an employee gets past summary judgment simply by showing that a factor in the hiring decision was not *expressly listed* in the job description when the factor was *encompassed* by the job description.” (*id.*) (emphasis in original).

Swackhammer v. Sprint/United Mgmt. Co., 493 F.3d 1160, 100 FEP 1704 (10th Cir. 2007) – Summary judgment affirmed – employee disputed allegation she violated company ethical standards, and alleged her excellent work record should have been taken into account – evidence did not draw into question whether employer actually relied in good faith upon appearance of impropriety shown by an investigation – issue is therefore not whether the ethical violations occurred or not but the employer’s motivation.

Berry v. T-Mobile USA, Inc., 490 F.3d 1211, 100 FEP 1623 (10th Cir. 2007) – Protected-age female employee claimed termination pretextual since she had recently received a raise, was told she was highly valued, and did not receive progressive discipline – un rebutted evidence showed that 21 of 26 employees who had recently been fired received no previous discipline, 18 of those were male, 17 were younger than plaintiff, and 12 were under the age of 40 – summary judgment affirmed.

Holland v. Wash. Homes, Inc., 487 F.3d 208, 100 FEP 1060 (4th Cir. 2007), *cert. denied*, 552 U.S. 1102 (2008) – Employee terminated for threatening supervisor – however, employer reported to state agency that he was laid off rather than terminated for cause to enable him to get unemployment benefits – this is not an inconsistency establishing pretext – even though the employer may have committed a crime under state law the employer acted for a charitable reason – the employer never changed its story to the employee or the court.

Brewer v. Bd. of Trs. of Univ. of Ill., 479 F.3d 908, 100 FEP 161 (7th Cir.), *cert. denied*, 552 U.S. 825 (2007) – Decisionmaker not “cat’s paw” for racist supervisor – employee had contended that employee’s involvement in parking scandal was honest mistake which racist supervisor knew about – but no showing that supervisor had “singular influence” over the termination such as would make her the functional decisionmaker – the decisionmaker simply did not rely upon the allegedly racist supervisor and independently investigated the employee’s alleged misconduct by verifying that he had altered his parking tag – employee never asserted to decisionmaker that supervisor had authorized the alteration of his parking tag.

Disparate Treatment – General (Ch. 2)

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

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

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

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

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

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

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

Staub v. Proctor Hosp., 560 F.3d 647, 186 LRRM 2001 (7th Cir. 2009), *cert. granted*, ___ U.S. ___ (2010) – Uniform Services Employment and Reemployment Rights Act case – cat’s-paw issue – allegation that supervisor was biased against those who served in the military and unbiased HR representative was cat’s paw – jury verdict for plaintiff reversed – court failed to determine whether a reasonable jury could find that supervisor’s influence on unbiased HR executive rose to the level of being a “singular influence” – issue is not whether investigation inadequate but whether decisionmaker was “wholly dependent” on biased supervisor - evidence indicated that HR rep conducted an independent investigation and relied on information from sources other than biased supervisor – trial court should have barred the jury from considering any evidence of the supervisor’s discriminatory animus since supervisor was not the decisionmaker.

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

Madden v. Chattanooga City Wide Serv. Dep’t, 549 F.3d 666, 104 FEP 1473 (6th Cir. 2008) – Biased supervisor was “cat’s paw” for unbiased higher level decisionmakers – supervisor reported only black plaintiff’s conduct in setting off firecrackers at work while ignoring the same conduct by white co-workers and not reporting those facts to the higher level managers – City’s defense that higher level managers who made the decision were unaware of white employees who set off fireworks who were not punished rejected on “cat’s paw” theory – the decisionmakers thus did not conduct an adequate investigation but rather relied upon the discriminatory information flow – supposedly “unconditional reinstatement offer” insufficient to cut off back pay because it was not unconditional – it was contingent upon the plaintiff dropping his claims.

Makey v. Chertoff, 541 F.3d 205, 103 FEP 1665 (3d Cir. 2008) – Plaintiff argued that qualifications for the position need not be established in a mixed-motive case because the essence of the mixed-motive theory is the recognition that there may be a legitimate reason as well as a prohibited reason for the adverse action – even in a mixed-motive case plaintiff must establish prima facie case which includes requirement of qualifications – summary judgment affirmed.

Ellis v. United Parcel Serv., Inc., 523 F.3d 823, 103 FEP 129 (7th Cir. 2008) – UPS prohibits romantic relationships between manager and any hourly employee, even an employee the manager does not supervise, because managers are frequently transferred – “Unsurprisingly, this policy does not stop Cupid’s arrow from striking at UPS. . . . [I]ntracompany dating is prevalent, although employees often take precautions to keep their relationships secret. [Plaintiff], . . . unfortunately . . . got caught.” (523 F.3d at 824) – plaintiff was black, he was married to a white woman, and he claimed racial discrimination – through discovery and otherwise, he asserted 20 different instances of whites dating or marrying whites, without discharge – Seventh Circuit assumed that associational discrimination was prohibited by Title VII, but ruled for UPS because the alleged comparables did not have the same decisionmaker or were otherwise not similarly situated – all but four of the alleged other relationships were not supported by admissible evidence – the other four situations did not involve more favorable treatment – “Although UPS . . . comes out on top in this case, love and marriage are the losers. Something just doesn’t seem quite right about that.” (*id.* at 830).

White v. Baxter Healthcare Corp., 533 F.3d 381, 103 FEP 1121 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 2380 (2009) – Burden-shifting framework does not apply to mixed-motive cases – purposes of prima facie requirement and pretext were to narrow actual reasons in order to determine whether trial necessary – elimination of legitimate reasons not needed when allegation is mixed motive (a legitimate plus an illegitimate motive) - in mixed motive claimant can prevail showing that protected characteristic was a motivating factor even in the presence of a legitimate motive – summary judgment reversed – jury could reasonably conclude supervisor used harsher standard than normal for evaluation.

Race and Color (Ch. 6)

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

Dear v. Shinseki, 578 F.3d 605, 106 FEP 1802 (7th Cir. 2009) – Black nurse supervisor demoted – paper qualifications were superb, including a bachelor’s degree in nursing, a master’s in nursing administration, plaintiff had taught nursing to college students, and prepared combat medical personnel during the Iraq war – she had numerous clashes with her staff, physicians and supervisors – one of supervisors explained demotion by stating “You need to change your voice and you need to change your facial expressions” (578 F.3d at 608) – this is not a racial statement – “[T]his statement, even if it was

delivered in a snippy or condescending way, has no plausible connection to [her] race. It could have been said to an employee of any race who was having trouble supervising staff” (*id.* at 609).

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

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

Holcomb v. Iona College, 521 F.3d 130, 102 FEP 1844 (2d Cir. 2008) – White employee discharged because of marriage to black woman has alleged actionable race discrimination – Second Circuit joins Fifth, Sixth and Eleventh Circuits in so holding – white employee who suffers discrimination because an employer disapproves of his interracial relationship suffers discrimination because of his own race.

National Origin and Citizenship (Ch. 7)

Rivera v. NIBCO, Inc., 108 FEP 1527 (9th Cir. 2010) (unpublished) – Ninth Circuit 2-1 (Reinhardt and Hawkins) overturns jury verdict for employer in national origin discrimination case – trial court erred in denying plaintiff’s challenge to the company’s use of peremptory strikes to remove three Hispanic jurors – although trial court found credible legitimate reasons offered by the employer’s attorney in making the strikes, the majority found that all of the reasons accepted by the trial court “either lack support in the record or are thoroughly undermined by a comparative juror analysis” – dissenting Judge Siler asserted the trial court was in a better position to judge the demeanor and credibility of the employer’s attorney in making the challenged strikes – the majority relied on the employer’s explanations for striking one of the Hispanic jurors – that she had filed a workers’ compensation claim and had previous jury experience – the Ninth Circuit found that several white jurors had filed such claims or had served on juries before and were not struck – the dissent pointed out that four non-Hispanic jurors had filed workers’ compensation claims, but they did not have the overall mixture of criteria

relied upon by the employer – according to the dissent, “The majority’s comparative juror analysis is an exercise in comparing apples to oranges.”

Religion (Ch. 9)

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

EEOC v. Abercrombie & Fitch Stores, Inc., 107 FEP 1029 (E.D. Mo. 2009) – Store required its models/salespersons to wear store-type clothes in “California beach style” which is “a little revealing” – employee who had previously done so claimed religious conversion to a faith which “forbade her from wearing pants or skirts that fell above the knee” – EEOC summary judgment motion denied because of serious question about bona fides of religious belief – complainant “arrived for her deposition in this case wearing [clothing] . . . which she admitted was inconsistent with her faith.” (107 FEP at 1031).

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

Fischer v. Forestwood Co., 525 F.3d 972, 103 FEP 353 (10th Cir. 2008) – Family-owned company refused to rehire son of president unless he returned to the Mormon church – son secretly recorded conversations with father where father imposed that condition – recorded conversations should have been admitted as the admissions of a party opponent.

EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 102 FEP 961 (4th Cir. 2008) – Discharge of Sabbatarian for refusing to work on his Sabbath and 14 other religious holidays upheld – employer provided reasonable accommodation since it had a seniority-based bidding system for shifts, provided 15 vacation days and three floating holidays, allowed employees to swap shifts, and provided 60 hours of unpaid leave – more than that would be unreasonable – EEOC position requiring total accommodation rejected as unreasonable.

Sex (Ch. 10)

Elam v. Regions Fin. Corp., ___ F.3d ___, 108 FEP 1729, No. 09-2004, 2010 WL 1526450 (8th Cir. Apr. 19, 2010) – Summary judgment affirmed in discharge case brought by pregnant bank teller – plaintiff claimed one supervisor referred to her as “pregnant” and another supervisor used the phrase “pregnant girl teller” in a note to human resources – “Reference to protected status ‘without reflecting bias is not direct evidence of discrimination.’” (2010 WL 152640, at *3) – neither comment “indicated a negative attitude towards [her] pregnancy” (*id.* at ___) – plaintiff engaged in multiple acts of misconduct and misconduct of two co-workers who were not terminated was not of comparable seriousness or the supervisors were not aware of it.

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

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

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

Farr v. St. Francis Hospital and Health Centers, 570 F.3d 829, 106 FEP 1046 (7th Cir. 2009) – Reverse sex discrimination case – plaintiff contended that because he was the only male in the department, he was singled out for termination when it was discovered

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

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

Henry v. Milwaukee County, 539 F.3d 573, 104 FEP 140 (7th Cir. 2008) – Same-sex policy for guards at juvenile facility rejected – since most detainees were male, this resulted in much more overtime for male than female officers – no BFOQ sex.

Hall v. Nalco Co., 534 F.3d 644, 103 FEP 1345 (7th Cir. 2008) – Woman fired because she was undergoing in vitro fertilization (IVF) treatments has stated a cause of action for sex discrimination – although both men and women have to deal with infertility, and thus that is not protected, only women can undergo IVF – manager’s notes indicated plaintiff let go because of “absenteeism – infertility treatments” – summary judgment reversed.

Doe v. C.A.R.S. Prot. Plus, Inc., 527 F.3d 358, 103 FEP 577 (3d Cir.), *cert. denied sub nom., New York Law Publ’g Co. v. Doe*, 129 S. Ct. 576 (2008) – Abortion is covered by the Pregnancy Discrimination Act’s prohibition of discrimination barring discrimination on the basis of pregnancy “or related medical conditions” – an abortion is a “related medical condition” – employee had abortion on advice of physician who told her baby had severe deformities – employer argued that she was discharged because she failed to call in sick every day while recovering from the procedure – plaintiff prevailed.

Webb-Edwards v. Orange County Sheriff’s Office, 525 F.3d 1013, 103 FEP 157 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 915 (2009) – Sheriff chose male deputy with physically imposing stature and tactical skills for position at middle school with history of violence and severe behavioral problems rather than higher ranked female deputy – she was offered a position at a safer school – testimony was unrebutted that a non-physically-imposing male would not have been placed in the problem school – thus, no sex discrimination.

Sexual Orientation and Gender Identity (Ch. 11)

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

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

Jackson v. Cal-Western Packaging Corp., ___ F.3d ___, 108 FEP 1281 (5th Cir. 2010) – Following investigation by Chief Operating Officer and outside counsel, 69-year-old employee fired for sexual harassment – his denial that he committed sexual harassment is not a defense since issue is employer’s reasonable belief following an investigation – fact that Chief Operating Officer referred to him as an “old, gray-haired fart” a year before the discharge decision does not affect analysis since no evidence it was related to his discharge.

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

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

Senske v. Sybase, Inc., 588 F.3d 501, 107 FEP 1583 (7th Cir. 2009) – Summary judgment affirmed in an age discrimination case against salesperson fired in 2005 even though he was the employer’s top earner for North America in 2004 – “The central premise of [plaintiff’s] pretext argument is that no juror could believe that Sybase’s top earner for North America in 2004 would be fired for performance deficiencies in 2005,” (588 F.3d at 507) – but it is undisputed that he did not meet his revenue quota in any of the eight quarters preceding his fourth quarter of 2004 and his success in the fourth quarter of 2004 hinged entirely on two deals – at least one of those deals was in industry parlance a “bluebird” – a deal that just flies in the window with little or no work by the salesperson – based on his deficiencies in 2005 no reasonable jury could conclude that discrimination rather than performance deficiencies were the reason for his termination.

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

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

Nagle v. Village of Calumet Park, 554 F.3d 1106, 105 FEP 749 (7th Cir. 2009) – Summary judgment affirmed – black police chief repeatedly referred to white officer and his peers as “old white mother f____ers” – chief also commented that plaintiff was getting too old for the job – this was insufficient to avoid summary judgment because the remarks lacked any temporal proximity to any action taken against him – with respect to retaliation claims, suspension that was never served is not materially adverse action, nor was reassignment from patrol duty to a liaison position to a strip mall – changes did not affect pay, hours or prospects for advancement, and were not punitive.

Adams v. Lucent Techs., Inc., 104 FEP 877 (6th Cir. 2008) (unpublished) – High seniority protected age employees accepted voluntary early severance program which would not be available in the event of a merger, believing that merger talks were progressing – merger talks had in fact broken down – the program was still voluntary – they were not certain to lose their jobs and in fact unlikely to do so – no evidence that age motivated employer’s decision not to reveal that merger talks had broken down and that the voluntary program would not automatically expire.

Sabinson v. Trs. of Dartmouth Coll., 542 F.3d 1, 104 FEP 321 (1st Cir. 2008) – Summary judgment affirmed against tenured professor who is female, Jewish and over 40 – investigative committee found that she had great difficulties in interacting with colleagues and some students – it recommended a buyout package – she rejected the buyout package and filed an EEOC charge – she was then assigned to teach first-year courses rather than the advanced courses and directing theater productions that had previously been her work – three professors submitted affidavits offering anecdotal anti-Semitism evidence “[b]ut they were not directed to any events concerning Sabinson and did not involve the decision-makers in her case during the time period at issue here” (542 F.3d at 3) – as to the buyout offer, “the offer of a buyout to resolve an employment dispute is by itself hardly direct evidence of age discrimination even if the employee is elderly” (*id.*) – as to the retaliation claim, the recommendation to “marginalize” her course assignments was made before the EEOC charges – although the actual assignments occurred after her EEOC charge the assignments “were the carrying out of a plan avowed well *before* the complaint and therefore not even arguably caused by the complaint” (*id.* at 5) (emphasis in original)

Faas v. Sears, Roebuck & Co., 532 F.3d 633, 103 FEP 1241 (7th Cir. 2008) – Summary judgment affirmed in termination case – younger employees who were not performing well who were given a chance to improve were not shown to have a “comparable set of failings” – plaintiff had a long history of poor customer service and inability to motivate her team – reliance on the fact that two managers who were several years older than plaintiff received positive evaluations – a situation where protected class members “sometimes do better” and “sometimes do worse” is not evidence of discrimination – destruction of documents about promotability which contain age data was done routinely to protect privacy and not in bad faith so no adverse inference.

Fitzgerald v. Action, Inc., 521 F.3d 867, 103 FEP 30 (8th Cir. 2008) – Summary judgment affirmed on ADEA discharge claim – same decisionmaker hired and fired plaintiff within two years – “Action hired Fitzgerald when he was fifty and terminated him when he was fifty-two. We have noted it is unlikely a supervisor would hire an older employee and then discriminate on the basis of age, and such evidence creates a presumption against discrimination.” (521 F.3d at 877) – despite supervisor’s alleged comments that plaintiff was replaced with “younger kids,” that supervisor stated plaintiff was “too old for that type of work” and “needed to retire,” these stray remarks “are insufficient to overcome the presumption created by the fact Action hired Fitzgerald at age fifty” (*id.* at 876-77).

Age - General Issues (Ch. 12)

Gross v. F.B.L. Fin. Servs., Inc., ___ U.S. ___, 129 S. Ct. 2343, 106 FEP 833 (2009) – Standard of proof in ADEA disparate treatment cases is “but-for” – the burden of persuasion never shifts even when a plaintiff has produced some evidence that age was one motivating factor – Title VII and the ADEA are materially different – Title VII’s burden-shifting framework is not applicable to the ADEA – when Congress added the “mixed motive” amendments to Title VII, it did not do so to the ADEA – ordinary meaning of ADEA requirement that the employer took adverse action “because of” age is that age was the “reason” the employer decided to act – the plaintiff retains the burden of persuasion at all times under the “but-for” test – contention that *Pricewaterhouse* applies to ADEA rejected – mixed-motive jury instruction never proper in an ADEA case - not at all clear Court today would apply *Pricewaterhouse* to Title VII – its burden-shifting framework is difficult to apply – 5-4 decision – dissent contended that Supreme Court should not answer a question not presented by the petition for certiorari – whether a mixed-motive case is ever appropriate under the ADEA – dissent contended that “because of” is totally consistent with “motivating factor” – Court should have simply held that direct evidence was not necessary to obtain a mixed-motive instruction – dissent contended that in employment decisions, there will frequently be multiple motives, and the statute prescribes using age as one of the motives – burden should switch to employer to prove same result if plaintiff establishes that one of the motivations was age.

Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395, 103 FEP 908 (2008) – Reasonable factor other than age is an affirmative defense which must be proven by the employer – it is applicable to ADEA adverse impact cases – “[A]lthough we are now satisfied that the business necessity test should have no place in ADEA disparate-impact cases . . . this conclusion does not stand in the way of our holding that the RFOA exemption is an affirmative defense.” (128 S. Ct. at 2404) – *City of Jackson* made it clear “that a plaintiff falls short by merely alleging a disparate impact, or pointing to a generalized policy that leads to such an impact” (citation and internal quotation marks and alterations omitted) (*id.* at 2405) – “[P]laintiff is obliged to do more: to isolate[e] and identify[y] the *specific* employment practices that are allegedly responsible for any observed statistical disparities” (citation and internal quotation marks omitted; emphasis

in original; first alteration added) (*id.*) – this is to avoid “the result [of] employers being potentially liable for the myriad of innocent causes that may lead to statistical imbalances” (internal quotations and citation omitted; alteration in original) (*id.* at 2406) – “[T]he requirement has bite” (*id.*) – “Identifying a specific practice is not a trivial burden” (*id.*) – “[T]he more plainly reasonable the employer’s ‘factor other than age’ is, the shorter the step for that employer from producing evidence raising the defense, to persuading the factfinder that the defense is meritorious. It will be mainly in cases where the reasonableness of the non-age factor is obscure . . . that the employer will have more evidence to reveal and more convincing to do in going from production to persuasion.” (*id.*) – “Congress took account of the distinctive nature of age discrimination, and the need to preserve a fair degree of leeway for employment decisions with effects that correlate with age, when it put the RFOA clause into the ADEA, significantly narrow[ing] its coverage.” (citation and internal quotation marks omitted; alteration in original) (*id.*) – “In this case, we realize that the Court of Appeals showed no hesitation in finding that Knolls prevailed on the RFOA defense” (*id.*) – “Whether the outcome should be any different when the burden is properly placed on the employer is best left to that court in the first instance.” (*id.* at 2406-07).

Ky. Ret. Sys. v. EEOC, 128 S. Ct. 2361, 103 FEP 897 (2008) – Hazardous-duty employees can retire after 20 years of service or after five years of service if at age 55 – the pension benefit is 2.5% times years of service times final retirement pay – employees who become disabled prior to being eligible to retire can retire immediately and have imputed to them extra years of service necessary to bring them to retirement eligibility – thus, a 45-year-old disabled employee with 10 years of service would have 10 years of imputed service, and a pension benefit based on 20 years of service – however, an employee age 55 with 10 years of service who becomes disabled would have nothing imputed and would have a pension benefit calculated on the basis of 10 years of service – Supreme Court 5-4 (Kennedy, Scalia, Ginsburg, and Alito in dissent) finds no ADEA violation – *Hazen Paper* controls – employer must be “actually motivated” by age – age must have had a determinant influence on the outcome – pension status and age are analytically distinct – but *Hazen* indicated in some cases pension could serve as a proxy for age – *Hazen* left open “the special case” dealing with pension vesting based on age rather than years of service, which is this case – Court’s reasons for not equating pension eligibility with age in this case are: (1) age and pension status are analytically distinct; (2) background facts indicate that pension status was not a proxy for age – this case involves not an individual case but a set of complex system-wide rules involving not wages but pensions which the ADEA treats more flexibly and leniently in respect to age; (3) there is a clear non-age-related rationale for the disparity; (4) in some instances the plan could work to the advantage of older workers – a worker age 45 with 10 years of service would get 10 imputed years; a worker age 40 with 15 years of service would get only five years of imputed service; (5) the plan does not rely on stereotypical assumptions that ability declines with age; and (6) no remedy is obvious – if the plan is unlawful it is not clear how many extra years of imputed service would have to be given to each person – all of the above indicates that the plan was not actually motivated by age – none of this undercuts the rule that a statute or policy that facially discriminates

based on age suffices to show disparate treatment under the ADEA – this is a special case based on pension status which itself turns in part on age.

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

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

EEOC v. Kelley Drye & Warren, LLP, Civil Action No. 10-CIV0655 (S.D.N.Y. filed Jan. 28, 2010) – EEOC filed suit alleging age discrimination – alleges that partners must give up equity participation at age 70 and thereafter be compensated solely on the basis of a discretionary bonus.

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

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

was error – case remanded to evaluate the continuing validity of the rationale underlying the FAA regulation.

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

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

Neely v. Good Samaritan Hosp., 106 FEP 1741 (6th Cir. 2009) (unpublished) – Over-40 employee claimed race discrimination but never claimed age discrimination – district court dismissed all claims except race discrimination and referred matter to mediation – parties reached a settlement which they confirmed on the record – parties never discussed age or right to revoke in mediation – defendant prepared settlement agreement which waived rights under the ADEA and contained a clause allowing employee 21 days to consider and seven days to revoke – employee signed agreement but revoked within seven days – district court rejected revocation on ground that there was a verbal settlement – court of appeals reversed, holding that it did not matter that there was no age issue – the written agreement expressly allowed revocation – employer clearly wanted to protect itself against any theoretical age claim since plaintiff was over 40 – does not matter that right to revoke was not bargained for – once there was an ADEA release right to revoke was required by law.

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

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

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

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

Collazo v. Nicholson, 535 F.3d 41, 103 FEP 1448 (1st Cir. 2008) – Employee claimed supervisor harassed him on the basis of age – no claim of lost wages or benefits – case dismissed because compensatory damages are not available under the ADEA.

Hirt v. Equitable Ret. Plan for Employees, Managers & Agents, 533 F.3d 102, 103 FEP 1577 (2d Cir. 2008) – Cash balance pension plans do not discriminate on the basis of age – fact that younger workers received more money is merely the result of time value of money.

Disability/Handicap - General (Ch. 13)

Sulima v. Tobyhanna Army Depot, ___ F.3d ___, ___ FEP ___, No. 08-4684, 2010 WL 1427542 (3d Cir. Apr. 12, 2010) – Plaintiff alleged that side effects of medicine prescribed for a condition which was itself not a disability under the ADA rendered him disabled – as a matter of law, a disabling impairment can be caused by a side effect of prescribed medicine if the treatment is required “in the prudent judgment of the medical profession” (2010 WL 1427542, at *6) and no equally effective alternative exists – here, plaintiff could not show that his prescription was “medically necessary” and so his condition was not covered by the ADA.

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

Sermatka v. Rockwell Automation, Inc., 591 F.3d 957, 22 A.D. Cas. 1379 (7th Cir. 2010) – Mixed-motive theory not cognizable under disability act – logic of Supreme Court’s decision in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009) (no mixed-motive under ADEA) compels the same conclusion with respect to the ADA – ADA contains

no express language establishing employer liability in mixed-motive cases and does not cross-reference the 1991 Civil Rights Act provision dealing with mixed motive under Title VII.

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

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

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

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

Erdman v. Nationwide Ins. Co., 582 F.3d 500, 22 A.D. Cas. 669 (3d Cir. 2009) – Employee denied leave to care for daughter with Down syndrome took leave anyway, and was

discharged – no violation – ADA association discrimination does not apply - duty to accommodate does not extend to relatives of disabled individuals.

Barrett v. Covington & Burling LLP, ___ F.3d ___, 22 A.D. Cas. 449 (D.C. Cir. 2009) – Timeliness issue under District of Columbia Human Rights Act – plaintiff alleged a series of failures to accommodate, some of which were before the relevant time frame, others after – plaintiff argued continuing violation doctrine should apply to failure to accommodate – “Unlike a hostile work environment claim, however, a reasonable accommodation claim is based on discrete acts, not on prolonged or repeated conduct,” (22 A.D. Cas. at 453) – denial of accommodation starts clock running on the day it occurs – position of EEOC that since an employer has an ongoing obligation to provide a reasonable accommodation there is a new violation each time the employee needs the accommodation rejected – “[T]he statute of limitations bars any claim for relief based on denials of accommodation that [preceded the limitations period],” (*id.* at 454) – issue is whether plaintiff within the time frame “requested a new accommodation . . . or renewed a request previously denied. These distinctions are critical. A plaintiff cannot extend the limitations period by reiterating an identical request that was previously denied.” (*id.*) – however, revocation of a previously authorized accommodation during the relevant time frame is actionable, as is a denial of a new request made in light of changed circumstances – there is a genuine issue of material fact as to whether during the relevant time frame plaintiff was capable of performing the job in question with a reasonable accommodation – on remand the focus will be whether plaintiff was seeking a new accommodation or merely trying to revive a time-barred claim and whether a previously granted accommodation was revoked.

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

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

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

Kimmel v. Gallaudet Univ., 639 F. Supp. 2d 34, 22 A.D. Cas. 277 (D.D.C. 2009) – Former dean at school for deaf persons stated a cause of action by contending that she was discriminated against because she was not fully deaf – “not deaf enough” – she alleged harassment in part because she supported the selection of a president who was also considered “not deaf enough” – the trial court refused to dismiss the case, finding that the dean’s deafness was a disability – she did not allege she was discriminated against because of her deafness, but rather the extent of her deafness – the trial court held that the District of Columbia Human Rights Act was intended to secure an end to discrimination for any reason other than individual merit, and relied on *Price Waterhouse v. Hopkins* with respect to discrimination based on stereotypes.

EEOC v. Lee’s Log Cabin, Inc., 546 F.3d 438, 21 A.D. Cas 97 (7th Cir. 2008), *en banc review denied*, 554 F.3d 1102 (7th Cir. 2009) – Seventh Circuit 2-1 ruled that because the EEOC’s original complaint stated only that the job applicant was HIV positive, the EEOC could not contend that the job applicant also had progressed to having AIDS which substantially limited major life activities – by 6-4 vote, the Seventh Circuit rejected the EEOC’s petition for *en banc* rehearing.

Louie v. Carichoff, 21 A.D. Cas. 493 (9th Cir. 2008) (unpublished) – Plaintiff in employment disability case sued attorney for defendant under Title III of ADA because attorney noticed his deposition in a noncompliant facility – case dismissed and defendant attorney awarded attorney’s fees on the ground that an attorney who simply uses a room in an office building to conduct a deposition is not operating the facility within the meaning of the ADA.

Mobley v. Allstate Ins. Co., 531 F.3d 539, 20 A.D. Cas. 1349 (7th Cir.), *reb’g en banc denied*, 2008 U.S. App. LEXIS 19292 (7th Cir. Sept. 5, 2008) – Layoff of disabled employee upheld – she was a qualified individual under the ADA but failure to meet performance expectations after receiving a variety of accommodations resulted in her being included in the reduction in force – no showing that the accommodations that she was denied would have raised her performance to a level where she would have withstood the layoff.

Trujillo v. PacifiCorp, 524 F.3d 1149, 20 A.D. Cas. 897 (10th Cir. 2008) – Married employees who were discharged while son was undergoing treatment for terminal brain cancer established association discrimination claim – evidence of self-insured employer’s concern about costs and suspicious timing sufficient to raise factual issue warranting reversal of summary judgment in favor of defendant.

Rios-Jimenez v. Sec’y of Veterans Affairs, 520 F.3d 31, 20 A.D. Cas. 609 (1st Cir. 2008) – Employee protested revocation of temporary promotion after she became depressed – mixed-motive analysis inappropriate because of insufficient direct evidence – promotion revocation decision made on the basis of irregular attendance and poor performance prior to management becoming aware of employee suffering from depression – this negates illegal motivation – summary judgment affirmed.

Dewitt v. Proctor Hosp., 517 F.3d 944, 20 A.D. Cas. 385 (7th Cir. 2008) – Employee discharged while husband was undergoing extremely expensive cancer treatment may proceed with association discrimination action – allegation was that she was discharged so that employer would not have to continue to pay for husband’s expensive treatments.

Disability - ADA-Covered Disability (Ch. 13)

Tjernagel v. Gates Corp., 533 F.3d 666, 20 A.D. Cas. 1345 (8th Cir. 2008) – Employee with medical restrictions precluded from working overtime was unable to perform the essential functions of her job and therefore was not qualified – mandatory overtime is an essential job function – this rendered her unable to perform an essential function of her job which was being in attendance at work when she was needed.

Thornton v. Fed. Express Corp., 530 F.3d 451, 20 A.D. Cas. 1308 (6th Cir.), *reh’g en banc denied*, 2008 U.S. App. LEXIS 22358 (6th Cir. Oct. 20, 2008) – Employee with stress, panic disorder, and fibromyalgia not disabled under ADA despite being determined to be disabled for purposes of social security.

Gribben v. United Parcel Serv., Inc., 528 F.3d 1166, 20 A.D. Cas. 1185 (9th Cir. 2008) – Truck driver with heart condition who worked in Phoenix refused to drive delivery trucks that were not air-conditioned – summary judgment reversed and case remanded for trial – driver was not required to offer comparative evidence of the ability of average Phoenix residents to participate in summer outdoor activities to establish that he was substantially limited in his ability to walk, lift, or perform other major life activities – his testimony alone regarding the significance of his impairment was sufficient to overcome summary judgment, when coupled with his physician’s testimony that he experienced labored breathing, dizziness, fatigue, and the like when exerting himself in extreme heat.

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

VandenBroek v. PSEG Power, CT LLC, ___ F.3d ___, 22 A.D. Cas. 1304 (2d Cir. 2010) – Discharge sustained – reliable attendance is an essential job function.

Disability - Reasonable Accommodation (Ch. 13)

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

Hennagir v. Utah Dep’t of Corr., 581 F.3d 1256, 22 A.D. Cas. 545 (10th Cir. 2009) – Discharge of physician’s assistant at prison who failed to complete an emergency response certification upheld – certification was an essential job function for positions that involved direct contact with inmates – does not matter that assistant never had to

respond to a crisis situation during her eight years as a physician's assistant – proposed accommodation of waiving the certification was not reasonable.

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

King v. City of Madison, 550 F.3d 598, 21 A.D. Cas. 608 (7th Cir. 2008) – Bus driver discharged after two-year disability layoff did not establish failure to accommodate claim – she was medically restricted from working as a bus driver, collective bargaining agreement accorded her right to return to work only in that work unit, and she was not the most qualified candidate for vacancies outside her bus driver work unit.

Grubb v. Southwest Airlines, 21 A.D. Cas. 231 (5th Cir. 2008) (unpublished), *cert. denied*, 129 S. Ct. 1986 (2009) – Flight instructor with sleep apnea had requested accommodation of set shift assignment – this was not a reasonable accommodation because it would impose burdens on co-workers and fundamentally alter work schedules.

Bellino v. Peters, 530 F.3d 543, 20 A.D. Cas. 1315 (7th Cir.), *reh'g en banc denied*, 2008 U.S. App. LEXIS 18448 (7th Cir. Ill. Aug. 18, 2008) – Plaintiff rejected transfer that would have accommodated his limitations – no duty to engage in interactive process after reasonable accommodation of transfer was offered.

Willard v. Potter, 264 Fed. Appx. 485, 20 A.D. Cas. 1022 (6th Cir. 2008) (unpublished) – Plaintiff cannot proceed with failure to accommodate claim despite contention that postal service failed to engage in interactive process – plaintiff had duty to identify vacant position to which she could have been reassigned and failed to do so.

Brannon v. Luco Mop Co., 521 F.3d 843, 20 A.D. Cas. 709 (8th Cir.), *cert. denied*, 129 S. Ct. 725 (2008) – Third request for extended medical leave not reasonable accommodation – diabetic employee suffering from complications absent from work 40 of the 77 days preceding her discharge – she failed to show that she was a qualified individual in that she adduced no evidence indicating that a three-week leave of absence would allow her to meet the essential functions of her job, namely, consistent attendance.

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

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

Retaliation (Ch. 14)

Crawford v. Metro. Gov't of Nashville & Davidson County, 129 S. Ct. 846, 105 FEP 353 (2009) – During a sexual harassment investigation of her superior, not initiated by plaintiff, plaintiff was interviewed and reported that her superior had sexually harassed her – the issue was whether this constituted “opposition” to illegal conduct which would protect her against retaliation – the Sixth Circuit held that it did not – that the Opposition Clause demanded “active, consistent” opposing activities – the Supreme Court unanimously reversed – the Opposition Clause extends to an employee who speaks out about discrimination not on her own initiative but in answering the employer’s questions – opposition includes someone who has taken no action at all to advance a position beyond disclosing it – in dicta the Court stated: “We would call it ‘opposition’ if an employee took a stand against an employer’s discriminatory practices by not ‘instigating’ action, but by standing pat, say, by refusing to follow a supervisor’s order to fire a junior worker for discriminatory reasons.” (129 S. Ct. at 851) – Justice Alito, with Justice Thomas concurring, asserted that “the Court’s holding does not and should not extend beyond employees who testify in internal investigations or engage in analogous purposive conduct” (*id.* at 853) – asserting that there was no need to adopt a definition of the term “oppose” any broader than the case demanded, they noted that “[b]ut in dicta, the Court . . . embraces silent opposition.” (*id.* at 660) – the concurrence concluded by stating: “The question whether the opposition clause shields employees who do not communicate their views to their employers through purposive conduct is not before us . . . and I do not understand the Court’s holding to reach that issue here.” (*id.* at 855).

CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951, 103 FEP 481 (2008) – Section 1981 prohibits retaliation against employees for complaining about race discrimination, even though the statute does not contain an express retaliation prohibition – 7-2 vote.

Gomez-Perez v. Potter, 128 S. Ct. 1931, 103 FEP 494 (2008) – ADEA prohibits retaliation against federal employees for complaining about age discrimination – does not matter that ADEA contains express retaliation prohibition with respect to private-sector employees but does not contain such a provision with respect to public sector.

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

Robinson v. Cavalry Portfolio Servs., LLC, 2010 U.S. App. LEXIS 2723, 108 FEP 941 (10th Cir. Feb. 10, 2010) – Reversing jury verdict for retaliation – plaintiff submitted to management a written statement reporting racist statements by a co-worker – later, she

received less desirable accounts and lower commissions, and she was not given a promotion – nevertheless, there was no triable question – “No reasonable person could have believed that the single [racist] incident violated Title VII’s standard.” (2010 U.S. App. LEXIS 2723, at *24) – “A complaint of a single racist remark by a colleague, without more, is not ‘opposition protected by Title VII’” (*id.* at *20) – citing *Jordan v. Alternative Res. Corp.*, 467 F.3d 378 (4th Cir. 2006).

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

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

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

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

Thompson v. N Am. Stainless, LP, 567 F.3d 804, 106 FEP 639 (6th Cir. 2009) (en banc) – Female employee filed EEOC charge – her fiancé was terminated three weeks after the employer received notice of the charge, allegedly in retaliation for his fiancée’s EEOC charge – male then filed retaliation charge with the EEOC – district court granted summary judgment for employer – en banc court by vote of 10-6 affirmed the summary

judgment – statute on its face limits retaliation protection to individual who engaged in the protected opposition or participation, stating: “because *he has opposed*” or “because *he has made a charge, testified, assisted or participated*” (567 F.3d at 826 (emphasis in original) – male employee does not claim that he engaged in any statutorily protected activity and thus is not included in the class of persons protected against retaliation – EEOC position that statute should be construed to include claimants who have a close associational relationship with a person who was protected rejected – Third, Fifth and Eighth Circuits have unanimously rejected third-party retaliation claims – Supreme Court’s *Cranford* case rejected this circuit’s view that Opposition Clause demands active, and consistent opposing activities – but here there was nothing – Supreme Court’s holding in *Burlington Northern* that retaliation provision should be broadly read and should cover conduct which would deter an individual from exercising their protected rights not applicable to this situation where the statutory language is clear – concurring opinion of Circuit Judge Rogers says that female who filed charge could have filed a retaliation action but her fiancé could not – dissenters argue that male encouraged his fiancée and this was sufficient opposition within the meaning of *Cranford* – dissent asserts that all judges recognize that it was unlawful to fire the male fiancé, but that he has no standing to sue – but the language Congress used simply referred to the opposing employee because that is what is unlawful – it did not restrict litigation to the opposing employee. [Note: Case analyzed at 186 LRR 284.)

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

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

Baloch v. Kempthorne, 550 F.3d 1191, 105 FEP 1 (D.C. Cir. 2008) – No adverse action sufficient to dissuade a reasonable worker from filing a discrimination claim – summary judgment affirmed – after complaining about discrimination, four times in a year supervisor yelled and cursed at plaintiff which included a threat to have him arrested, comments which did not reference his protected activity or protected status – the proposed suspensions were never served – letters of counseling and reprimand contained constructive criticism – a negative performance evaluation did not affect his position, salary or promotion opportunities – finding of no hostile environment also affirmed.

Amrhein v. Health Care Serv. Corp., 546 F.3d 854, 104 FEP 929 (7th Cir. 2008) – Prior to discharge plaintiff committed four separate acts of misconduct – she claimed retaliation because six weeks before discharge she told supervisors of her intention to file an EEOC charge alleging that a male in her group was being assigned less work and being treated more favorably than she – temporal proximity was insufficient to create a factual issue because of her violations of company policy which included insubordination which eclipsed any inference that her intention to go to the EEOC was causative.

Kelley v. City of Albuquerque, 542 F.3d 802, 104 FEP 459 (10th Cir. 2008) – Plaintiff, as Deputy City Attorney, represented the City in two EEOC mediation sessions in which Martin Chavez was opposing counsel – she claimed that he was rude and offensive during the second mediation session, offended that a private investigator had been used to check allegations of his client, and in response to plaintiff referring to Chavez by his first name, threw his file on the table, demanded that she address him as “Mr. Chavez,” and abruptly terminated the session – he was later elected Mayor of Albuquerque and had her fired – he testified that he believed she was a “bigot” based on a “sixth sense” – the jury found in plaintiff’s favor on retaliation – the Tenth Circuit affirmed, finding that plaintiff’s conduct as the City’s attorney in a Title VII case was entitled to retaliation protection in what it termed as “a matter of first impression” – “[T]he plain language of [Title VII] provides anti-retaliation protection for a defense attorney who represents an alleged violator of discrimination laws” (542 F.3d at 813) - this conduct falls clearly within the participation clause.

Argyropoulos v. City of Alton, 539 F.3d 724, 104 FEP 248 (7th Cir. 2008) – Employee filed sexual harassment complaint and then secretly recorded meeting with supervisors – she was fired for secretly recording the meeting – even though stated aim of eavesdropping was to obtain evidence of discrimination, engaging in “dubious self-help tactics or workplace espionage” fell outside of Title VII’s protective scope – once the City learned of the secret recordings, it both fired her and had her arrested on a felony eavesdropping charge – seven-week interval between harassment complaint and arrest did not establish a causal link by itself – criticisms of her job performance following her complaint were consistent with criticisms that preceded her complaint – summary judgment affirmed.

Russell v. Univ. of Toledo, 537 F.3d 596, 103 FEP 1797 (6th Cir. 2008) – Summary judgment affirmed with respect to race and retaliation claims – insubordinate nurse had

a long history of misconduct – not similarly situated to Caucasian co-workers who each had engaged in only a single incident of misconduct – doctors with whom she worked were aware that she had filed an EEOC charge and were told to bring any performance problems to the attention of the doctor responding to the charge – this was simply part of progressive discipline that employer used in an attempt to correct numerous incidents of misconduct.

Hall v. Forest River, Inc., 536 F.3d 615, 103 FEP 1547 (7th Cir. 2008) – Insufficient evidence of causal connection between sexual harassment complaint and failure to promote – even though plaintiff with more experience than male employee was not promoted, experience is not necessarily determinative of qualifications.

Butler v. Ala. Dep't of Transp., 536 F.3d 1209, 103 FEP 1542 (11th Cir.), *reh'g en banc denied*, 2008 U.S. App. LEXIS 27976 (11th Cir. Oct. 1, 2008) – Black plaintiff was riding as passenger driven by white co-worker when vehicle collided with truck being driven by black male – white driver described the driver of the other truck as a “mother-fucking N_____” – the black plaintiff reported her co-worker’s remarks to their employer and later claimed she was retaliated against for reporting the remarks – the conduct was not protected – the employee did not have an objectively reasonable belief that the employer had engaged in an unlawful employment practice – the incident was away from work, outside the hearing of supervisors, and the remark was not aimed at the plaintiff.

Caskey v. Colgate-Palmolive Co., 535 F.3d 585, 103 FEP 1441 (7th Cir.), *cert. denied*, 129 S. Ct. 738 (2008) – Plaintiff supported co-worker’s sexual harassment claim – plaintiff, alleged harasser, and two other female employees who supported the claim terminated – this alleged “pattern” is insufficient to create an inference of a causal connection – with respect to the indirect method of proof, summary judgment granted because plaintiff has not “presented a similarly situated employee that was treated more favorably.” (535 F.3d at 594).

Macias v. Aaron Rents, Inc., 288 Fed. Appx. 913, 103 FEP 1719 (5th Cir. 2008) (unpublished) – Prevailing Title VII plaintiffs fear that prospective employers conducting background checks would locate case does not warrant an order sealing the record or changing to “X” all references to his name – potential for employer retaliation against litigious employees could apply to virtually every case filed in the federal courts – request denied.

Matthews v. Wis. Energy Corp., 534 F.3d 547, 103 FEP 1224 (7th Cir. 2008) – Terminated employee and company agreed that company would respond to references by giving only dates of employment, job held, and compensation – company responded to a reference request by indicating that plaintiff had been involved in “legal actions against the company” – summary judgment affirmed on retaliation claim but reversed on breach of contract claim – *Burlington Northern* defines adverse employment action as an action likely to dissuade a reasonable worker from filing a charge – “[H]er prior litigation history was objectively true, so . . . disclosure of this fact was not adverse”

(534 F.3d at 559) – no adverse employment action and thus no statutory retaliation claim.

Niswander v. Cincinnati Ins. Co., 529 F.3d 714, 103 FEP 1257 (6th Cir. 2008) – Summary judgment affirmed in self-help discovery case – plaintiff fired after she delivered files containing policyholder names and other confidential information to attorneys pursuing a sex discrimination class action against the company – she engaged in no “protected activity” – she acknowledged that the documents containing policyholder data lacked information pertinent to sex bias or unequal pay – giving confidential documents to attorneys might be protected in some situations but not in this case.

Hervey v. County of Koochiching, 527 F.3d 711, 103 FEP 813 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 1003 (2009) – Summary judgment affirmed in retaliation case – although there was close temporal proximity between her discrimination complaint and discipline for insubordination, she had been accused of insubordination before she notified the employer of her protected activity – insubordinate employees may not insulate themselves from discipline by claiming discrimination before employer takes action.

Van Horn v. Best Buy Stores, LP, 526 F.3d 1144, 103 FEP 599 (8th Cir. 2008) – Retaliation claimant was required to prove that protected activity was “determinative – not merely motivating – factor” since *Price Waterhouse* does not apply to retaliation claims – no causal connection shown between complaints of sexual harassment and discharge – interval of two months is too long to support inference of causation – summary judgment affirmed.

Smith v. Int’l Paper Co., 523 F.3d 845, 103 FEP 37 (8th Cir. 2008) – Black employee complained about lack of civility by supervisor, who was “hollering and cussing” at him – this is not protected activity which could support a retaliation claim for later adverse action – no reasonable person could believe that complaints about workplace civility were protected under Title VII.

Recio v. Creighton Univ., 521 F.3d 934, 103 FEP 25 (8th Cir. 2008) – Summary judgment in retaliation case affirmed – shunning by faculty and alteration of teaching schedule and failure to assign plaintiff to teach advanced classes amounted to no more than non-actionable petty slights which do not meet the significant harm standard – six-month interval between protected activity and teaching assignments are not close enough to raise inference of causation.

Brannum v. Mo. Dep’t of Corr., 518 F.3d 542, 102 FEP 1393 (8th Cir. 2008) – No retaliation protection since plaintiff who corroborated sexist remark could not have reasonably believed that she was engaged in protected activity – the alleged statement by the supervisor was a “single, relatively tame comment” that no reasonable person could have believed amounted to sexual harassment.

Benders v. Bellows & Bellows, 515 F.3d 757, 102 FEP 1072 (7th Cir. 2008) – Plaintiff had five-year affair with the husband of a husband-and-wife legal partnership – she was told by Mr. Bellows that his wife and another partner were campaigning to get her out and

she should begin looking for another job – nine months later she was told she would have to leave the firm in approximately five weeks – shortly thereafter she filed an EEOC race and age discrimination charge – two months later, just after the firm filed its position statement with the EEOC, Mr. Bellows told her that because she had filed an “awful EEOC charge” he would not consider severance – one week later she was discharged – summary judgment reversed – she was not actually terminated until shortly after filing the EEOC charge – a notification of intention to terminate is not the same thing as a termination – summary judgment affirmed on hostile environment – her affair was consensual and did not affect her work – plaintiff’s contention that Mr. Bellows wished to terminate her to keep his wife from finding out about the affair does not implicate Title VII.

Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 102 FEP 716 (11th Cir. 2008) – Employee with pending racial hostile environment claim asked to sign arbitration agreement that required arbitration of past, present or future disputes – employee discharged for refusing – retaliation finding by jury affirmed – court distinguished case which held that employer could require all employees to agree to arbitrate future claims – case analyzed at 183 LRR 235.

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

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

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

Huston v. P & G Paper Prods. Corp., 568 F.3d 100, 106 FEP 746 (3d Cir. 2009) – Employer not liable for co-worker harassment – two supervisors who were aware of the harassment were not “management level” employees whose knowledge could be

imputed to the employer – knowledge of employees who merely have supervisory authority over performance of work is insufficient to attribute that knowledge to the employer – employer took prompt action as soon as plaintiff complained to higher-level managers.

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

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

Chaloult v. Interstate Brands Corp., 540 F.3d 64, 104 FEP 229 (1st Cir. 2008) – Plaintiff was an entry-level supervisor – company had *Faragher/ Ellerth* compliant policy with a grievance procedure – plaintiff did not follow the policy by reporting the harassment – she contended that a peer, another entry-level supervisor, was aware of the harassment – company had adopted a policy that all supervisors have a duty to report any harassment of which they are aware – this does not broaden liability or in any way mitigate the obligation of a harassee to follow the policy and report the conduct – summary judgment affirmed.

Adams v. O'Reilly Auto., Inc., 538 F.3d 926, 103 FEP 1793 (8th Cir. 2008) – Summary judgment based on *Faragher/ Ellerth* affirmative defense – court rejected as unsupported allegation employer had long history of ignoring complaints – single failure to respond to a co-worker's complaint did not establish a failure to follow properly written policies that were published – employee claimed she should be excused from following the policy because of her belief that she needed a corroborating witness and her fear of retaliation – when report made, employer investigated and promptly fired harasser.

Thornton v. Federal Express Corp., 530 F.3d 451, 103 FEP 1035 (6th Cir.), *reh'g en banc denied*, 2008 U.S. App. LEXIS 22358 (6th Cir. Oct. 20, 2008) – Employee did not report harassment until after she began a leave of absence due to stress – she attributed the delay to fear of retaliation – employer had facially effective harassment policy and undertook an investigation while she was on leave but was unable to corroborate her allegations – employer offered return to work under different supervisor that potentially would have cured the problem – summary judgment affirmed.

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

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

Turner v. The Saloon, Ltd., 595 F.3d 679, 108 FEP 673 (7th Cir. 2010) – Only one act of harassment occurred within statute of limitations – a comment by the female harasser to the male harassee that she missed seeing him naked – but that was sufficient to bring into play three earlier instances of sexual touching and punishment for refusing her advances – however, retaliation claim dismissed since no jury could find a causal connection given 10-month gap and string of discipline and no jury could find that plaintiff was meeting his employer’s legitimate expectations.

Reeves v. C.H. Robinson Worldwide Inc., 594 F.3d 798 (11th Cir. Jan. 20, 2010) (en banc) – Summary judgment in a hostile work environment sexual harassment case reversed – although the conduct was not directed against plaintiff, in addition to the fact that profane language of a non-sexual nature permeated the workplace, there is also “ample evidence of gender-specific derogatory comments made about women on account of their sex” (594 F.3d at 803) – offensive conduct was between men but overheard by necessity by the plaintiff – although not referring to plaintiff, her male co-workers referred to individual females in the workplace with extremely offensive terms, using the “b” word, the “F” word, and the “c” word – her co-workers tuned the radio to a crude morning show that had offensive language of a graphic nature – one co-worker displayed a pornographic image of a fully naked woman on his screen saver – general vulgarity is not enough to violate Title VII – Title VII is not a civility code – sexual language in discussions that truly are indiscriminate do not establish sexual harassment – the issue is whether members of one sex are exposed to disadvantageous terms and conditions of employment – “Nevertheless, a member of a protected group cannot be forced to endure pervasive, derogatory conduct and references that are gender-specific in the workplace, just because the workplace may be otherwise rife with generally indiscriminate vulgar conduct. Title VII does not offer boorish employers a free pass to discriminate against their employees specifically on account of gender just because they have tolerated pervasive but indiscriminate profanity as well.” (*id.* at 810) – “Calling a female colleague a ‘bitch’ is firmly rooted in gender. It is humiliating and degrading based on sex.” (*id.*) – “A final principle that guides us . . . is that words and conduct that are sufficiently gender-specific and either severe or pervasive may state a claim of a hostile work environment, even if the words are not directed specifically at the plaintiff.” (*id.* at 811) – employer defense that the comments preceded plaintiff’s arrival rejected – “It is no answer to say that the workplace may have been vulgar and sexually degrading before [plaintiff] arrived.” (*id.* at 813).

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

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

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

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

Sutherland v. Mo. Dep’t of Corr., 580 F.3d 748, 107 FEP 269 (8th Cir. 2009) – Allegations by female corrections officer that a captain who was not currently supervising the plaintiff rubbed her arm and grabbed her breast on one occasion insufficient to support hostile environment claim where supervisor was disciplined and there was no further contact between them – lowering of performance rating after complaint of sexual

harassment from “highly successful” to “successful” is not materially adverse since it had no effect on pay – summary judgment affirmed.

Anderson v. Family Dollar Stores of Ark., Inc., 579 F.3d 858, 107 FEP 157 (8th Cir. 2009) – Alleged sexual harassment not severe or pervasive – district manager fired her as store manager after brief tenure in that position – the alleged conduct included rubbing her shoulders or back, accusing her of not wanting to be “one of my girls,” calling her “baby doll,” and, during a business phone conversation when he was traveling out of state, suggesting that she should be there in bed with him having a cocktail, and insinuating she could go further in the company if she got along with him – this was simply not severe or pervasive enough – she also cannot show that she suffered an adverse employment action as a result of her refusal to submit to alleged demands for sexual favors – no evidence that her discharge related to his comment about being in bed with him, and their only contacts while she was a store manager were on her first and last day on the job and her telephone calls to him.

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

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

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

fears of confrontation did not justify failure to cooperate – no reasonable trier of the fact could conclude that the employer had been negligent in investigating or responding to the harassment complaint - constructive discharge claim also rejected.

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

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

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

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

Ziskie v. Mineta, 547 F.3d 220, 104 FEP 1377 (4th Cir. 2008) – Summary judgment reversed because of categorical refusal of trial court to consider affidavits of other female employees in the workplace with respect to abusive conduct not personally

witnessed by the plaintiff – all circumstances are relevant, including evidence of a general atmosphere of hostility toward those of plaintiff's gender – blanket refusal to consider such evidence is inconsistent with the Federal Rules of Evidence – however, on remand, plaintiff must establish that a reasonable jury could view the hostility allegedly directed at her as a product of gender animus rather than personality conflicts, and must also show that her perception of a hostile environment was objectively reasonable.

Lapka v. Chertoff, 517 F.3d 974, 102 FEP 1253 (7th Cir.), *reh'g denied*, 2008 U.S. App. LEXIS 53486 (7th Cir. Apr. 30, 2008) – Department of Homeland Security not liable for co-worker rape that occurred at night in training session hotel – co-worker harassment actionable only if employer negligent – no showing employer knew of propensity for rape – DHS acted reasonably after report – insufficient evidence to take action against alleged rapist – DHS did take steps to eliminate contact between alleged rapist and plaintiff.

Anda v. Wickes Furniture Co., 517 F.3d 526, 102 FEP 1274 (8th Cir. 2008) – Store manager comments (asking plaintiff whether another female employee was bisexual, telling plaintiff that two women at another store wanted to make a sandwich out of him, and that he had been wrongly written up for sexual harassment) not severe or pervasive enough as a matter of law to establish hostile environment – resignation immediately after complaining about one male co-worker's conduct not constructive discharge since employer promptly investigated and urged her not to quit – she never gave her employer a reasonable opportunity to correct the allegedly intolerable conditions.

Discharge and Reduction in Force (Ch. 20)

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

Charging Parties and Plaintiffs (Ch. 24)

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

Kirleis v. Dickie, McCamey & Chilcote, PC, 107 FEP 1121 (W.D. Pa. 2009) – 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 . . .” (*id.* 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.

EEOC Administrative Process (Ch. 25)

Fed. Express Corp. v. Holowecki, 552 U.S. 389, 102 FEP 1153 (2008) – Issue was whether intake questionnaire constituted charge – it did – to be a charge there must be an allegation of discrimination, the name of the charging party, and the document must be reasonably construed as a request for the agency to take remedial action to protect the employee’s rights – the EEOC’s regulations are reasonable constructions of the statutory term “charge” – EEOC’s failure to treat the document as a charge and failure

to act does not preclude individual from suing – the affidavit accompanying the intake questionnaire asked the EEOC to “force [FedEx] to end [its] age discrimination plan” – because the EEOC failed to treat the filing as a charge, both sides lost the benefits of the ADEA’s informal dispute resolution process – the court that hears the merits can stay proceedings to allow an opportunity for conciliation and settlement.

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

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

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

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

EEOC v. Watkins Motor Lines, Inc., 553 F.3d 593, 105 FEP 364 (7th Cir. 2009) – Federal district court refused to enforce EEOC subpoena on the ground that it lacked jurisdiction since the EEOC had unreasonably refused to allow the charging party to

withdraw his charge so that he could settle with the employer – district courts can adjudicate subpoena enforcement actions regardless of the current existence of a valid charge – the EEOC had the right to enforce the subpoena because the charge was valid when filed – the EEOC need not allow withdrawal of the charge when in its judgment the settlement would injure others – the EEOC treatment of the no-withdrawal decision as a Commissioner’s charge was appropriate – subpoena enforced.

Am. Ctr. for Int’l Labor Solidarity v. Fed. Ins. Co., 548 F.3d 1103, 104 FEP 1569 (D.C. Cir. 2008) – Liability insurer properly denied coverage of Title VII suit because employer failed to notify it of the claim as soon as EEOC charges were filed – employer waited one year until suit was filed – insurance policy required insured to notify insurer promptly of any “claim” which was defined as including a “formal administrative . . . proceeding commenced by the filing of a notice of charges.” (548 F.3d at 1104) – EEOC proceedings are formal in nature even though the EEOC did not conduct a hearing and lacks adjudicative authority – excluding the insurer from early but consequential stages of the Title VII process could prejudice its right to defend.

Venetian Casino Resort, L.L.C. v. EEOC, 530 F.3d 925, 103 FEP 1025 (D.C. Cir. 2008) – EEOC policy to disclose employer’s confidential information to potential ADEA plaintiffs without giving employer prior notice is arbitrary and capricious and violates the Administrative Procedure Act – although policy did not violate Trade Secrets Act it cannot be reconciled with the EEOC’s regulation governing FOIA requests which requires the agency to “provide a submitter with explicit notice of a FOIA request for confidential commercial records whenever . . . the submitter previously, in good faith, designated the records as confidential” (530 F.3d at 934) (citing 29 C.F.R. § 1610.19(b)(3)) – EEOC contention that FOIA regulations do not apply absent a FOIA request rejected – EEOC required to explain the inconsistency and therefore enjoined from releasing confidential information without advance notice.

Timeliness – Continuing Violation (Ch. 26)

AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 106 FEP 289 (2009) – *Lilly Ledbetter Fair Pay Act* interpreted – prior to 1979, when the Pregnancy Discrimination Act (PDA) became effective, the employer did not provide full credit for leaves of absence caused by pregnancy for the purpose of calculating pension benefits – Ninth Circuit en banc found a violation – Supreme Court 7-2 reversed – *Ledbetter Act* does not affect a bona fide seniority system that was legal at the time – it imposes no duty to correct sex-based disparities and benefits where the disparity was not based on illegal conduct – retiring female employees who had taken pregnancy leaves received lower pensions than similarly situated male employees who had not done so – the key difference from *Ledbetter* and the *Ledbetter* statute is that during the time the pregnancy differential was in effect it was lawful – Ginsburg and Breyer dissented.

Tomlinson v. El Paso Corp., 209 U.S. Dist. LEXIS 77341, 107 FEP 194 (D. Colo. Aug. 28, 2009) – *Lilly Ledbetter Fair Pay Act* of 2009 requires reconsideration of order granting summary judgment to employer on claim that conversion of defined benefit pension

plan to cash balance formula violates the ADEA – court’s order was based on a finding that the employees failed to timely file EEOC charge within 300 days after the plan was amended – but the Act covers “wages, benefits, or other compensation” which includes employer contributions to plan during the 300-day period – court felt torn between Act’s declaration that it was not intended to work any change in existing law “when pension benefits are considered paid” and the express provision renewing the limitations period “each time wages, benefits, or other compensation is paid” – court distinguished between cases involving “the payment of retirement benefits” where the Act does not apply and cases like this one which concern “the rate of accrual of benefits” – if the charge is filed during the period when benefits are still accruing (presumably while plaintiff is still employed) a charge will be timely even if the accrual formula was changed long ago – court required briefing on the merits of the conversion allegations.

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

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

Timeliness – General Issues (Ch. 26)

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

Ikossi-Anastasion v. Bd. of Supervisors of La. State Univ., 579 F.3d 546, 106 FEP 1815 (5th Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 957 (Jan. 25, 2010) – Statute of limitations for terminated professor began to run when she received letter from University denying her request for additional unpaid leave and requiring her to report to work, and not from time when she received University’s letter discharging her for job abandonment for not returning within the specified time – any discriminatory act was communicated in the first letter.

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

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

Lukovsky v. City & County of San Francisco, 535 F.3d 1044, 103 FEP 1673 (9th Cir.), *cert. denied*, *Zolotarev v. City & County of San Francisco*, 129 S. Ct. 1997 (2009) – Statute of limitations for purposes of failure-to-hire discrimination claim begins to run when City notified plaintiffs they would not be hired, rather than the date when they learned of City’s alleged discriminatory intent in giving preferential hiring treatment to others – statute of limitations runs from date of actual injury, not when plaintiff suspects legal wrong – no basis for equitable estoppel based on contention that City alleged it was hiring the most qualified where the alleged fraud is not above and beyond the wrongdoing upon which the claim is filed.

Hartz v. Adm’rs of Tulane Educ. Fund, 275 Fed. Appx. 281, 103 FEP 1374 (5th Cir. 2008) – Charge untimely – filed more than 300 days after professor received notice she would not receive tenure – challenging decision in grievance procedure does not toll limitations.

Levis v. City of Chicago, 528 F.3d 488, 103 FEP 705 (7th Cir. 2008), *cert. granted*, 130 S. Ct. 47 (2009) – Applicants for firefighter jobs took test and were rated well qualified, qualified, or not qualified – Mayor announced disappointment because only well qualified had a chance to be hired and blacks were disproportionately below that group – charge not filed within 300 days of Mayor’s announcement but within 300 days of first hires – untimely - if classification was racial, as opposed to well qualified/qualified, each implementation would be a new violation – but categories were not racial – plaintiffs knew they were not going to be hired more than 300 days before charge – these principles apply equally to disparate treatment and disparate impact cases – not being hired was the automatic impact of being rated qualified – contrary Ninth Circuit decision of *Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991), based on mistaken premise that plaintiff could wait until there was certainty – but the claim accrues with the first injury and the first injury was being rated qualified – doctrine of continuing violation not applicable – it allows delay in suing until a series of acts blossom into a wrongful injury – it is thus about cumulative violation rather than continuing violation – plaintiffs claim it was reasonable to wait since City claimed its hiring test had been validated by an expert – equitable tolling rejected – plaintiffs “knew enough within 300 days” (528 F.3d at 493) – “To file a suit, you need only have a prima facie case . . .” (*id.* at 494) – plaintiffs’ lawyer admitted at argument that he did not file

within 300 days because he did not think it was necessary – “That was a fatal mistake” (*id.*) – Posner decision.

Williams v. Boeing Co., 517 F.3d 1120, 102 FEP 1352 (9th Cir. 2008) - Statute of limitations on Section 1981 claim did not relate back to original complaint, but ran from second amended complaint which was the first complaint to specifically allege compensation discrimination.

Jurisprudential Bars to Action (Ch. 27)

Hankins v. NY Annual Conference of United Methodist Church, 107 FEP 776 (2d Cir. 2009) (unpublished), *amended and superseded by* 2009 WL 3497753 (2d Cir. Oct. 30, 2009) – Ministerial exception to ADEA requires dismissal of church pastor’s challenge to mandatory age 70 retirement – ministerial exception is constitutionally based and cannot be displaced by legislation.

State of Alaska v. EEOC, 564 F.3d 1062, 106 FEP 97 (9th Cir. 2009) (en banc), *cert. denied*, 2010 U.S. LEXIS 133 (Jan. 11, 2010) – Eleventh Amendment does not bar Title VII claims asserted through the EEOC against the State of Alaska by two high-level employees of the Governor’s office – Government Employee Rights Act amended Title VII to extend its protections to such employees – this validly abrogated state sovereign immunity pursuant to the Fourteenth Amendment – underlying complaints alleged pay discrimination on the basis of race and sex, sexual harassment, and retaliation for complaining about the alleged discrimination.

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

Title VII Litigation Procedure (Ch. 28)

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

Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937 (2009) – Applying the rule of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), Supreme Court held that a lawsuit against former Attorney General by individual imprisoned after September 11 attack must be dismissed

for lack of sufficient factual matter – to have facial plausibility a claim must plead factual content that allows a court to draw the reasonable inference that the defendant is liable – the principle that a court must accept a complaint’s allegations as true is inapplicable to threadbare recitals of a cause of action’s elements supported by mere conclusory statements – in determining whether a complaint states a plausible claim the reviewing court must draw on its experience and common sense and consider the context of the claim – a motion to dismiss may begin by identifying allegations that because they are mere conclusions they are not entitled to the assumption of truth – only well-pleaded factual allegations warrant an assumption of veracity – argument that *Twombly* case is limited to antitrust context rejected – *Twombly* applies to antitrust and discrimination suits alike – a complaint that is defectively pleaded does not entitle the plaintiff to discovery.

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

Allen v. Highlands Hosp. Corp., 545 F.3d 387, 104 FEP 934 (6th Cir. 2008) – Summary judgment for employer affirmed – in *dicta*, court in analyzing whether disparate impact claim could be brought under charge that merely alleged disparate treatment held that exhaustion was not jurisdictional in light of Supreme Court decision in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006) (15-employee limit not jurisdictional - when Congress does not rank a statutory limitation as jurisdictional courts should treat it as non-jurisdictional) – this means that the like or reasonably related to an EEOC charge requirement is not jurisdictional – administrative exhaustion requirement in the statute “is not jurisdictional in nature, but is instead best understood as a prudential prerequisite to filing a claim in federal court” (545 F.3d at 402) – court declines to dismiss disparate impact claim for failure to exhaust since that is not now jurisdictional (but presumably discretionary) – disparate impact claim dismissed on the merits.

Okros v. Angelo Iafrate Constr. Co., 298 Fed. Appx. 419, 21 A.D. Cas. 221 (6th Cir. 2008) (unpublished) – Fired employee presented evidence to jury that he telephoned principal employer representative shortly after discharge from a speaker phone with three witnesses standing by seeking an explanation for his discharge, whereupon the company representative stated that he fired plaintiff because of his disability (stuttering) and even called him a “stuttering prick” – defendant obtained evidence that no call from the phone that all four witnesses testified had been used had been made to the company, and the company sought a new trial based on the falsified evidence – plaintiff’s attorney had represented that he had subpoenaed AT&T in trying to get the records and was told that the records were not retained – some time after the trial the defendant decided to obtain the records which showed that no such call had been made – the trial court denied the motion on the ground that the evidence could have been discovered earlier – the court of appeal reversed – the attorney who was an officer of the court had deceived

the court – plaintiff’s attorney affirmatively represented to the jury that the records did not exist which was false, and at a minimum constituted a concealment by the attorney when one is under a duty to disclose – there can be no doubt that plaintiff’s attorney deceived the court – the attorney certainly did not subpoena the records or search for them as he represented – since plaintiff’s attorney could be found by a finder of the fact to have “committed a fraud on the court,” the district court abused its discretion in denying a new trial.

Whitman v. Mineta, 541 F.3d 929, 104 FEP 129 (9th Cir. 2008) – Plaintiff filed charge in 1999 protesting denial of promotion – did not file charge one year later for separate alleged discriminatory act – waited more than one year after second alleged discriminatory act – second discriminatory act barred as untimely.

McClain v. Lufkin Indus., Inc., 519 F.3d 264, 102 FEP 1362 (5th Cir.), *cert. denied*, 129 S. Ct. 198 (2008) – Class action judgment affirmed on promotions, reversed as to job assignments – named plaintiffs never pursued a job assignments claim before the EEOC – “Courts should not condone lawsuits that exceed the scope of EEOC exhaustion, because doing so would thwart the administrative process and peremptorily substitute litigation for conciliation.” (519 F.3d at 273) – “Failure to exhaust is not a procedural ‘gotcha’ issue. It is a mainstay of proper enforcement of Title VII remedies.” (*id.* at 272).

Gates v. Caterpillar, Inc., 513 F.3d 680, 102 FEP 609 (7th Cir. 2008) – In response to summary judgment motion in retaliation case, employee in declaration alleged for the first time that she had made a statement to her supervisor opposing gender bias – statement made for first time in declaration properly disregarded even though there was never a specific deposition question calling for the comment – “Although the affidavit statement does not necessarily conflict with [plaintiff’s] testimony from her previous deposition, the *omission* of such a significant statement during her deposition in a sex discrimination case speaks volumes.” (513 F.3d at 688) – while we have long held that a plaintiff cannot avoid summary judgment by contradicting a prior deposition, it is less obvious when the new statement does not directly contradict prior testimony – “Under the circumstances at hand here, where specific, gender-based complaints are vital to [plaintiff’s] claim and where she made no mention of the statement in her deposition, it is reasonable to exclude it.” (*id.* at n.5) – summary judgment affirmed.

Federal Employee Litigation (Ch. 31)

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

Class Actions (Ch. 32)

Dukes v. Wal-Mart Stores, Inc., ___ F.3d ___, ___ FEP ___ (9th Cir. 2010) (*en banc*) – 6-5 decision - nationwide class certification affirmed with two exceptions: (1) remand to determine whether punitive damages bar certification under (b)(2) because monetary relief will predominate and, if so, whether punitives can be certified under (b)(3); (2) individuals not working for Wal-Mart when the case was brought cannot proceed under (b)(2) and thus remand to determine whether their class can be certified under (b)(3) – great discretion with respect to class certification and “very limited” review – more deference to certification than denial of certification – purports to agree with Second Circuit in *IPO* and Third Circuit in *Hydrogen Peroxide* and *Hobider* that must resolve merits issues if pertain to Rule 23 issues – however, there is an exception in Title VII cases dealing with statistical proof because in contrast with securities class action “the plaintiff’s statistical evidence does not *overlap* with the merits, it largely *is* the merits [citations omitted] . . . [t]his means that disputes over whose statistics are more persuasive are often not disputes about whether the plaintiffs raise common issues or questions, but are really arguments going to proof of the merits” (___ F.3d at ___) – precedent involving (b)(3) cannot be applied to determining commonality under (a)(2) – *IPO* is wrong on this issue – dissent misreads footnote 15 of *Falcon* in arguing that there is a necessity for “significant proof” as a condition of company-wide class certification – in any case *Falcon* is dicta – on commonality in the Ninth Circuit this is “construed permissively” – “One significant issue common to the class may be sufficient to warrant certification” (*id.* at ___) – it would have been error for the district court to reject Wal-Mart’s arguments about commonality because they overlap with the merits but this did not occur – with respect to Bielby stereotyping testimony, Daubert inquiry not necessary – does not matter whether the stereotyping opinion evidence would later be deemed inadmissible – disagree with dissent on this but in any case Bielby met the Daubert standard – commonality can be established by statistical evidence which survives a rigorous analysis – while Wal-Mart argues for a store-by-store analysis, only question is whether plaintiffs’ statistics are sufficiently probative to create a common question – even though Second Circuit in *IPO* overruled *Caridad* and district court cited *Caridad* five times in its opinion, none of the citations were erroneous – district court did not adopt the “‘some showing’ standard that [*Caridad* had held sufficient and] the Second Circuit properly rejected” (*id.* at ___) – district court specifically analyzed whether plaintiffs’ aggregated statistics were proper “or whether Wal-Mart was correct to insist on a store-level evaluation” (*id.* at ___) – in any event Wal-Mart’s expert separately examined specialty departments, grocery departments, and the rest of the store departments – “We are *not* to re-examine the relative strength or persuasiveness of the commonality evidence ourselves.” (*id.* at ___) – Wal-Mart’s survey was rejected as not based on scientifically valid reasoning or methodology under Daubert – decentralized, subjective decision-making can contribute to a common question of fact – “Plaintiffs’ factual evidence, expert opinions, statistical evidence, and anecdotal evidence provide sufficient support *to raise the common question* whether Wal-Mart’s female employees nationwide were subjected to a *single set of corporate policies* (not merely a number of independent discriminatory acts) . . .” (*id.* at ___) – typicality is also judged by permissive standards – typicality is met even for store manager positions even

though only one plaintiff held a low-level salaried position – no conflict even though female store managers made pay decisions that are being challenged and are also in the class – on promotions, district court concluded that lost pay for promotions would be limited to the subset of the class for whom objective applicant flow data exists – plaintiffs’ object to this limitation but it is affirmed – with respect to certification under (b)(2) Wal-Mart claims monetary relief predominates – Ninth Circuit joined the Second Circuit in *Robinson* – several other circuits use the incidental damages standard of *Allison* – *Molski* case now overruled - it focused on plaintiffs’ subjective intent – *Allison* requirement that monetary relief be no more than incidental is in direct conflict with the text of the Advisory Committee’s note – predominant is not synonymous with more than incidental – new test for (b)(2) certification – district court should consider factors such as whether the monetary relief determines key procedures, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, whether its size and nature as measured by recovery per class member raise particular due process and manageability concerns will be determinative – under this standard the district court’s inclusion of back pay under (b)(2) is not an abuse of discretion – district court did abuse discretion by including punitive damages without determining whether this would make monetary relief predominate – fact that billions of dollars of back pay is sought does not mean monetary relief predominates – some circuits hold that back pay is monetary relief for determining predominance – we need not decide but under any standard monetary relief does not predominate – back pay can be calculated on a class-wide basis because this is a pattern-or-practice case requiring proof of discrimination at the group level – on remand on punitives district court must determine whether certification under (b)(2) would cause monetary relief to predominate – factors for district court include fact that punitive damage claims will mean that the key issue in the case, liability, will be decided by a jury rather than a judge – punitives raise new and substantial factual issues of malice and reckless indifference – size of the potential punitive damage award could be significant since Title VII allows up to \$300,000 per employee which raises due process and manageability concerns - first three favor finding monetary relief predominates – unlike other cases “this case does not require individualized punitive damage determinations” (*id.* at ___) – this factor counsels against a finding that punitive damage is predominant – if punitives cannot be certified under (b)(2) district court should consider (b)(3) hybrid certification, and if that is appropriate how it would be managed to comply with Seventh Amendment principles – on manageability, the trial court’s trial plan envisions a Stage I determining whether there was a pattern or practice of discrimination and a Stage II where back pay would be calculated by formula – “[t]he Court would examine Wal-Mart’s employment records to determine which class members were victims of this form of discrimination (and how much in back pay each is owed) to determine a . . . ‘lump sum’ A separate procedure would then be used to distribute these lump sums to those class members entitled to share in them – a stage in which Wal-Mart would no longer have an interest.” (*id.* at ___ n.49) – Wal-Mart and business-related amici claim this violates due process, Section 706(g)(2) of Title VII

[Important Note: Majority never discusses 706(g)(2) other than to quote it.], the Rules Enabling Act, and the Supreme Court’s *Teamsters* decision – dissent argues that Wal-Mart has statutory right to prove its actions against individuals were not

discriminatory – this ignores that pattern or practice has to be proven on a group basis – uneconomical and inefficient to do so in individual actions – since *Teamsters* and *Domingo* we have affirmatively held that the district court may award class-wide relief at the damages phase without individualized hearing – however, “[a]t this stage we express no opinion regarding Wal-Mart’s objections to the district court’s tentative trial plan . . . but simply note . . . there are a range of possibilities . . .” (*id.* at ___) – *Hilao* presents one example where 137 claims were randomly selected, reviewed by an expert, resolved at trial, and extrapolated over the entire class – although we labeled this procedure “unorthodox” we rejected due process challenges and see no reason why a similar procedure could not be used here – “Given the tentative nature of the district court’s trial plan, we decline to address Wal-Mart’s due process and manageability challenges to that plan. We note, however, that the district court has the discretion to modify or decertify the class should it become unmanageable.” (*id.* at ___).

Dissent: “Without evidence of a company-wide discriminatory policy implemented by managers through their discretionary decisions, or other evidence of a discriminatory company-wide practice, there is nothing to bind these purported 1.5 million claims together in a single action.” (citation omitted) (*id.* at ___) – “Under Title VII, Wal-Mart has the right to raise affirmative defenses as to each class member’s claim. . . . On its face, a class action of this sort makes no sense.” (*id.* at ___) – “This case features the unusual distinction of placing victims and their alleged victimizers [female store managers] on the same side of the counsel table.” (*id.* at ___ n.4) – district court abused its discretion in two ways: failure to perform a rigorous analysis of the named plaintiffs’ representative status under 23(a), and, second, it ignored Wal-Mart’s statutory right to raise defenses to liability under 706(g) and the Rules Enabling Act – *Falcon* explains that a named plaintiff’s own discriminatory experience does not allow an inference that it’s typical – the named plaintiff must bridge the “wide gap” between her own treatment and the existence of a class – female employed in California may have a valid claim that her manager discriminated – this should not entitle her to bring the discrimination claims of female employees in a store in Wyoming – absent a testing case, under *Falcon* there is only one way to bridge this gap: you can bring a company-wide action if the plaintiff proves a general policy of discrimination that was implemented through entirely subjective decision-making processes – the majority claims that *Falcon*’s requirement of “significant proof” of this general policy of discrimination was a “hypothetical and clear dicta” – but it’s guidance from the Supreme Court – *Falcon*’s determination that there must be “significant proof” to extrapolate is based on the general principle that a plaintiff’s claim must “fairly encompass” those of the class – plaintiffs’ motion was based on three things: (1) 120 anecdotes (one for every 12,500 class members); (2) statistical evidence; and (3) expert testimony – while undisputed that Wal-Mart maintains uniform company-wide policies, none other than allowing subjectivity were alleged to be discriminatory – “The evidence does not come close to meeting the *Falcon* requirements for demonstrating commonality and typicality.” (*id.* at ___) – The class “claim[ed] discrimination in different forms, at the hands of different people, in different stores, in different parts of the country, at different times, and under a constellation of facts unique to each individual.” (*id.* at ___) – one affidavit for every 12,500 class members does not raise an inference of a general policy of discrimination –

“The plaintiffs’ statistical evidence is no better.” (*id.* at ___) – Wal-Mart objected to aggregated data, but the trial court refused to resolve the issue, “[r]ejecting what it characterized as Wal-Mart’s effort ‘to engage the Court in a merits evaluation of the expert opinions,’ the district court stated it would delve[] into the substance of the expert testimony only to the extent necessary to determine if it is sufficiently probative of an inference of discrimination to create a common question. . . .” (*id.* at ___) – “The district court’s superficial examination of Drogin’s statistics constituted legal error. The plaintiffs’ class proposal hinged on its proof that Wal-Mart had a general policy of discrimination; absent convincing proof on that point, the plaintiffs could not bridge the gap between their discrimination claims and the purported claims of the class.” (*id.*) – district court put burden on Wal-Mart to prove that plaintiffs’ statistics were fatally flawed – majority affirms this error by simply labeling the district court’s analysis as rigorous without performing any analysis – “Information 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 discretion[] As Wal-Mart’s statistical expert . . . explained, the statistical disparities at the regional level could be due to decisions made at only a small percentage of Wal-Mart stores. Indeed, Haworth [the defense expert] concluded that, when data is considered at the store level, over 90% of Wal-Mart stores showed no statistical difference in the hourly pay rates between men and women associates with similar work-related characteristics.” (*id.* at ___) – a plaintiffs’ argument that aggregated statistics make sense because the subjective decision-making takes place within parameters and guidelines that are uniform “makes little sense” – it is contrary to the thrust of plaintiffs’ legal theory that the decisions of individual managers were without guidelines and contrary to the district court’s own determination that pay and promotion decisions are largely subjective and made within a substantial range of discretion by store managers – with respect to the third basis for finding commonality/typicality, Bielby’s stereotyping opinion, the district court committed legal error by failing to test the reliability of the expert opinion under Daubert – *IPO* and *Hydrogen Peroxide* held that Daubert is equally applicable in the class certification context – district court abused its discretion with respect to 23(a) – district court made two crucial errors under (b)(2) – “[T]he district court erroneously concluded that it had no obligation to allow Wal-Mart to raise the statutory defenses provided by Title VII. This was an error: A court must ensure that its certification of a class does not affect the substantive rights of either party.” [citation to Rules Enabling Act omitted] (*id.* at ___) – “This mistake led to a second legal error: Because the district court turned a blind eye to Wal-Mart’s right to individual hearings, the district court failed to realize that the class did not fit the historical model of Rule 23(b)(2)” (*id.*) – under 706(g)(2)(A), no back pay can be ordered to any non-discriminatee – under 706(g)(2)(B)(ii), even if the employee proves discriminatory motivation in part a court cannot award back pay if the employer can prove it would have taken the same action even in the absence of the impermissible motivating factor – *Teamsters* mandates individual back pay hearings – this is true for punitive damages as well as back pay – if pattern or practice is found, “[t]he employer then has a statutory right, recognized by the Supreme Court, to prove that its actions against individual employees were not discriminatory. The Rules Enabling Act prohibits a district court from depriving an

employer of this right simply to facilitate the certification of a class action.” (*id.* at ___) – district court concluded that a *Teamsters* hearing would be impossible and this should have compelled the conclusion that there should be no certification – dissent reviews history of (b)(2) and Advisory Committee notes, and notes that the civil rights cases for which it was intended were cases where only injunctive relief was sought, such as access to hotels and restaurants – Supreme Court indicated that “adventuresome class actions” should be certified if at all under (b)(3) – Advisory Committee did not intend to craft (b)(3) opt-outs onto (b)(2) – monetary relief clearly predominates – majority dismisses Wal-Mart’s arguments as mere objections to the trial plan but then the majority expresses no opinion on the trial plan but concludes there are many ways to do it – majority in a single sentence says punitive damages do not require individual hearings – this is unprecedented and conflicts with Title VII’s test and the Supreme Court’s reasoning in *BMW* about punitive damages – it’s also factually wrong since plaintiffs do not allege that Wal-Mart’s alleged policy affected all members in the same way – “Never before has such a low bar been set for certifying such a gargantuan class. The majority’s ruling provides scant limits to the types of classes that can be certified. Put simply, the door is now open to Title VII lawsuits targeting national and international companies, regardless of size and diversity, based on nothing more than general and conclusory allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions.” (*id.* at ___)

Chief Judge Kozinski, joining in dissent: “[T]he half-million members of the majority’s approved class held a multitude of jobs, at different levels of Wal-Mart’s hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed depending on each class member’s job, location, and period of employment. Some thrived, while others did poorly. They have little in common but their sex and this lawsuit.” (*id.* at ___).

Narouž v. Charter Comm’ns., LLC, 591 F.3d 1261 (9th Cir. 2010) – Class settlement agreed upon – named plaintiff to receive \$60,000 for individual claims and eligible to receive an additional amount if the district court approved the class settlement – District Court Judge Real refused to certify the case as a class action for settlement purposes or to approve the settlement – issue was whether individual plaintiff could appeal the adverse certification order – “We hold that when a class representative voluntarily settles his or her individual claims, but specifically retains a personal stake . . ., he or she retains jurisdiction to appeal the denial of class certification.” (591 F.3d at 1264) – “In order to retain such a ‘personal stake,’ a class representative cannot release any and all interest he or she may have had in class representation through a private settlement agreement.” (*id.*) – here, the named plaintiff was to receive additional consideration if the class settlement was approved – denial of class certification not reviewed under abuse of discretion standard because Judge Real failed to make sufficient findings – case remanded for reconsideration of approval of class settlement – “Under the circumstances of this case, it is appropriate that the case be reassigned to a different district judge on remand.” (*id.* at 1267) – concurring judge noted that “[O]nly an explicit waiver of the right to appeal would deny [plaintiff] the opportunity to appeal

the adverse judgment by the district court.” (*id.* at 1268) – Judge Rymer in dissent would hold that a class representative who dismisses all substantive claims cannot appeal the denial of class certification unless the settlement papers explicitly carve out a live controversy and personal stake.

Hobider v. United Parcel Service, Inc., 574 F.3d 169, 2009 WL 2183267, 22 A.D. Cas. 133 (3d Cir. July 23, 2009) – This highly awaited ADA nationwide class certification case had former Supreme Court Justice Sandra Day O’Connor sitting by designation on the panel, and amicus briefs from a significant number of employer and plaintiff groups – it was authored by Chief Judge Scirica, who had authored the *In Re Hydrogen Peroxide* case – plaintiffs obtained class certification based on their allegation that UPS had a “100% healed” policy – class certification was reversed because no one could be victimized by the policy who is not a qualified person with a disability, so individual issues predominated – the court indicated that it was analyzing the issue under Title VII principles and *Teamsters* pattern or practice jurisprudence – “And that the *Teamsters* framework contemplates a second stage of proceedings where questions of individual relief may be addressed, does not mean that all individualized inquiries with respect to a given class can be delayed until that stage.” (574 F.3d at 184) – “[I]n light of the substantive requirements of the ADA, we find [plaintiffs’] claims cannot be adjudicated within the parameters of Rule 23 such that a determination of class-wide liability and relief can be reached.” (*id.* at 185) – *Teamsters* framework cannot solve necessity of resolving individual issues at the liability stage – separately, case is not appropriate for certification under 23(b)(2) because of monetary relief – “[O]ur sister circuits are split on that question, with some adopting the ‘incidental damages’ standard . . . in *Allison* . . . and others opting for a more discretionary, ‘ad hoc balancing’ approach such as that used by the Court of Appeals for the Second Circuit in *Robinson*.” (*id.* at 198) – trial court found that plaintiffs’ claims for compensatory and punitive damages could not be certified under (b)(2), but that back pay could – “[P]laintiffs’ requested compensatory and punitive damages would be ineligible for class treatment under Rule 23(b)(2), regardless of whether the ‘incidental damages’ or the ‘ad hoc balancing’ approach is applied.” (*id.* at 200) – UPS says this necessity to sever alone precludes certification under (b)(2) – need not resolve that question – but conditional certification of plaintiffs’ request for back pay was improper – a trial court must make a definitive determination that the requirements of Rule 23 have been met – a trial court cannot rely on later developments to determine whether certification is appropriate – “[B]efore moving forward with certification, it was necessary for the court to determine whether plaintiffs’ back-pay request actually conforms with the requirements of Rule 23, including Rule 23(b)(2)’s monetary-predominant standard. And, were the court to find such relief could go forward under Rule 23(b)(2), it would then need to address how that relief would be managed, specifying, for example, the methodology by which calculations and awards of relief would be made with respect to individual class members.” (*id.* at 202) – advisory committee’s 2003 note to Rule 23 introduces the concept of a “trial plan” which as we said in *Hydrogen Peroxide* focuses attention on a rigorous evaluation of a likely shape of a trial – “Such rigorous analysis would be appropriate were the court to use either the ‘incidental damages’ or ‘ad hoc balancing’ standard to evaluate plaintiffs’ back-pay request, as both stress that only monetary relief sufficiently manageable on a

class-wide basis may be certified under Rule 23(b)(2).” (*id.*) – “The court’s deferral of this analysis post-class certification was an abuse of discretion.” (*id.*)

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

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

Whitaker v. 3M Co., 106 FEP 215, 2009 WL 1118951 (Minn. Ct. App. Apr. 28, 2009) – Age discrimination Rule 23-type class action – class certification reversed and remanded – lawsuit alleged pattern or practice of discrimination in performance appraisals, training, promotions, compensation and terminations under both intentional discrimination and disparate impact theories – trial court abused discretion in failing to require proof of certification requirements by preponderance of evidence – it considered employee’s statistical analysis without addressing employer’s objections or alternative analyses – it failed to resolve factual disputes, including disputes among expert witnesses – reliance on Second Circuit decision of *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006), for proposition that must resolve disputes overlapping the merits if relevant to class certification – further reliance on *In Re: Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 323 (3d Cir. 2008) (“[e]xpert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis” and “[w]eighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands”) – court cited Seventh Circuit in *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) - “[F]ailing to resolve expert disputes at the time of a certification application amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert.” 2009 WL 1118951 at *5 (internal quotation marks omitted).

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

Gutierrez v. Johnson & Johnson, 523 F.3d 187, 103 FEP 1 (3d Cir. 2008) – Ten-day limit for filing 23(f) request for leave to appeal denial of class certification is mandatory – tolling can occur only if a proper petition for reconsideration is filed within the 10 days – here no petition for reconsideration was filed within the 10 days.

McClain v. Lufkin Indus., Inc., 519 F.3d 264, 102 FEP 1362 (5th Cir.), *cert. denied*, 129 S. Ct. 198 (2008) – Disparate impact class certified, but class certification properly denied for disparate treatment claim – (b)(2) certification denied because individual claims for monetary relief would predominate – class representatives would be inadequate if they dropped demand for compensatory and punitive damages – “[I]f the price of a Rule 23(b)(2) disparate treatment class both limits individual opt outs and sacrifices class members’ rights to avail themselves of significant legal remedies, it is too high a price to impose.” (519 F.3d at 283)

Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 102 FEP 865 (11th Cir. 2008) – Private “pattern or practice” claims can only be brought as class actions – African-American employees without seeking class certification alleged that employer engaged in a pattern or practice of race discrimination – plaintiffs lack standing to pursue pattern or practice claims for declaratory and injunctive relief that would apply to similarly situated black employees as well as to themselves.

Bates v. United Parcel Serv., Inc., 511 F.3d 974, 20 A.D. Cas. 1 (9th Cir. 2007) (en banc) – Named plaintiff who after certification accepted position that did not allow sought-after driving relief had Article III standing at the time of certification – even if his injunctive relief claim became moot later, another member of the class has standing to seek the injunctive relief, so the entire federal class has standing.

In re Initial Pub. Offering Sec. Litig., 471 F.3d 24 (2d Cir. 2006), *decision clarified on denial of reh’g*, 483 F.3d 70 (2d Cir. 2007) – “(1) that a district judge may not certify a class without making a ruling that each Rule 23 requirement is met and that a lesser standard such as ‘some showing’ for satisfying each requirement will not suffice, (2) that all of the evidence must be assessed as with any other threshold issue, (3) that the fact that a Rule 23 requirement might overlap with an issue on the merits does not avoid the court’s obligation to make a ruling as to whether the requirement is met, although such a circumstance might appropriately limit the scope of the court’s inquiry at the class certification stage” (471 F.3d at 27) – securities litigation – class certification vacated and remanded – court below rejected the preponderance of the evidence standard where elements of class certification were enmeshed with the merits, holding that “some showing” would suffice – Supreme Court in *Falcon* required a “rigorous analysis” and noted that this analysis is generally “enmeshed” with the merits – *Eisen* was earlier, and has been misunderstood – careful analysis of *Eisen* makes clear that “there is no basis for thinking that a specific Rule 23 requirement need not be fully established just because it concerns . . . the merits” (*id.* at 33) – the oft-quoted statement from *Eisen* was made in a case where the district judge’s merits inquiry had nothing to do with the requirements for class certification – it is unfortunate that the *Eisen* statement that “a court considering certification must not consider the merits” has been taken out of context “and applied it to consideration of the Rule 23 threshold requirements” (*id.* at 34-35) – in *Caridad* it was implied that “some showing” would be sufficient for class certification, and *Caridad* was influenced by *Eisen* – “Thus, under the influence of *Eisen*, *Caridad* condemned ‘statistical dueling’ between experts and ruled that the report of the plaintiffs’ expert plus anecdotal evidence ‘satisfies the Class

Plaintiffs’ burden of demonstrating commonality for purposes of class certification,’ without requiring the district court to have made a clear determination of commonality in light of all the evidence” (*id.* at 35) (citations omitted) – “*Caridad*, by the imprecision of its language, left unclear whether the merits dispute between the experts was not to be resolved at the class certification stage” (*id.*) – author of current opinion was author of *Caridad – Visa Check* case followed *Caridad* and held that in examining expert opinions in support of class certification the issue was whether it was “not so flawed that it would be inadmissible as a matter of law.” (*id.* at 36) – the case law outside the Second Circuit generally supports an obligation of the district court to determine all the requirements of Rule 23 and not accept a weak “some showing” standard – “It would seem to be beyond dispute that a district court may not grant class certification without making a determination that all of the Rule 23 requirements are met.” (*id.* at 40) – factual disputes must be resolved when they affect Rule 23 requirements – properly understood *Eisen* precludes “consideration of the merits only when a merits issue is unrelated to a Rule 23 requirement” (*id.* at 41) – “[T]here is no reason to lessen a district court’s obligation to make a determination that every Rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue.” (*id.*) – “To avoid the risk that a Rule 23 hearing will extend into a protracted mini-trial” (*id.*) a district judge must be granted considerable discretion “to limit both discovery and the extent of the hearing on Rule 23 requirements” (*id.*) – we hold that a determination that a Rule 23 requirement has been met “can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met” (*id.*) – this may require resolution of merits issues that are identical with Rule 23 requirements – however, a district judge should not assess any aspect of the merits unrelated to a Rule 23 issue – we “disavow . . . that an expert’s testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed. A district judge is to assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit.” (*id.* at 42) – courts cannot at class certification refuse to weigh conflicting evidence – applying these standards to the case at bar, class certification must be denied for numerous reasons, including the necessity for individualized liability determinations.

In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008) – In a non-employment case, the Third Circuit adopts the class certification standards set forth by the Second Circuit in *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006) – district court must conduct a rigorous analysis of the evidence submitted in support of and in opposition to class certification – it must make findings that each criterion of Rule 23 is met – it must resolve legal and factual disputes relevant to the Rule 23 inquiry, even if the issues overlap the merits – the duty to resolve factual disputes extends to expert evidence and argument necessary to address Rule 23 factors – district court view that at class certification it should not make judgments about whether plaintiffs have adduced enough evidence or whether their evidence or defendant’s is

more credible and that district court cannot “weigh the relative credibility of the parties’ experts” rejected as a matter of law – plaintiffs cannot satisfy Rule 23 by making a “threshold showing,” (552 F.3d at 321-22) – “[a]n overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met,” (*id.* at 316) – *Eisen* is “best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement,” (*id.* at 317) – “A contested requirement is not forfeited in favor of the party seeking [class] certification merely because it is similar or even identical to one normally decided by a trier of fact,” (*id.* at 318) – “[A] district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the [Rule 23] requirements.” (*id.* at 320) - “opinion testimony should not be uncritically accepted as establishing a Rule 23 requirement merely because the court holds the testimony should not be excluded, under Daubert” (*id.* at 323) – refusal to resolve a “battle of the experts” at the class certification stage is reversible error. [Note: This opinion was authored by Chief Judge Scirica, the Chairman of the Executive Committee of the Judicial Conference. It is the latest of a line of cases including, in addition to *Initial Public Offering*, *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001), and *In re: New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6 (1st Cir. 2008). It is likely that under the new standards evidentiary hearings with live testimony will become much more common at the class certification stage.]

Discovery (Ch. 33)

Koch v. Cox, 489 F.3d 384, 100 FEP 1402 (D.C. Cir. 2007) – Psychotherapist privilege not waived when plaintiff withdrew claim for emotional distress damages.

Statistical and Other Expert Proof (Ch. 34)

Shollenbarger v. Planes Moving & Storage, 297 Fed. Appx. 483, 104 FEP 1169 (6th Cir. 2008) (unpublished) – RIF case – directed verdict for employer affirmed – employer confined RIF to four departments, which were 89% female, and did not extend RIF to three other departments, which were only 29% female – 12 women and only one man laid off – this does not establish disparate impact – employer had legitimate reasons for confining RIF to specified departments – with a pool that is 89% female, 12 females and one man is within the range of statistical probability.

Sanders v. Southwestern Bell Tel., L.P., 544 F.3d 1101, 104 FEP 833 (10th Cir. 2008), *cert. denied sub nom.*, *Coffey v. Southwestern Bell Tel., L.P.*, 130 S. Ct. 69 (Oct. 5, 2009) – RIF of first-level managers – managers were grouped into bands based on most recent performance evaluations – those in the lowest bands were then separately rated at a meeting of area managers, the next level of supervision, and the lowest ranked were chosen for layoff – 10 of 19 women (52%) and only 11 of 83 men (13%) were laid off – statistics in isolation are generally not probative – statistical evidence that fails to take into account nondiscriminatory explanations does not infer pretext – “[s]tatistical

evidence that does not adjust for the various performance evaluations and departmental rankings of the employees included in the statistical pool is insufficient to establish pretext” (544 F.3d at 1110) (citation and internal quotation marks omitted; alteration in original) – “[T]he plaintiffs’ statistical evidence does not take into consideration nondiscriminatory explanations for the disparity – for example, differences in various individuals’ job performance, experience and training. Because the statistics fail to account for these variables, they do not constitute evidence of pretext.” (*id.*) – summary judgment affirmed on sex discrimination claims – reversed on age discrimination claim because of direct evidence of age discrimination with respect to one plaintiff.

McClain v. Lufkin Indus., Inc., 519 F.3d 264, 102 FEP 1362 (5th Cir.), *cert. denied*, 129 S. Ct. 198 (2008) – Excess subjectivity adverse impact promotion liability finding affirmed – while actual applicant flow data is superior, it was incomplete – plaintiff’s regression analysis did not take into account matters such as education, but the Supreme Court has taught that a regression analysis need not include all variables – formula back pay approved – “Whenever possible, back pay should be awarded individually and tailored to the actual victims of discrimination.” (519 F.3d at 281) – the “inherent uncertainty of the individual claims” indicates an individualized approach will not work – “[c]lass members outnumber promotion vacancies” – an individualized process would not work – on remand the court will be dealing solely with damages attributable to 127 lost promotions and it can compute the total additional wages for each and divide the value among class members – “What the court may not do is return to Dr. Drogin’s lost wages calculations” (*id.* at 282) – he assumed each class member was a victim of discrimination, when each “had at best a possibility of progressing up the ladder.” (*id.*)

Baylie v. Fed. Reserve Bank, 476 F.3d 522, 99 FEP 1310 (7th Cir. 2007) – Panel composed of Easterbrook, Posner and Wood – extensive discussion of statistics in employment litigation – “In individual cases, studies of probabilities are less helpful [than in class actions].” (476 F.3d at 524) – statistics indicating that white workers in a bank are slightly more likely than black workers to be promoted is insufficient in an individual case to establish a prima facie case – giving statistical proof all favorable inferences, race would affect one promotion every 20 years – all denials except those in the last 300 days fall outside of Title VII statute of limitations – thus the analysis must proceed vacancy-by-vacancy in an individual case – summary judgment affirmed.

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

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

discrimination – *Jett* made it clear that this requirement, for Section 1983 actions, is in any event applicable if Section 1981 is available.

Fitzgerald v. Barnstable Sch. Comm., 129 S. Ct. 788, 105 FEP 358 (2009) – Title IX of the Education Amendments of 1972 does not preclude § 1983 equal protection claims of gender discrimination in schools – parents of daughter sexually harassed by fellow student can sue under both statutes – case arguably implies that Seventh Circuit decision in *Waid v. Merrill Area Public School*, 91 F.3d 857, 71 FEP 577 (7th Cir. 1996) (Title IX precluded female applicant who was rejected for teacher position from asserting § 1983 claim) is erroneous.

Milligan-Hitt v. Bd. of Trs. of Sheridan County Sch. Dist. No. 2, 523 F.3d 1219, 103 FEP 185 (10th Cir. 2008) – Section 1983 suit for alleged discrimination by a school superintendent based on sexual orientation – school district’s liability reversed because superintendent did not have final authority – final policy-making authority rests with the Board of Trustees – judgment against supervisor reversed because sexual orientation was not at the time in question a well-established constitutionally protected category, and the superintendent was thus shielded by qualified immunity.

Abdullahi v. Prada USA Corp., 520 F.3d 710, 102 FEP 1537 (7th Cir. 2008) – Iranian can state claim of “race” under Section 1981 even though Iran is a country and not a race – the term race was used in a loose sense in the statute – it was routine in 1866 to refer to persons from a particular country as a race – Congress in passing Section 1981 intended to protect persons subjected to bias solely because of their ancestry or ethnic characteristics – distinctive physiognomy is not essential – Posner opinion.

Reverse Discrimination and Affirmative Action (Ch. 37)

Ricci v. DeStefano, ___ U.S. ___, 129 S. Ct. 2658, 106 FEP 929 (2009) – City of New Haven had contract with firefighters union to make promotions on the basis of a written examination (weighted 60%) and oral evaluations (weighted 40%) – City spent \$100,000 with professional test designer to develop both portions – written test was based on specified manuals and source materials and constituted 100 questions, multiple choice – oral examinations graded by panels, each composed of three out-of-state firefighters - each panel consisted of one white, one black, and one Hispanic – promotions to lieutenant and captain at issue – many firefighters spent large amounts of time and in some cases money preparing for the tests – if test followed no black would have been promoted – significant disparate impact which would have constituted a prima facie case of disparate impact discrimination – Civil Service Board held five hearings, and received conflicting advice – political pressure involved – Civil Service Commission by 2-2 vote did not certify the test results – white and Hispanic firefighters sued City – City defended on the ground that it had a right not to expose itself to disparate impact litigation – if disparate impact litigation, since prima facie case existed, City would have to prove tests job related and consistent with business necessity – if successful, plaintiff could still succeed by showing that City refused to adopt an available alternative employment practice that has less impact and would serve the

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

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

Monetary Relief (Ch. 40)

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

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

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

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

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

Wallace v. DTG Operations, Inc., 563 F.3d 357, 105 FEP 1761 (8th Cir. 2009) – Employee recovered \$30,000 in lost wages and emotional distress, and punitive damages of \$500,000 – punitives reduced to \$120,000 – anything above a 4-1 ratio would raise constitutional questions.

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

Abner v. Kan. City S. R.R. Co., 513 F.3d 154, 102 FEP 616 (5th Cir. 2008) – Punitive damage awards of \$125,000 to each plaintiff upheld despite no compensatory award or back pay – statutory caps on punitive damage awards under Title VII undermine

concerns that there must be a relation to compensatory damages – it is contrary to public policy to deny punitive damages to employees who did not suffer loss of back pay and whose harm is not quantifiable in terms of compensatory damages.

Murphy v. IRS, 493 F.3d 170 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 2050 (2008) – On reconsideration, taxability of damages for emotional distress and reputation upheld.

Fogg v. Gonzales, 492 F.3d 447, 100 FEP 1601 (D.C. Cir. 2007) – Employer could not assert mixed-motive partial defense to avoid back pay after both sides recognized that the case was tried truly on a single-motive theory – government’s post-trial motion for JNOV treated case as one involving a single motive – district court order to “gross up” employee’s back pay award to offset adverse tax consequences of lump-sum award reversed – “make-whole” does not support such relief. [Trial practice suggestion: employer should argue in the alternative.]

Attorney’s Fees (Ch. 41)

Perdue v. Kenny A., ___ U.S. ___, ___ S. Ct. ___, 2010 WL 1558980 (Apr. 21, 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” (2010 WL 1558980, at *6); (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.

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

McCown v. City of Fontana, 565 F.3d 1097, 2009 WL 1098893 (9th Cir. 2009) – Excessive force case against police department – settlement of \$20,000 – fees of \$300,000 requested and \$200,000 awarded – reversed and remanded for reduction in light of limited success – claims thrown out were related but success limited in light of what was sought and settlement demanded – Supreme Court’s *Hensley v. Eckerhart* (461 U.S. 424 (1983)) decision requires answering the question “[D]id the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?” (565 F.3d at 1103-04) – “[W]e hold that attorney’s fees awarded . . . must be adjusted downward where the plaintiff has obtained limited success . . . and the result does not confer a meaningful public benefit.” (*id.* at *5) – as *Hensley* stated, “[a] reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.” (*id.* at 1103, quoting 461 U.S. at 440); alteration in original – “A comparison of damages awarded to damages sought is required” (*id.* at 1104) – the Supreme Court in *Farrar v. Hobby* (506 U.S. 103, 114 (1992)) made it clear that “a district court should give primary consideration to the amount of damages awarded as compared to the amount sought” (*id.*) (internal quotation marks omitted) – the court in *McGinnis v. Ky. Fried Chidken* (51 F.3d 805, 808, 810 (9th Cir. 1994)) “noted that [t]he district court must reduce the attorney’s fee award so that it is commensurate with the extent of the plaintiff’s success” (*id.*) (internal quotation marks omitted; alteration in original) – on remand the trial court must “take into account [plaintiff’s] limited success when determining a reasonable award” (*id.* at 1105).

Sabyers v. Prugh, Holliday & Karatinos, P.L., 560 F.3d 1241, 14 Wage & Hour Cas. 2d 1000 (11th Cir. 2009) – Paralegal left law firm, retained lawyer, and sued for overtime, alleging she was nonexempt – prior to suit there was no claim and no contact with the defendant – defendant served discovery asking for total number of hours worked and plaintiff “objected to those requests and repeated that she worked in excess of 40 hours per workweek and wanted payment for it.” (560 F.3d at 1243) – in settlement discussions plaintiff’s lowest demand was \$25,000 – defendant served a Rule 68 offer for \$3,500 plus attorney’s fees and costs which was accepted – court asked plaintiff’s lawyer why there had been no pre-suit contact with defendant and explanation was that his client had so instructed him to suit – plaintiff sought \$13,800 in attorney’s fees plus costs – all fees and costs denied – district court wrote: “there are some cases in which a reasonable fee is no fee” (*id.* at 1244) - ruling affirmed – district court has inherent powers to supervise the conduct of lawyers – “Defendants are lawyers and their law

firm. And the lawyer for Plaintiff made absolutely no effort – no phone call; no email; no letter – to inform them of Plaintiff’s impending claim much less to resolve this dispute before filing suit.” (*id.* at 1245) – “[T]his conscious disregard for lawyer-to-lawyer collegiality and civility caused (among other things) the judiciary to waste significant time and resources on unnecessary litigation and stood in stark contrast to the behavior expected of an officer of the court.” (*id.*) – “Given the district court’s power of oversight for the bar, we cannot say that this decision was outside of the bounds of the district court’s discretion.” (*id.* at 1246) – “We strongly caution against inferring too much from our decision today. These kinds of decisions are fact-intensive. We put aside cases in which lawyers are not parties.” (*id.*)

Kenny A. ex. rel. Winn v. Perdue, 532 F.3d 1209 (11th Cir. 2008), *cert. granted*, 129 S. Ct. 1907 (Apr. 6, 2009) – Supreme Court grants certiorari to review attorney’s fee award under Civil Rights Attorney’s Fees Awards Act – standards are the same as for discrimination cases – issue is whether attorney’s fee award can include an enhancement based on superior representation and exceptional results - \$10.5 million attorney’s fee award included a \$4.5 million enhancement in a class action brought on behalf of foster children – lodestar after reductions for excessive hours was approximately \$6 million, and court added a 75% enhancement – the Eleventh Circuit affirmed.

Garner v. Cuyaboga County Juvenile Court, 554 F.3d 624, 105 FEP 507 (6th Cir. 2009) – Federal district court did not err in finding that claims of black employees were frivolous, and the employees and their attorney should be liable for attorneys’ fees – it did err in making each employee, who had a separate claim, jointly and severally liable for the totality of the attorneys’ fees – it also erred in not evaluating ability to pay with respect to the individual employees – attorney asserted that she alone should be held responsible for the attorneys’ fees – appeals court rejected this argument, saying attorney should be jointly liable with clients, but that the amount of her liability, imposed as a sanction, should also be dependent upon remand on the degree of her responsibility and her ability to pay.

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

Alternative Dispute Resolution - Arbitration (Ch. 42)

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., ___ U.S. ___, 2010 WL 1655826 (Apr. 27, 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 an agreement to arbitrate,” (2010 WL 1655826, at *13) – 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.*) – 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).

Rent-A-Center West, Inc. v. Jackson, ___ U.S. ___, 130 S. Ct. 1133 (Jan. 15, 2010) – Certiorari granted to review – 2-1 decision of Ninth Circuit that a court, not an arbitrator, decides whether the arbitration agreement signed as a condition of employment is unconscionable under state contract law.

14 Penn Plaza LLC v. Pyett, ___ U.S. ___, 129 S. Ct. 1456, 105 FEP 1441 (2009) – Union contract provided that arbitration clause covered statutory discrimination claims – this is a mandatory subject of bargaining under the National Labor Relations Act – a decision to arbitrate Title VII and ADEA claims cannot be equated to a decision to forgo substantive rights against employment discrimination – those rights are enforceable in arbitration – the ADEA itself does not remove age discrimination claims from the National Labor Relations Act’s broad sweep – *Gardner-Denver* distinguished but not overruled – the collective bargaining agreement in *Gardner-Denver* did not contain an express commitment to arbitrate statutory claims – *Gardner-Denver*’s highly critical view of using arbitration to vindicate statutory rights is based on now-outmoded judicial hostility to arbitration – 5-4 decision – “Nothing in the law suggests a distinction between the status of an arbitration agreement signed by an individual employee and those agreed to by a union representative.” (129 S. Ct. at 1465) – citing the *Employment Discrimination Law* text, the Supreme Court noted that a union is subject to liability under the ADEA if it discriminates against its members on the basis of age either in negotiations or by acquiescing in employer discrimination.

Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396 (2008) – Grounds specified in Federal Arbitration Act for vacating or modifying an arbitration award are exclusive – they cannot be expanded by agreement of the parties.

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

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

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

Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 105 FEP 1464 (3d Cir. 2009) – Shareholder in law firm need not arbitrate discrimination claims under mandatory arbitration provision in law firm’s bylaws – Pennsylvania law requires explicit agreement to arbitrate – shareholder claimed she never saw the bylaws.

Cox v. Ocean View Hotel Corp., 533 F.3d 1114, 103 FEP 1560 (9th Cir. 2008) – District court refused to compel arbitration of employment dispute because employer had refused to arbitrate prior employment dispute in which employee had not timely perfected demand for arbitration under AAA rules – Ninth Circuit reversed – issue is for court and not arbitrator since courts have jurisdiction over defenses in law or equity for revocation of arbitration clause – district court erred in finding employer had waived right to compel arbitration because of its rejection of the prior arbitration demand – unanimous decision on reversal – partial dissent contending that since arbitration clause is valid motion to compel must be granted and issues such as waiver should be left to the arbitrator.

Panepucci v. Honigman Miller Schwartz & Cohn LLP, 281 Fed. Appx. 482, 103 FEP 1179 (6th Cir. 2008) (unpublished) – Female equity partner must arbitrate claim that she is statutory employee and was discriminated against on the basis of sex despite claim that arbitration clause in partnership agreement is limited to breach of partnership agreement – arbitration clause states partners must arbitrate claims “related to” the partnership agreement and issues of more compensation and whether or not she is a statutory employee require interpretation of the agreement.

Settlement (Ch. 43)

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

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