

**SIGNIFICANT RECENT EMPLOYMENT
DISCRIMINATION LAW DECISIONS**

By

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SIGNIFICANT RECENT EMPLOYMENT DISCRIMINATION LAW DECISIONS

By

Paul Grossman*

Set forth below are brief digests of recent court decisions which I consider of particular interest. My criteria for inclusion of cases, in rough order of importance, are as follows: significance of the case, utility in litigation, uniqueness, and intellectual content. This paper does not, of course, purport to list all cases which could reasonably be considered as meeting the above criteria. This paper is designed to be used in conjunction with the third edition of Lindemann & Grossman, Employment Discrimination Law (Paul W. Cane, Jr., ed. 1996), and the 1998 Supplement (Carl Jordan, ed.).

Disparate Treatment - Applying Reeves (Ch. 2)

Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 82 FEP 1748 (2000) - Reeves (57 years old) spent 40 years with Sanderson and was a supervisor of hourly employees - he was discharged because of his alleged failure to maintain accurate attendance records for his subordinates which the employer characterized as an intentional falsification of pay records - he disputed this, contending that the electronic time clock

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sometimes did not work and pursuant to normal company policy, he simply wrote in the time for his subordinates when he knew they were at the assembly line in a timely fashion - although three managers allegedly concurred in the recommendation to the company president to discharge Reeves, one of them, Chesnut, was alleged to be "all powerful" - Chesnut was also the husband of the company president who made the discharge decision - Chesnut, some months before discharge, told plaintiff he "was so old [he] must have come over on the Mayflower," and that plaintiff "was too damn old to do [his] job." - Court of Appeal erred in granting JNOV - Reeves presented strong evidence of pretext and direct evidence of discriminatory bias - Court of Appeal erroneously assumed that prima facie case coupled with sufficient evidence to disbelieve the employer's reason "is insufficient as a matter of law" - Court quoted seemingly contradictory passages from Hicks:

"The ultimate question is whether the employer intentionally discriminated, and proof that 'the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct.' *Id.*, at 524. In other words, '[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination.' "

* * *

“The factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant’s proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.”

Id. at 2108. The Court then clarified Hicks:

“Proof that the defendant’s explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.”

* * *

“In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.”

Id.

* * *

“[O]nce the employer’s justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.”

Id. at 2108-09.

* * *

“Thus, a plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

“This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury’s finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant’s explanation, no rational factfinder could conclude that the action was

discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. See Aka v. Washington Hospital Center, 156 F.3d, at 1291-1292; see also Fisher v. Vassar College, 114 F.3d, at 13338 (“[I]f the circumstances show that the defendant gave the false explanation to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent.”). To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts should not ‘treat discrimination differently from other ultimate questions of fact.’ St. Mary's Honor Center, supra, at 524 (quoting Aikens, 460 U.S. at 716).

“Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those

include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law. See *infra*, at 15-16. For purposes of this case, we need not - and could not - resolve all of the circumstances in which such factors would entitle an employer to judgment as a matter of law."

* * *

"Under Rule 50, a court should render judgment as a matter of law when '. . . there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.'"

Id. at 2109.

* * *

"In the analogous context of summary judgment under Rule 56, we have stated that the court must review the record 'taken as a whole.' Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). And the standard

for granting summary judgment ‘mirrors’ the standard for judgment as a matter of law, such that ‘the inquiry under each is the same.’ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-251 (1986); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.

“In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.”

* * *

“Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.”

Id. at 2110.

* * *

“The District Court plainly informed the jury that petitioner was required to show

‘by a preponderance of the evidence that his age was a determining and motivating factor in the decision of [respondent] to terminate him.’ Tr. 7 (Jury Charge) (Sept. 12, 1997). The court instructed the jury that, to show that respondent’s explanation was a pretext for discrimination, petitioner had to demonstrate 1, that the stated reasons were not the real reasons for [petitioner’s] discharge; and 2, that age discrimination was the real reason for [petitioner’s] discharge. *Ibid.* (emphasis added). Given that petitioner established a prima facie case of discrimination, introduced enough evidence for the jury to reject respondent’s explanation, and produced additional evidence of age-based animus, there was sufficient evidence for the jury to find that respondent had intentionally discriminated.”

Id. at 2112.

Malacara v. City of Madison, ___ F.3d ___, 83 FEP 1109 (7th Cir. 2000) - Summary judgment in promotion case affirmed 2-1 since no “reasonable jury could find that the defendants failed to hire [plaintiff] based on race” (83 FEP at 1111) - no discussion of Reeves by majority - dissenting judge contends that under Reeves plaintiff established a prima facie case and cast doubt on the employer’s explanations for preferring the white candidate - in particular Reeves mandates disregarding all contested employer evidence - majority did not do

this - dissent contended case is a classic “he said, she said” which should proceed to trial.

Aka v. Washington Hospital Center, 156 F.3d 1284, 77 FEP 1840 (D.C. Cir. 1998) (en banc) - By a 7-4 vote summary judgment overturned - D.C. Circuit asserts it is carving a middle ground between “pretext plus” and “pretext only” - there is no absolute requirement of direct evidence of discriminatory animus in addition to rebutting the employer’s explanation for the adverse job action - one must evaluate the total circumstances of the case - in some instances material questions as to whether

the employer was given the real explanation will not suffice to support an inference of discrimination - in others it will - dissent claims that majority's assertion of a middle ground between pretext plus and pretext only is an illusion and will result in plaintiffs' claims being routinely sent to a jury trial without any showing of discrimination.

Fisher v. Vassar College, 114 F.3d 1332, 74 FEP 109 (2d Cir. 1997) (en banc), cert. denied, 522 U.S. 1075 (1998) - The trial court sitting without a jury found discrimination under Title VII and the ADA - a panel of the court of appeals reversed as clearly erroneous - en banc review was granted limited to the question of whether a finding of liability under Title VII which is supported by a prima facie case and a sustainable finding of pretext (false explanation) can be reversed for clear error - it can - once an employer has proffered a nondiscriminatory reason a plaintiff must show by a preponderance of the evidence that the real reason was discrimination - the plaintiff can rely on supportable inferences to be drawn from the falsity of

the employer's explanation, but this is simply one factor to be considered - panel concluded that district court finding of pretext was supportable but that the findings of discrimination were clearly erroneous - this is affirmed - the term prima facie case in employment law is different from other areas of the law - "In our diverse workplace, virtually any decision in which one employment applicant is chosen from a pool of qualified candidates will support a slew of prima facie cases of discrimination. The rejected candidates are likely to be older, or to differ in race, religion, sex and national origin from the chosen candidate. Each of these differences will support a prima facie case of discrimination, even though a review of the full circumstances may conclusively show that illegal discrimination played no part. . . ." - "[E]vidence sufficient to establish the scaled-down requirements of the prima facie case under McDonnell Douglas does not necessarily tell much about whether discrimination played a role in the employment decision. The fact that a plaintiff is judged to have satisfied these minimal requirements is no indication that, at the end of the case, plaintiff will have enough evidence of discrimination to support a verdict in his favor." - it is not enough that pretext is shown - "We attach the label 'pretext' to a proffered reason that is not credited by the finder of fact. But the label 'pretext' does not answer the question: pretext for what? In some cases, an employer's proffered reason is a mask for unlawful discrimination. But discrimination does not lurk behind every inaccurate statement. Individual decision-makers may intentionally dissemble in order to hide a reason that is non-discriminatory but unbecoming or small-minded, such as back-scratching, log-rolling, horse-trading, institutional politics, envy, nepotism, spite, or personal hostility." - "In short, the fact that the proffered reason was false does not necessarily mean that the true motive was the illegal one argued by the plaintiff." - this is especially true when there are multiple decisionmakers - "[A] defendant's false statements are nothing more than pieces of circumstantial evidence . . ." - "[I]f . . . there are many possible reasons for the false explanation, stated or unstated, and illegal discrimination is no more likely a reason than others, then the pretext gives minimal support to plaintiff's claim of discrimination." - in some cases a prima facie case and pretext (a false reason) may show discrimination - the combined effect of both may have little capacity to prove discrimination - a finding of pretext does not insulate the case from appellate review - "[A] Title VII plaintiff may prevail only if an employer's proffered reasons are shown to be a pretext for discrimination, either because the pretext finding itself points to discrimination or because other evidence in the record points in that direction -- or both." - "[O]nce the employer has proffered an explanation, a plaintiff may not prevail without evidence that, on its own, unaided by any artificially prescribed presumption, reasonably supports the inference of discrimination." - "Even where the proffered reason is an outright falsehood, the power of that fact as support for a finding of

discrimination is not, and should not be, a rule of law but a function of logic. A finding of pretext in circumstances that suggest numerous other possible unstated explanations no less likely than discrimination gives little inferential support to a finding of discrimination.” - “The rule is that there is no rule peculiar to discrimination cases. As in all other areas, the answer depends on how forcefully the evidence has shown what plaintiff has the burden of showing -- that the adverse employment action suffered by plaintiff was attributable to the alleged discrimination.” - once there has been a prima facie case and a defense response, “all special rules drop from the case At this point no rule of law gives artificially enhanced weight to any piece of evidence.” - “[T]he stronger the evidence that illegal discrimination is present, the greater the likelihood that discrimination is what the employer’s false statement seeks to conceal. And, conversely, the weaker the evidence of discrimination, the less reason there is to believe that the employer’s false statement concealed discrimination, as opposed to the numerous other reasons for which employers so frequently give false reasons for employment decisions.” - “When a court comes to consider, either upon defendant’s motion for summary judgment, or after a plaintiff’s verdict, whether the evidence can support a verdict of discrimination, no special rules affect the weight to be given to the prima facie case, the truthfulness or falsity of the employer’s explanation, or any other piece of evidence. As in any other type of case, the judge must analyze the evidence, along with the inferences that may be reasonably drawn from it, and decide if it raises a jury question as to whether the plaintiff was the victim of discrimination.”

Disparate Treatment - General (Ch. 2)

Massey v. Blue Cross-Blue Shield of Illinois, ___ F.3d ___, 83 FEP 1368 (7th Cir. 2000) - JNOV affirmed on appeal in race discrimination case - plaintiff had received excellent evaluations before being promoted under an allegedly biased Caucasian supervisor - prior good evaluations do not support discrimination finding since job from which plaintiff was discharged was higher level job - criticism of writing skills when coupled with similar writing errors by supervisor does not create inference of discrimination - even if the supervisor was not an A+ writer she was entitled to insist on good writing from subordinates - fact that supervisor called plaintiff “stupid” does not amount to evidence of racial discrimination - standard for JNOV is the same as for summary judgment except that when a case has been tried burden shifting is irrelevant and the

only question is whether plaintiff "presented enough evidence to allow a rational jury to find that she was the victim of discrimination" - plaintiff did not do this.

Lee v. GTE Florida, Inc., ___ F.3d ___, __ FEP ___ (11th Cir. 2000) - JNOV on appeal in sex discrimination promotion case - decisionmaker chose male because in decisionmaker's judgment male was better qualified in three of the four primary criteria, and plaintiff better qualified in only one - plaintiff's evidence was limited to testimony that she was super-competent - "In a failure to promote case, a plaintiff cannot prove pretext by simply showing that she was better qualified A plaintiff must show not merely that the defendant's employment decisions were mistaken but that they were in fact motivated by sex." - "[Courts] 'are not in the business of adjudging whether employment decisions are prudent or fair. Instead our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision.'" - evidence that the employer hired a less qualified applicant may be probative of the discrimination issue - the Fifth Circuit has held that the disparity in qualifications must virtually "jump off the page and slap you in the face" before there can be an inference of discrimination - JNOV on appeal because plaintiff's evidence does not rise to the level of proof required when discrimination is attempted to be shown by proving that the plaintiff was substantially more qualified than the person promoted.

Kovacevich v. Kent State University, ___ F.3d ___, 83 FEP 1306 (6th Cir. 2000) - Court which denied motion for summary judgment cannot after trial decide case based on no prima facie case - must decide ultimate question of discrimination.

Hunt v. City of Markham, 219 F.3d 649, 83 FEP 635 (7th Cir. 2000) - Denial of bonus is not actionable adverse employment action, since bonuses are generally sporadic, irregular, unpredictable and wholly discretionary - denial of raise is adverse employment action, since regular raises are normal for a worker who performs satisfactorily.

Febres v. Challenger Caribbean Corp., 214 F.3d 57, 82 FEP 1834 (1st Cir. 2000) - Jury instruction which indicated that burden of proof shifted in mixed-motive case as long as there was direct evidence is erroneous - it is the direct evidence that calls for a mixed-motive instruction - the burden of proof shifts only if the finder of the fact concludes, based on the direct evidence, that an impermissible criterion was used in reaching the disputed decision.

Watson v. Southeastern Pennsylvania Transportation Authority, 207 F.3d 207, 82 FEP 520 (3d Cir. 2000), pet. for cert. filed, 69 U.S.L.W. 3087 (July 12, 2000) (No. 00-92) - Under Title VII in an action that did not involve mixed motives the plaintiff must prove that sex bias was a determinative factor, not merely a motivating factor - § 703(m) of Title VII is limited to mixed-motive cases where it describes "motivating factor" as the test-conflict in the circuits is analyzed at 163 LRR 425.

Hawkins v. PepsiCo, Inc., 203 F.3d 274, 81 FEP 1670 (4th Cir. 2000) - Tough and arguably unfair treatment imposed on an African-American employee by a supervisor is insufficient to demonstrate racial animus - summary judgment affirmed - plaintiff "has shown nothing more than a routine difference of opinion and personality conflict with her supervisor. Because we refuse to transmute such ordinary workplace disagreements between individuals of different races into actionable race discrimination, we affirm . . ." Id. at 276. - assuming that such personality conflicts are caused by racial animus would turn the workplace into "a litigious caldron of racial suspicion" - manager required employee to do work over and over again, unreasonably required her to work late on the night of the office Christmas party - hostile environment claim dismissed on summary judgment - discriminatory and retaliatory discharge claim dismissed following presentation of plaintiff's evidence - allegation that similarly situated white persons not discharged fails for lack of evidence that they were in fact similarly situated.

Stimpson v. City of Tuscaloosa, 186 F.3d 1328, 82 FEP 616 (11th Cir. 1999), cert. denied, 120 S. Ct. 1555 (2000) - JNOV on appeal - even assuming police officer who on one occasion threatened to shoot her partner was recommended for termination based on discriminatory animus, independent investigation conducted by Civil Service Board before affirming her discharge breaks the causal connection - Board conducted three-day hearing to investigate the charges, and plaintiff was represented by legal counsel and put on defense evidence and witnesses.

Penn v. Heitmeier, ___ F. Supp. 2d ____, 82 FEP 609 (E.D. La. 2000) - Evidence of later job performance is admissible in bias case in support of employer's contention that it terminated employee for the same type of conduct shown on subsequent jobs - this is not character evidence but is fact-based, eyewitness evidence of how he performed in similar jobs.

Perry v. Woodward, 199 F.3d 1126, 81 FEP 838 (10th Cir. 1999), cert. denied, 120 S. Ct. 1964 (2000) - Need not show replaced by anyone outside plaintiff's protected group to create prima facie case - protected group individual who eliminates two most common reasons for termination (lack of qualifications or elimination of job) has created prima facie case - discharged Hispanic employee replaced by another Hispanic - summary judgment for employer reversed.

Taylor v. Virginia Union University, 193 F.3d 219, 80 FEP 1569 (4th Cir. 1999), cert. denied, 120 S. Ct. 1243 (2000) - University's police department hired first female patrol officer on police chief's recommendation - eight months later he gave her a poor evaluation in one category which rendered her ineligible for promotion - witnesses testified police chief said he "was never going to send a female to the academy" and that the chief once referred to her as a "stupid bitch" - employee could not prevail on promotion claim because of her poor rating - since chief was same person who hired her strong inference that low evaluation was not pretextual prevails - "same actor" principle analyzed in 162 LRR 200.

Primes v. Reno, 190 F.3d 765, 80 FEP 1345 (6th Cir. 1999) - Performance evaluation not actionable - if low evaluations or other supervisory actions that make an employee unhappy are considered an adverse action, "[p]aranoia in the workplace would replace the prima facie case as the basis for a Title VII cause of action." Id. at 767.

Pivrotto v. Innovative Systems Inc, 191 F.3d 344, 80 FEP 1269 (3d Cir. 1999) - Woman claiming sex discrimination need not show she was replaced by someone outside her protected class - employer can discriminate against persons because of protected status while still willing to hire others - Third Circuit joins seven other circuits on this issue.

Scamardo v. Scott County, 189 F.3d 707, 80 FEP 1140 (8th Cir. 1999) - Reversible error in retaliation case to refuse to instruct jury as follows: "You may not return a verdict for the plaintiff just because you might disagree with the defendant's decision or believe it to be harsh or unreasonable." (Id. at 711.) - such an instruction is essential in discrimination cases unless evidence of the employer's improper motive is very strong.

Shorter v. ICG Holdings, Inc., 188 F.3d 1204, 80 FEP 1031 (10th Cir. 1999) - Decisionmaker's inappropriate racial comments not related to decisionmaking process - while they constitute substantial evidence of pretext, they are insufficient to avoid a summary judgment based on powerful evidence of poor job performance - racial comments were: (1) supervisor asked black female employee about black men's sex organs; (2) supervisor told third party that plaintiff talked like people of her culture and race; (3) supervisor accused plaintiff of being defensive "because you are black"; (4) supervisor, after discharge, in fit of anger at not being able to locate an important document referred to her using the "N" word - statements of personal opinion are not direct evidence - Opinion 2-1 - case analyzed and other authorities set forth at 162 LRR 41 - it analyzes split in circuits on degree to which remarks must be related to the decisionmaking process.

Flores v. Preferred Technical Group, 182 F.3d 512, 80 FEP 84 (7th Cir. 1999) - Honest belief is sufficient to negate charge of discrimination - court declines to adopt view of Sixth Circuit in Smith v. Chrysler Corp., 155 F.3d 799, 8 A.D. Cas. 1084 (6th Cir. 1998), requiring a higher standard than a mere honest belief - however, differences between the cases may not be that great, because reasonableness of belief bears on the honesty of the belief.

Johnson v. Zema Systems Corp., 170 F.3d 734, 79 FEP 584 (7th Cir. 1999) - Summary judgment against discharged African American vice president of sales overturned - applicability of same-decisionmaker doctrine rejected - same-actor inference "may not hold true on the facts of the particular case" - could hire someone not expecting them to rise to a high position where you would have to work with them - hiring official might be unaware of his or her stereotypical views until work begins - same-actor doctrine is convenient shorthand for cases in which plaintiff is unable to present sufficient evidence of discrimination - here plaintiff produced sufficient evidence of racial bias to suggest that hiring official expected plaintiff to comply with race-based limitations on the job.

Deines v. Texas Department of Protective and Regulatory Services, 164 F.3d 277, 78 FEP 1632 (5th Cir. 1999) - Hiring case - differences in qualifications between applicants are not probative evidence of discrimination unless the differences are so favorable to claimant that there can be no dispute among reasonable persons of impartial judgment that plaintiff was clearly the better qualified - judge's instruction to jury that disparities in qualifications are not enough to demonstrate discriminatory intent unless they are so apparent as to "jump off the page and slap you in the face" did not improperly elevate plaintiff's burden from preponderance of

the evidence to clear and convincing evidence - jury is not to scrutinize employer's judgment as to who is best qualified and to reweigh that judgment, since employer's judgment as to qualifications is not probative of discriminatory intent absent extreme differences - jury is not entitled to "second guess" employer's judgment - challenged jury's instructions not erroneous and judgment of jury affirmed.

Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 80 FEP 890 (9th Cir. 1998) - Summary judgment reversed - after prima facie case and employer's reason, plaintiff can avoid summary judgment by either direct evidence or indirect evidence - if direct evidence of bias, it need not be substantial - dicta since the decisionmaker had acknowledged he did not want another woman on his floor and there were gifts of "sex toys" and "a Barbie doll kit" - also evidence that the company president made derogatory comments about women - if direct evidence is not available, summary judgment can be avoided by presenting circumstantial evidence - this type of evidence must be specific and substantial to avoid summary judgment - employee met both the direct and indirect evidence standards.

Smith v. Chrysler Corp., 155 F.3d 799, 8 A.D. Cas.1084 (6th Cir. 1998) - Summary judgment affirmed based on employer's reasonable belief that employee lied about health - unlike Seventh Circuit, Sixth Circuit requires particularized facts which make the employer's honest belief reasonable - here such particularized facts were present.

Walker v. Mortham, 158 F.3d 1177, 78 FEP 573 (11th Cir. 1998), cert. denied, 120 S. Ct. 39 (1999) (No. 98-1599) - Relative qualifications are not part of prima facie case - if employer claims that successful candidate was more qualified, then plaintiff must address the issue.

Jones v. Bessemer Carraway Medical Center, 151 F.3d 1321, 77 FEP 1163 (11th Cir. 1998) - Biased statements by direct supervisor such as "You black girls get away with everything" are not direct evidence of discrimination - direct evidence of discrimination must be evidence which if believed proves the existence of discrimination - it gives too much weight to "a few isolated words" - language not amounting to direct evidence but showing some racial animus may be significant in some factual contexts - here the direct supervisor did no more than orally report an incident to the decisionmaker - there is no evidence that the direct supervisor failed to report such incidents in other cases or that the direct supervisor coaxed the decisionmaker to take disciplinary action - the decisionmaker met personally with the plaintiff and made her own decision - "Given the

circumstances, [the direct supervisor's] statements -- remote from the main events -- cannot establish a prima facie case of discriminatory discipline" - motion for rehearing denied.

Williams v. Vitro Services Corp, 144 F.3d 1438, 77 FEP 297 (11th Cir. 1998) - Inference of nondiscrimination from fact that same manager hired and then discharged older employee is permissible but not mandatory - Eleventh Circuit indicates that Fourth, Fifth, Seventh and Ninth Circuits have held the inference from "same actor" evidence to be mandatory, while the Third Circuit regards such evidence as "simply evidence that should be accorded no presumptive value" - Eleventh Circuit takes in-between position.

Beaird v. Seagate Technology, Inc., 145 F.3d 1159, 76 FEP 1865 (10th Cir.), cert. denied, 525 U.S. 1054 (1998) - Summary judgment reversed - with respect to several employees laid off in RIF - plaintiff can demonstrate illegality in RIF in three ways: (1) plaintiff's termination does not accord with the RIF criteria allegedly employed; (2) plaintiff's evaluation was deliberately falsified; or (3) the reason for the RIF itself was pretextual, such as an effort to replace older employees with younger, less expensive ones.

Simpson v. Kay Jewelers, 142 F.3d 639, 76 FEP 1083 (3d Cir. 1998) - Terminated individual cannot show pretext by finding non-protected employee who had less favorable evaluations who is retained, when numerous younger employees were also terminated for the same reason.

Sattar v. Motorola, Inc., 138 F.3d 1164, 76 FEP 512 (7th Cir. 1998) - Supervisor I, a devout Muslim, harassed plaintiff for abandoning Islam and gave him low performance ratings - plaintiff transferred to Supervisor II, who was displeased with his performance and terminated him - summary judgment for employer affirmed - undisputed that harassing supervisor played no direct role in the termination decision-making - court rejected contention that supervisor's harassment had "poisoned" the atmosphere of the workplace - lack of evidence that legitimate nondiscriminatory reason, deficient performance and lack of leadership skills, were pretextual.

Aramburu v. Boeing Co., 112 F.3d 1398, 77 FEP 238 (10th Cir. 1997) - Summary judgment affirmed - plaintiff discharged for poor attendance treated unfavorably compared to non-minority group employees - no inference of discrimination can be drawn since other minority group employees were accorded the same favorable treatment as non-minority group employees.

Rose-Maston v. NME Hospitals, Inc., 133 F.3d 1104, 75 FEP 1534 (8th Cir. 1998) - Summary judgment against discharged African-American employee affirmed - employee asserted that prior satisfactory evaluations supported an inference of pretext because they were inconsistent with her employer's assertions that she was incompetent - prior evaluations simply show that employee had performed competently in the past, but they do not render her most recent negative evaluations inherently untrustworthy.

Mungin v. Katten Muchin & Zavis, 116 F.3d 1549, 74 FEP 391 (D.C. Cir. 1997) - Lower court finding of discrimination against black senior associate reversed - no pay discrimination since he compared himself to home-grown attorneys, not lateral attorneys, and to attorneys in other offices not similarly situated - work assignments not actionable - "Perhaps in recognition of the judicial micromanagement of business practices that would result if we ruled otherwise, other circuits have held that changes in assignments or work-related duties do not ordinarily constitute adverse employment decisions if unaccompanied by a decrease in salary or work hour changes."

Adverse Impact (Ch. 4)

Dormeyer v. Comerica Bank - Illinois, ___ F.3d ___, 83 FEP 700 (7th Cir. 2000) - Chief Judge Posner dismisses disparate impact claim by pregnant woman that applying uniform absenteeism policy to her which resulted in her discharge had adverse impact on pregnant women - disparate impact theory was developed to negate employer-imposed eligibility requirements that are not really necessary for job performance - here attendance is clearly legitimate objective and plaintiff seeks exemption from uniformly-applied attendance requirements.

In Re: Employment Discrimination Litigation Against the State of Alabama, 198 F.3d 1305, 81 FEP 950 (11th Cir. 1999) - Eleventh Amendment does not exempt a state from liability under Title VII for disparate impact discrimination - Congress unequivocally expressed its intent to abrogate the state's Eleventh Amendment immunity when it amended Title VII to cover state and local governments - this meets the "great clarity" required by Supreme Court decisions with respect to Congress's intent to abrogate the immunity - court notes that in Washington v. Davis Supreme Court ruled that the constitutional standard for discrimination required intent and the disparate impact analysis does not require intent - but intent is not wholly irrelevant to a claim of disparate impact - if the employer cannot demonstrate a job-related business necessity, its continued use of the

practice may indicate an invidious purpose - the case is analyzed at 163 LRR 41, and indicates that a number of other courts have held that a showing of intent to discriminate is necessary and thus the disparate impact theory is not applicable to the states - the view of these cases was considered but rejected by the Fifth Circuit.

Williams v. Ford Motor Co., 187 F.3d 533, 80 FEP 1175 (6th Cir. 1999) - Content validity strategy appropriate under Ohio discrimination law- content of test is representative of important aspects of job - content validity not negated by fact that some individuals who scored "low" succeeded in similar jobs elsewhere - test also valid under criterion-related validity - appropriate correlation between success on test and success on job shown.

Nonscored Objective Criteria (Ch. 6)

Lanning v. Southeastern Pennsylvania Transportation Authority, 181 F.3d 478, 80 FEP 221 (3d Cir. 1999), cert. denied, 120 S. Ct. 970 (2000) - Requirement that police officer run mile and a half in 12 minutes had disproportionate adverse impact on female applicants - such a requirement cannot survive disparate impact challenge unless it measures minimum necessary qualifications - case remanded to determine if requirement was minimum qualification.

Religion (Ch. 8)

Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 82 FEP 40 (11th Cir. 2000) - Free exercise and establishment clauses of the First Amendment prohibit a church from being sued under Title VII by its clergy - ministerial exception is a blanket prohibition.

Weber v. Roadway Express, Inc., 199 F.3d 270, 81 FEP 1138 (5th Cir. 2000) - Trucking company lawfully denied Jehovah's Witness driver's request that he never be assigned runs that included a female partner - his religion prohibited him from traveling overnight with a woman other than his wife - this would involve more than de minimis expense.

Balint v. Carson City, Nevada, 180 F.3d 1047, 79 FEP 1750 (9th Cir. 1999) (en banc) - A Sabbatarian alleged a failure of accommodation - giving the Sabbath off would have required modification of a long-standing unwritten seniority system - summary judgment granted on the ground that an employer has no obligation as a matter of law to modify a seniority system - reversed - the mere existence of a bona fide seniority system does

not relieve an employer of the duty to attempt a reasonable accommodation if it can be accomplished without modification of the seniority system and with no more than a de minimis cost - factual issues exist as to whether this is the case - however, the duty to accommodate does not include violating the seniority system - examples of accommodations include voluntary shift trades and shift splitting.

Rodriguez v. City of Chicago, 156 F.3d 771, 77 FEP 1421 (7th Cir. 1998), cert. denied, 525 U.S. 1144 (1999) - Roman Catholic police officer did not want duty guarding abortion clinics - did so under protest and sued - no failure of reasonable accommodation since employee was offered the opportunity to transfer under collective bargaining agreement - Chief Judge Posner in concurrence proposes automatic undue hardship exemption any time a public safety officer objects to an assignment on religious grounds.

Tiano v. Dillard Department Stores, 139 F.3d 679, 76 FEP 561 (9th Cir. 1998) - JNOV on appeal - plaintiff, a devout Roman Catholic, testified that she had a "calling from God" to attend a pilgrimage to a shrine during the department store's busy season - leave was denied and she was terminated when she left anyway - only evidence offered by plaintiff to prove that the timing was essential was her own testimony that "I had to be there at that time" - district court's finding that there was a "temporal mandate" clearly erroneous - dissent indicated that since district court believed that plaintiff felt compelled to go on the pilgrimage in October, judgment should stand.

Disability/Handicap- General (Ch. 9)

University of Alabama at Birmingham v. Garrett, 120 S. Ct. 1266 (Mar. 1, 2000) - Certiorari granted to resolve question of whether states are immune from suit under the Americans with Disabilities Act.

Lavia v. Commonwealth of Pennsylvania, ___ F.3d ___, 10 A.D. Cas. 1511 (3d Cir. 2000) - Unconstitutional to apply ADA to the states.

Echazabal v. Chevron USA, 213 F.3d 1098, 10 A.D. Cas. 961 (9th Cir. 2000) - Direct threat defense does not include threat to oneself - the defense does not apply to a rejection of a job applicant whose hepatitis makes him susceptible to harm from exposure to chemicals used at the workplace - employers may not assume a paternalistic role in evaluating whether it's good for an employee to take a particular job - Ninth Circuit, in

opinion by Judge Reinhardt, rejects contrary EEOC guideline.

McCullah v. Southern California Gas Co., 82 Cal. App. 4th 495, 10 A.D. Cas. 1438 (Cal. Ct. App. 2000) - Class certification denial affirmed in disability discrimination case - no “well-defined community of interest among the [purported] class members” (Id. at 498) - “Where the discrimination claim is based on an employee’s physical or mental disability, it is difficult to identify and certify the class.” (Id. at 500)

Harris v. Harris & Hart, Inc., 206 F.3d 838, 10 A.D. Cas. 481 (9th Cir. 2000) - Prior to rehiring an employee who earlier had requested an accommodation for carpal tunnel syndrome and then left because of carpal tunnel syndrome, employer required a medical release - this does not violate the ADA - opinion by District Judge Manella - employer would have been entitled to insist on release before return from leave of absence - thus, this is not an illegal pre-offer medical inquiry.

EEOC v. Exxon Corp., 203 F.3d 871, 10 A.D. Cas. 225 (5th Cir. 2000) - Employer excludes from safety-sensitive jobs any employee who has undergone substance abuse treatment - the analysis should proceed under a business necessity test and not under a direct threat defense - direct threat focuses on the individual employee and risks posed by the individual employee’s disability - business necessity addresses a broad disqualification standard.

Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 10 A.D. Cas. 65 (9th Cir. 2000) - Lower level of benefits for mental disabilities than physical disabilities does not violate ADA - insurance distinctions that apply equally to all employees cannot be discriminatory - Ninth Circuit rejects EEOC interpretation that ADA forbids differential insurance coverage - the EEOC’s view is “entitled to no deference” because it conflicts with the law’s plain language and with the EEOC’s own guidance on health insurance.

Green v. National Steel Corp., 197 F.3d 894, 10 A.D. Cas. 36 (7th Cir. 1999) - Employee whose EEOC ADA charge contested only her discharge may not litigate reasonable accommodation claim - summary judgment

granted also on discharge claim - bald assertion that she did not engage in misconduct insufficient to create factual dispute - record supports fact that employer had good-faith belief that she was responsible for altering records whose alteration benefited her.

Davoll v. Webb, 194 F.3d 1116, 9 A.D. Cas. 1533 (10th Cir. 1999) - Judgment in favor of three police officers affirmed - it may be a reasonable accommodation to transfer to alternate positions - denial of class certification also affirmed - court would have had to conduct individual inquiries to determine whether potential class members met statutory definition of disabled.

Zenor v. El Paso Healthcare System, Ltd., 176 F.3d 847, 9 A.D. Cas. 609 (5th Cir. 1999) - Hospital pharmacist used cocaine on August 15, but when terminated on September 20 was in drug rehabilitation program - no protection under ADA since plaintiff was "current" user of illegal drugs - drug use sufficiently recent to justify a reasonable belief by the hospital that drug abuse remained an ongoing problem - "current" includes a person who used illegal drugs in the weeks and months preceding the adverse employment action.

Lessard v. Osram Sylvania, Inc., 175 F.3d 193, 9 A.D. Cas. 417 (1st Cir. 1999) - Plaintiff who claims he or she "regarded as" disabled must establish that what plaintiff is regarded as being is a disability within the meaning of the law - Congress did not intend that scope of protection afforded against perceived disability discrimination would be broader than scope of protection afforded against actual disability discrimination.

Rizzo v. Children's World Learning Centers, Inc., 173 F.3d 254, 9 A.D. Cas. 436 (5th Cir. 1999), reh'g en banc granted, 187 F.3d 680 (5th Cir. Aug. 27, 1999) - Employer has burden of proof on "direct threat" which is affirmative defense - jury verdict for plaintiff affirmed in 2-1 decision - school and daycare center removed driver because of hearing impairment - jury found that hearing-impaired employee could safely perform the job - court draws distinction between a requirement that excludes a class of persons, here a requirement that any teacher who drives must be able to understand spoken words, and a situation where in order to prove qualifications the

plaintiff must prove she is not a direct threat to herself and others - case analyzed at 161 LRR 104.

Zimmerman v. Oregon Department of Justice, 170 F.3d 1169, 9 A.D. Cas. 215 (9th Cir. 1999), pet. for cert. filed, 68 U.S.L.W. 3129 (Aug. 10, 1999) (No. 97 C4820) - Title II of ADA (state and local governments denying services, etc.) does not provide an alternative remedy for government employees to bring employment discrimination claims - disagrees with Eleventh Circuit's decision in Bledsoe v. Palm Beach, 133 F.3d 816, 7 A.D. Cas. 1433 (11th Cir.), cert. denied, 525 U.S. 826 (1998).

Colwell v. Suffolk County Police Department, 158 F.3d 635, 8 A.D. Cas. 1232 (2d Cir. 1998), cert. denied, 526 U.S. 1018 (1999) - Police officer who had cerebral hemorrhage and back injury not "regarded as" disabled despite: (1) employer providing accommodation - providing accommodation is simply common sense and does not concede disability; (2) being put on light duty - this does not imply that the county perceived him as having impairments which substantially limited a major life activity; (3) requirement of physicals - furthermore, activities such as driving, doing mechanical work on cars, performing housework, going shopping, skiing and golfing are not major life activities even though they may involve lifting, bending and reaching - police officer who alleges back injury makes it difficult for him to stand for a long period of time or sit for very long is not significantly restricted in his ability to perform a range of jobs nor his doctor's restriction that plaintiff must only work days and avoid late tours or rotating shifts and stress - seven-month impairment of ability to work is too short to be substantially limiting under ADA.

Hamilton v. Southwestern Bell Telephone Co., 136 F.3d 1047, 8 A.D. Cas. 1219 (5th Cir. 1998) - Plaintiff's post-traumatic stress disorder which followed his rescue of drowning woman does not substantially limit any major life activity - employee not "regarded as" disabled despite mental difficulties which led to his discharge - employee's discharge after he verbally abused physically smaller female employee and slapped her hand down was due to violation of employer's policy against workplace violence and was not ADA

protected - ADA does not insulate emotional or violent outbursts blamed on impairment.

Griffin v. Steeltek, Inc., 160 F.3d 591, 8 A.D. Cas. 1249 (10th Cir. 1998), cert. denied, 526 U.S. 1065 1455 (1999) - Non-disabled job applicants protected against being asked medical history or conditions questions during job interview process - 2-1 decision - employee claimed his rejection was because of his answers to improper questions.

Ross v. Indiana State Teacher's Association Insurance Trust, 159 F.3d 1001, 8 A.D. Cas. 1273 (7th Cir. 1998), cert. denied, 525 U.S. 1177 (1999) - Employer had right to demand medical release before allowing employee to return to work - no reasonable trier of fact could conclude that employer bore responsibility for breakdown in interactive processes.

Newberry v. East Texas State University 161 F.3d 276, 8 A.D. Cas. 1595 (5th Cir. 1998) - Faculty member with psychiatric problem terminated for threatening and nasty behavior - he sued alleging that he was terminated because of a perception that he had a psychiatric problem - "Where an employee engages in conduct that is legitimately a basis for dismissal, and the employer believes that the employee's conduct is symptomatic of disability, the employer may fire the employee on the basis of the conduct itself, as long as the collateral assessment of disability plays no role in the decision to dismiss." - no need to provide a reasonable accommodation simply because the employer thinks the employee has an impairment - this employee's dismissal came about not because of others' attitudes about his disorder "but because his behavior interfered with his job performance, and perhaps because the behavior displeased others" - jury verdict upheld.

Templeton v. Neodata Services, Inc., 162 F.3d 617, 8 A.D. Cas. 1615 (10th Cir. 1998) - Employer lawfully terminated employee who refused to provide requested medical certification when she wanted to return from medical leave of absence - medical information necessary for interactive process and thus she is precluded from claiming that employer unreasonably failed to accommodate -

request for medical information reasonable in light of doctor's letter indicating doubt as to her ability to return to her job - employer cannot be expected to propose reasonable accommodation absent critical information about medical condition and limitations medical condition imposes.

EEOC v. Prevo's Family Market, Inc., 135 F.3d 1089, 8 A.D. Cas. 401 (6th Cir. 1998) - Employee who sought accommodation based on having HIV virus could be compelled to take medical examination to confirm presence of virus - were rule the contrary every employee could claim disability warranting special accommodation while denying employer the right to check.

Crandall v. Paralyzed Veterans of America, 146 F.3d 894, 8 A.D. Cas. 348 (D.C. Cir. 1998) - Librarian discharged for extreme rudeness - not actionable unless employer was on notice that rudeness was caused by disability - court rejects contention that rude behavior was so extreme as to itself constitute notice.

Armstrong v. Turner Industries, Inc., 141 F.3d 554, 8 A.D. Cas. 118 (5th Cir. 1998) - Person who is neither disabled nor perceived as disabled lacks standing to challenge preemployment medical inquiry - applicant had been required to answer detailed questionnaire on prior injuries or ailments and undergo brief medical examination - applicant failed to disclose prior exposure to asbestos - employer refused to hire him because this constituted "falsification" - since employer did not perceive him as disabled and he was not disabled, lacks standing - issue, one of first impression, is whether ADA provides a private right of action for non-disabled job applicants who are subjected to preemployment medical examinations and inquiries which violate the statute - there is no such cause of action - case analyzed at 158 LRR 168.

Jasmantas v. Subaru-Isuzu Automotive, Inc., 139 F.3d 1155, 7 A.D. Cas. 1859 (7th Cir. 1998) - Disabled individual with severe restrictions ordered by doctor not to do bending, twisting, squatting, stooping or lifting - private investigator photographed her doing all those things while on a medical leave - she denied doing any of them to the employer - fired for untruthfulness - discharge sustained - this is not disability discrimination - does not matter whether company was right or wrong in its perception that

she was a malingerer and had been dishonest - they clearly believed this and that negates the discriminatory motive - irrelevant that two employer officials may have made disparaging remarks about disabled employees.

Cody v. CIGNA Healthcare of St. Louis, Inc., 139 F.3d 595, 7 A.D. Cas. 1716 (8th Cir. 1998) - Depression not sufficient to constitute disability under ADA - psychiatrist's conclusion that employee suffered from paranoia does not constitute limitation on major life activity - with respect to "regarded as," employer's knowledge of aberrational workplace behavior and employee's treatment by psychotherapist and employer's offer to give employee paid medical leave does not equate with employer "regarding" employee as disabled - mere knowledge of behavior that could be associated with impairment does not show employer treated employee as if she were disabled.

Christopher v. Adam's Mark Hotels, 137 F.3d 1069, 7 A.D. Cas. 1537 (8th Cir.), cert. denied, 525 U.S. 821 (1998) - Secretary with bipolar disorder terminated after one week on the job, and days after human resources director reviewed file which noted bipolar disorder - summary judgment granted for employer - employer's explanation was that secretary lacked word processing skills advertised on résumé - no evidence to support claim that this was pretext - mere knowledge of disability cannot be sufficient to show pretext.

Estate of Mauro v. Borgess Medical Center, 137 F.3d 398, 7 A.D. Cas. 1571 (6th Cir.), cert. denied, 525 U.S. 815 (1998) - HIV-positive surgical technician properly removed from position since he was a direct threat to health and safety - hospital offered alternate position.

Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 8 A.D. Cas. 308 (6th Cir. 1998) - Employer's leave of absence policy that requires termination of any employee who does not return to work at the expiration of one year does not violate ADA - it does not distinguish between disabled and non-disabled employees.

Porter v. United States Alumoweld Co., Inc., 125 F.3d 243, 7 A.D. Cas. 537 (4th Cir. 1997) - Employee off on back surgery submitted letter from doctor indicating could return - company insisted that he undergo fitness-for-duty examination - this does not violate the ADA

or the Family and Medical Leave Act - plaintiff was fired when he failed to undergo an examination following back surgery.

Burch v. Coca-Cola Co., 119 F.3d 305, 7 A.D. Cas. 241 (5th Cir. 1997), cert. denied, 522 U.S. 1084 (1998) - Jury awarded \$7 million to terminated alcoholic - trial judge reduced this to \$700,000 plus \$200,000 in attorney's fees - Fifth Circuit grants JNOV on appeal - case improperly analyzed below on reasonable accommodation theory - that theory is not applicable unless employer is shown to have terminated qualified individual with a disability to avoid accommodating his impairments at the workplace - employee who requests only opportunity to return to unmodified previously held position fails to state claim for accommodation - alcoholism is not per se a disability - former employee who is alcoholic has not shown he was qualified individual with a disability where his doctor admitted that his status as a recovering alcoholic did not affect any major life activity - permanency, not frequency, is the touchstone of substantially limiting impairment - the fact that the employee had to be hospitalized does not establish that his alcoholism substantially limited his major life activities - employers are under no obligation to accommodate misconduct that is a product of alcoholism - employers can hold alcoholic employees to the same standard of conduct as non-alcoholic employees - a second chance or a plea for grace is not the type of accommodation contemplated by the ADA - employer did not "regard" plaintiff as substantially limited - it regarded him as what he was, an alcoholic whose alcoholism did not substantially impair any major life activity, including the major life activity of working - prior to being discharged for mouthing threats while intoxicated at a company meeting, plaintiff told the company that he was having alcoholism problems and intended to undergo hospitalization and treatment - upon his release from the hospital he asked to return to part-time duty, but was told that he was on suspension pending a completion of an investigation into his conduct - following an investigation he was terminated.

Parker v. Metropolitan Life Insurance Co., 121 F.3d 1006, 6 A.D. Cas. 1865 (6th Cir. 1997) (en banc), cert. denied, 522 U.S. 1084 (1998) - Disability policy that cut off mental disability benefits after 24 months but allowed physical disability benefits to continue for life does not violate either Title I (employment) or Title III (goods in interstate commerce) of ADA - benefit plan not covered by Title III - the ADA does not mandate equality between

individuals with different disabilities with respect to benefits- it merely forbids discrimination between the disabled and the nondisabled - contrary view of First Circuit to the effect that Title III does cover such benefit plans rejected.

EEOC v. Amego, Inc., 110 F.3d 135, 6 A.D. Cas. 997 (1st Cir. 1997) - Clinically-depressed behavior therapist and not employer bears burden of establishing that she is not a direct threat to others - plaintiff twice attempted suicide by overdosing on prescription medicine, and job required prescribing medication - EEOC argued that when a direct threat is involved, it is an affirmative defense and the employer has the burden of proof.

Johnson v. American Chamber of Commerce Publishers, Inc., 108 F.3d 818, 6 A.D. Cas. 801 (7th Cir. 1997) - Plaintiff is missing 18 teeth- he was terminated after three days of telemarketing training allegedly because he mumbled - district court accepted the plaintiff's position that he does not mumble and that his missing teeth do not actually hinder his ability to sell - district court dismissed case on basis that "regarded as" claim requires a disabling impairment - this was not Congress's intent - need not establish an actual impairment - "Unlike Johnson, the Americans with Disabilities Act has teeth" - on remand defendants can assert that the perceived disability was not one that substantially limited a major life activity- in other words, defendants can claim that mumbling does not substantially limit a major life activity - "The 'major life activities' hurdle, rather than proof of a concrete disability, is what screens out trivial claims.. . ."

Disability - ADA-Covered Disability (Ch. 9)

Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 9 A.D. Cas. 694 (1999) - Plaintiff, a truck driver, was essentially blind in one eye and has monocular vision - he did not meet standard Department of Transportation standards - the employer fired him and refused to rehire him after he got a waiver - Ninth Circuit erred in finding that a limitation on vision was a limitation of the major life activity of seeing simply because there was a difference between the manner in which plaintiff sees and the manner in which most people see - this undercuts the fundamental statutory requirement that only impairments that substantially limit the ability to perform a major life

activity constitute disabilities- Ninth Circuit also erred in suggesting that it need not take into account the fact that plaintiff has compensated for his impairment - as we stated in Sutton, mitigating measures must be taken into account - Ninth Circuit also erred in not heeding the statutory obligation to determine a disability's existence on a case-by-case basis - this plaintiff is not limited in a major life activity - furthermore, employer who requires as a job qualification meeting a normally applicable federal safety standard does not have to alter its policies because the standard might be waived in an individual case.

Murphy v. United Parcel Service, Inc., 527 U.S. 516, 9 A.D. Cas. 691 (1999) - Plaintiff, a mechanic who had to drive commercial vehicles, had high blood pressure which was controlled with medication - as in Sutton, plaintiff is evaluated in his medicated state - when medicated petitioner's high blood pressure does not substantially limit him in any major life activity - with respect to plaintiff's contention that he was regarded as disabled, a person is regarded as disabled under the ADA if the employer mistakenly believes that the person's actual, non-limiting impairment substantially limits one or more major life activities - evidence that petitioner is regarded as unable to meet Department of Transportation regulations is not sufficient to create a genuine issue of material fact as to whether he is regarded as unable to perform a class of jobs.

Sutton v. United Airlines, Inc., 527 U.S. 471, 9 A.D. Cas. 673 (1999) - Plaintiffs were severely myopic twin sisters who wanted to be United Airlines pilots - with corrective measures they had normal eyesight but did not meet the airline's requirements - the determination as to whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment - petitioners with eyeglasses are not actually disabled since they are not substantially limited in any major life activity - plaintiffs claim they were nevertheless "regarded as" having an impairment that substantially limits a major life activity - employer is free to rely on physical characteristics which are medical conditions but are not impairments just as it is free to decide that some limiting impairments make individuals less than ideally suited for a job - petitioners are not regarded as substantially limited in the major life

activity of working - the position of global airline pilot is a single job, and many other pilot positions are available to them.

Bragdon v. Abbott, 524 U.S. 624, 8 A.D. Cas. 239 (1998) - 5-4 vote - asymptomatic HIV is a disability within the meaning of the ADA - plaintiff was denied dental treatment in a dental office because of being HIV-positive - HIV infection does substantially limit a major life activity- the major life activity of reproduction and childbearing - Congress directed that language shall be construed to apply a lesser standard than that required under Rehabilitation Act - asymptomatic is a misnomer - in light of the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease, "we hold it is an impairment from the moment of infection" - but the definition is not satisfied unless the impairment affects a major life activity - while other major life activities could have been argued, the one argued below was reproduction - reproduction is a major life activity - the ADA must be construed to be consistent with regulations - the Rehabilitation Act regulations include as major life activities caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working - this list is not exhaustive- there is no indication of an attempt to limit the meaning of the term "major" to "public activities" - the final requirement is that the limitation must be a substantial limitation on the major life activity - no question HIV imposes substantial limitations on one who tries to reproduce - sexual partner and/or child may become infected - the Act addresses substantial limitations, not utter inabilities- we give substantial deference to agency interpretations and regulations, all of which have confirmed asymptomatic HIV as a disability - with respect to the direct harm issue, the test is objective, not subjective- issue remanded for reconsideration on direct harm issue to court of appeal.

Moore v. J. B. Hunt Transport, Inc., ___ F.3d ___, 10 A.D. Cas. 1357 (7th Cir. 2000) - Arthritis does not substantially limit major life activity even though plaintiff can no longer participate in activities such as bowling and mowing lawn - they are not major life activities - as to walking, since plaintiff can consistently walk distances less than a mile, no substantial limitation on major life activity of walking.

Bowen v. Income Producing Management of Oklahoma, Inc., 202 F.3d 1281, 10 A.D. Cas. 296 (10th Cir. 2000) - Plaintiff who sustained brain injury from gunshot wound to head not substantially limited in abilities to work or to learn and thus not covered by ADA - plaintiff shot on employer's premises by an employee - plaintiff suffered short-term memory loss, an inability to concentrate, and difficulty in doing simple math - jury finding that plaintiff was not substantially limited in ability to work or learn affirmed on appeal - clinical neuropsychologist performed a series of 25 tests on plaintiff - after the injury his memory and learning was average, his general intellectual function was superior, his attention and concentration was above average, and his speed of information processing was above average - jury conclusion of no substantial limitation affirmed.

Schneiker v. Fortis Insurance Co., 200 F.3d 1055, 10 A.D. Cas. 75 (7th Cir. 2000) - Employee with depression not covered by ADA since no indication depression substantially limits her ability to work- although plaintiff claimed that stress triggered her depression the record shows only that she cannot work for a particular supervisor.

Broussard v. University of California, 192 F.3d 1252, 9 A.D. Cas. 1330 (9th Cir. 1999) - Carpal tunnel syndrome not proven to substantially limit plaintiff in major life activity of working - expert's contrary opinion rejected because of erroneous factual assumptions and because report did not address plaintiff's vocational training, abilities, the relevant geographic area, or the number and type of jobs demanding similar training from which she would be disqualified - summary judgment affirmed.

McAlindin v. County of San Diego, 192 F.3d 1226, 9 A.D. Cas. 1217 (9th Cir. 1999), amended, 201 F.3d 1211 (9th Cir.), cert. denied, 120 S. Ct. 2689 (2000) - Individual with panic disorder who takes medication that does not totally control the condition and has side effects may be disabled - factual issues - sleeping, engaging in sexual relations, and interacting with others are major life activities.

Wellington v. Lyon County School District, 187 F.3d 1150, 9 A.D. Cas. 1177 (9th Cir. 1999) - Factual question exists as to whether discharged maintenance man with carpal tunnel syndrome is substantially limited in ability to perform class of jobs and thus disabled within meaning of ADA -

his training and experience limit him to jobs in manufacturing, construction, heavy maintenance and plumbing - injury prevents him from doing mental fabrication, welding, and the like.

Blackston v. Warner-Lambert Co., ___ F. Supp. ___, 10 A.D. Cas. 262 (N.D. Ala.), aff'd, ___ F.3d ___ (11th Cir. 2000) - Summary judgment granted against plaintiff with attention deficit disorder (ADD) - plaintiff claimed substantially limited in two major life activities: thinking and working - condition can be alleviated by different types of treatment including medication plaintiff was taking - plaintiff's doctor admitted at deposition that while taking medicine plaintiff was not limited in major life activities, including working - plaintiff not covered by ADA - "regarded as" argument rejected - fact that company knew he suffered from ADD and offered accommodations does not indicate "regarded as" - reasonable jury could not conclude that company viewed plaintiff as substantially limited in working.

Webber v. Strippit, Inc., 186 F.3d 907, 9 A.D. Cas. 961 (8th Cir. 1999), cert. denied, 120 S. Ct. 794 (2000) - Employee with heart disease not disabled even though disease impacts cardiovascular system - absence of fully functioning cardiovascular system is an impairment but becomes a disability only if it substantially limits a major life activity employee not substantially limited in working - although employee had difficulty walking long distances or climbing stairs, these are moderate limitations on major life activities and do not constitute disability.

Hilburn v. Murata Electronics North America, Inc., 181 F.3d 1220, 9 A.D. Cas. 908 (11th Cir. 1999) - Employee who had heart attack and who has coronary heart disease not disabled - employee not limited in major life activities of running, performing manual tasks, lifting or working - diminished activity tolerance for running is not substantial limitation - lifting restriction has not interfered with employment.

Berg v. Norand Corp., 169 F.3d 1140, 9 A.D. Cas. 207 (8th Cir.), cert. denied, 120 S. Ct. 174 (1999) - Diabetic tax department manager asked for accommodation - reducing 70-80-hour workweek to 40-50 hours - no violation of ADA since limitation of only being able to work 40-50 hours does not substantially limit plaintiff in major life activity of working.

Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 8 A.D. Cas. 1752 (3d Cir. 1998) - Back injury caused lifting limitation of 50 pounds and carrying limitation of 25 pounds - summary judgment reversed - in deciding on ADA coverage courts must consider the effect of an impairment on the specific individual's job prospects - employee was supermarket bagger and meatcutter - district court found employee had severe employability problems because of limited education, limited job skills, and advanced age, plus the lifting restrictions - trial court found that the first three factors "dwarfed the last one in effect on employability" - trial court concluded that to find ADA coverage would be to base coverage on personal factors that have nothing to do with his impairment - court of appeals held this analysis was flawed because a court must consider the individual's "training, skills and abilities" in determining whether the impairment constitutes a substantial limitation on the major life activity of working - "A substantially limiting impairment for one individual may not be substantially limiting for another individual with different characteristics." - case analyzed at 160 LRR 169.

Castellano v. City of New York, 142 F.3d 58, 9 A.D. Cas. 67 (2d Cir.), cert. denied, 525 U.S. 922 (1998) - Plaintiffs were disabled retirees - need not be presently qualified to sue under ADA when issue is not ability to work but discrimination in post-work benefits - cannot compel individual with requisite years of service who becomes disabled to take a disability rather than normal pension.

Buckley v. Consolidated Edison Co. of New York, Inc., 155 F.3d 150, 8 A.D. Cas. 847 (2d Cir. 1998) (en banc) - Inability to urinate in public or on command not ADA-covered disability - plaintiff was recovering alcoholic and employer used urine tests to frequently test former substance abusers.

Perkins v. St. Louis County Water Co., 160 F.3d 446, 8 A.D. Cas. 1345 (8th Cir. 1998) - Employee not disabled by Meniere's disease, which causes occasional episodes of vertigo and vomiting - only two episodes during three years of employment - medical condition that causes individual to miss two and one-half weeks of work in a three-year period is not sufficient to render individual disabled under ADA.

Swain v. Hillsborough County School Board, 146 F.3d 855, 8 A.D. Cas. 488 (11th Cir. 1998) - Incontinent school teacher who must

have regular access to restroom not covered by ADA - she has not shown that she cannot perform a broad class of jobs.

Witter v. Delta Air Lines, Inc., 138 F.3d 1366, 8 A.D. Cas. 747 (11th Cir. 1998) - Airline pilot stripped of medical certification to fly commercial aircraft because of mental and emotional problems not regarded as disabled under ADA - inability to pilot commercial airplanes is too narrow a range of jobs to constitute a class of jobs - although he was perceived as unable to fly, this does not mean he was perceived as disabled - there are many jobs that use a pilot's skills other than commercial airline pilot.

Hoeller v. Eaton Corp., 149 F.3d 621, 8 A.D. Cas. 537 (7th Cir. 1998) - Former employee with bipolar disorder claims employer regarded him as being disabled - condition did not substantially limit employee in any major life activity, even though condition was difficult to live with.

Aldrich v. Boeing Co., 146 F.3d 1265, 8 A.D. Cas. 424 (10th Cir. 1998), cert. denied, 526 U.S. 1144 (1999) - It is possible to be disabled even if condition has not been classified as permanent - assembly worker had a muscular disorder that made it difficult for him to manipulate tools with his hands - the employer contended it had no duty toward him until a physician issued a permanent disability rating - this is not correct and contradicts both Justice Department and EEOC guidelines - summary judgment reversed and remanded.

Reeves v. Johnson Controls World Services, Inc., 140 F.3d 144, 7 A.D. Cas. 1675 (2d Cir. 1998) - Everyday mobility is not a major life activity - plaintiff suffered from panic disorder with agoraphobia - plaintiff could go to and from work but was unable to travel over bridges and through tunnels or board trains unaccompanied - whether activity is major life activity should not be determined on case-by-case basis - court cannot define major life activity by focusing on symptoms.

Francis v. City of Meriden, 129 F.3d 281, 7 A.D. Cas. 955 (2d Cir. 1997) - Obesity, absent special cases where it relates to a physiological disorder, is not a physical impairment - no claim under ADA by firefighter who was disciplined for failing to meet weight standards - "regarded as" not applicable since what the City

regarded him as having was not an impairment which would be covered by the statute.

Halperin v. Abacus Technology Corp., 128 F.3d 191, 7 A.D. Cas. 406 (4th Cir. 1997) - Computer consultant sustained temporary back injury attempting to lift computer at work - he was then discharged - summary judgment affirmed - ADA does not cover temporary impairments - “Applying the protections of the ADA to temporary impairments . . . would work a significant expansion of the Act” - “The ADA simply was not designed to protect the public from all adverse effects of ill health and misfortune.”

McKay v. Toyota Motor Manufacturing, USA, Inc., 110 F.3d 369, 6 A.D. Cas. 933 (6th Cir. 1997) - Toyota assembly line worker with carpal tunnel syndrome fired for excessive absences has no claim since carpal tunnel syndrome does not substantially limit her ability to perform either a class of jobs or a broad range of jobs - it disqualifies her only from a narrow range of repetitive-motion jobs - therefore no ADA protection - 2-1 decision - dissent sides with EEOC’s position that majority “effectively nullifies the ADA” as the law applies to claims based on impairments of the ability to work.

Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 6 A.D. Cas. 437 (1st Cir. 1997) - Summary judgment affirmed against plaintiff who contended that because of periodic episodes of depression he lost his ability to get along with others - that concept “is remarkably elastic, perhaps so much so as to make it unworkable as a definition” - “To impose legally enforceable duties on an employer based on such an amorphous concept would be problematic.” - in any event, even assuming a major life activity is implicated, plaintiff was not substantially limited- he just stayed away from crowded places.

Disability - Qualified Individual with
Disability/Essential Job Functions (Ch. 9)

Earl v. Mervyns Inc., 207 F.3d 1361, 10 A.D. Cas. 673 (11th Cir. 2000) (per curiam) - Store area coordinator whose obsessive compulsive disorder prevented her from

arriving on time at work could not perform an essential job function: punctuality.

Davis v. Florida Power & Light Co., 205 F.3d 1301, 10 A.D. Cas. 492 (11th Cir. 2000) - Mandatory overtime is essential function of job because of the utility's commitment to customers to do certain types of work on the same day - EEOC position that mandatory overtime can never be essential function of job rejected.

Greer v. Emerson Electric Co., 185 F.3d 917, 9 A.D. Cas. 1100 (8th Cir. 1999) - Employee suffering from depression and anxiety who is discharged for excessive absenteeism is not qualified individual with disability regular and reliable attendance are essential functions of job.

Buckles v. First Data Resources, Inc., 176 F.3d 1098, 9 A.D. Cas. 765 (8th Cir. 1999) - Disabled individual is not qualified since he is unable to maintain regular and reliable attendance with reasonable accommodation - company's detailed attendance policies and procedures demonstrate that attendance is essential function of job - does not matter that company has numerous employees and all employees have some absences.

Koshinski v. Decatur Foundry, Inc., 177 F.3d 599, 9 A.D. Cas. 353 (7th Cir. 1999) - Employee with degenerative wrist disease lawfully removed from job - employee claimed he wished to continue to perform the job despite pain and probable degeneration - employee not qualified to perform the essential functions of his job - court accepts principle that ADA is not paternalistic statute designed to protect disabled person from himself, and that person with degenerative heart disease could not be barred from a job simply because a future heart attack was likely - here, two different doctors said that he should not perform the type of work he wanted to return to, and that was sufficient - case and other "future harm" cases analyzed at 161 LRR 41.

Burch v. City of Nacogdoches, 174 F.3d 615, 9 A.D. Cas. 509 (5th Cir. 1999) - City properly terminated firefighter with back injury which prevented him from lifting or carrying heavy objects or stooping - ADA does not require an employer to relieve an employee of any

essential job functions, to modify essential job functions, to reassign existing employees to perform essential job functions, or to hire new employees to do so.

Waggoner v. Olin Corp., 169 F.3d 481, 9 A.D. Cas. 88 (7th Cir. 1999) - Summary judgment for employer affirmed - employee who suffered from seizures missed work or was late 40 times during a year and a half of employment - plaintiff seems to think that “the ADA requires Olin to provide her with a job and not require that she regularly perform it” - “It should not require saying that generally attendance is a requirement of a job.” - holding might be different if absences were relatively infrequent and did not interfere with productivity- court distinguished medical leave case on the ground that here it was the “excessive frequency of an employee’s absences” that leads to the conclusion that she cannot perform her job - case analyzed at 160 LRR 361.

Hamlin v. Charter Township of Flint, 165 F.3d 426, 8 A.D. Cas. 1688 (6th Cir. 1999) - Employer has burden of proving that given task is essential job function since that is an affirmative defense - concurring judge says that if Sixth Circuit had not previously ruled to the contrary, he would hold that proving ability to do essential function of job is part of prima facie case.

Nowak v. St. Rita High School, 142 F.3d 999, 8 A.D. Cas. 106 (7th Cir. 1998) - High school teacher absent because of illness for more than 18 months - attendance was essential function of the job - not a qualified person with a disability- the ADA does not require employers to accommodate employees who suffer from prolonged illnesses by giving them an indefinite leave of absence.

Deane v. Pocono Medical Center, 142 F.3d 138, 7 A.D. Cas. 1809 (3d Cir. 1998) (en banc) [note: this supersedes panel opinion earlier reported] - Issue is whether “regarded as” plaintiffs in order to be considered qualified must show they are able to perform all of the functions of the relevant position or just the essential functions, with or without accommodation - panel decision that held they must be able to perform all the functions rejected - all that is necessary is proof of a plaintiff’s ability to perform the essential functions - need not rule on more difficult question, which is whether after an employer is disabused of its improper perception that the individual is disabled, the employer has any obligation to accommodate -

nurse was released only for light duty since she was unable to lift more than 15 or 20 pounds - hospital refused to take her back - summary judgment should not have been granted - factual issue whether hospital regarded her as disabled - factual issue as to whether heavy lifting is an essential function of job.

Stone v. City of Mount Vernon, 118 F.3d 92, 6 A.D. Cas. 1685 (2d Cir. 1997), cert. denied, 522 U.S. 1112 (1998) - Summary judgment against paraplegic firefighter reversed - may be qualified for light-duty job - fire department in the past has assigned persons not capable of fighting fires to light duty and has never required them to engage in fire-suppression activity.

Miller v. Illinois Department of Corrections, 107 F.3d 483, 6 A.D. Cas. 678 (7th Cir. 1997) - When an employer rotates an individual through multiple job duties, a disabled employee is not qualified for the position unless he can carry out enough of those duties to warrant a judgment that he can perform the essential functions of the job - no violation in prison's failure to reemploy a blind correctional officer who could perform only the duties of switchboard officer and armory officer and who could not help in emergencies - court gave example: "If it is reasonable for a farmer to require each of his farmhands to be able to drive a tractor, clean out the stables, bale the hay, and watch the sheep, a farmhand incapable of performing any of these tasks except the lightest one (watching the sheep) is not able to perform the essential functions of his position." - this assumes a valid reason for requiring multiple abilities.

Disability - Reasonable Accommodation (Ch. 9)

EEOC v. Humiston-Keeling Inc., ___ F.3d ___, ___ FEP ___, Sept. 21, 2000 Daily Labor Report (7th Cir. 2000) - Duty of reasonable accommodation does not require reassigning a warehouse picker with "tennis elbow" to an equivalent vacant clerical position for which she was minimally qualified when there was a more qualified non-disabled person - EEOC position that a disabled person must "be advanced over a more qualified non-disabled person, provided only that [the disabled person] is at least

minimally qualified to do the job” rejected - “The reassignment provision makes clear that the employer must also consider the feasibility of assigning the worker to a different job in which his disability will not be an impediment to full performance, and if the reassignment is feasible and does not require the employer to turn away a superior applicant, the reassignment is mandatory.” - Judge Posner opinion.

McLean v. Runyon, ___ F.3d ___, 10 A.D. Cas. 1569 (9th Cir. 2000) - No JNOV for postal service since disabled clerk could have been reassigned to a vacant position as a reasonable accommodation - it makes no difference that the vacant position was one level above the plaintiff's position, since the plaintiff could have been assigned with the same pay to the higher rated position.

Donahue v. Consolidated Rail Corp., ___ F.3d ___, 10 A.D. Cas. 1505 (3d Cir. 2000) - Employer did not engage in “interactive process” - however, plaintiff failed to identify position to which he could have been transferred which he could perform with reasonable accommodation - Third Circuit joins Second, Tenth and Eleventh Circuits in holding that summary judgment is appropriate when plaintiff, following discovery, has been unable to uncover available jobs appropriate for accommodation.

Burns v. Coca-Cola Enterprises, Inc., ___ F.3d ___, 10 A.D. Cas. 1409 (6th Cir. 2000) - While employer has duty to transfer disabled employee in appropriate circumstances as accommodation, failure to request transfer by employee precludes recovery.

Boersig v. Union Electric Co., 219 F.3d 816, 10 A.D. Cas. 1249 (8th Cir. 2000) - ADA does not require accommodation that violates union contract - plaintiff sought promotion but under union contract preference given to applicants in different position.

Ward v. Massachusetts Health Research Institute, 209 F.3d 29, 10 A.D. Cas. 776 (1st Cir. 2000) - Summary judgment reversed - although punctuality is an essential function of most jobs, factual issue as to whether being at work at a particular time is essential for laboratory data-entry assistant - no evidence that nature of job

requires presence during specific hours of the day - modified work schedule can be reasonable accommodation.

Rehling v. City of Chicago, 207 F.3d 1009, 10 A.D. Cas. 589 (7th Cir. 2000) - Employer's failure to discuss potential accommodation through an interactive process does not in itself violate the ADA- in this case a reasonable accommodation was made without an interactive process - "The ADA seeks to ensure that qualified individuals are accommodated . . . , not to punish employers who, despite their failure to engage in an interactive process, have made reasonable accommodations." Id. at *5. - summary judgment affirmed.

Jackan v. New York State Department of Labor, 205 F.3d 562, 10 A.D. Cas. 497 (2d Cir. 2000) - Employee alleging that employer failed to accommodate him by transferring him to a desk job cannot recover since employee has the burden of proving the existence of a vacancy in a position to which he could have been transferred - employee bears the burden of establishing the availability of an adequate accommodation - it is not enough to suggest the possibility of an accommodation without establishing the existence of a relevant job.

Walsh v. United Parcel Service, 201 F.3d 718, 10 A.D. Cas. 161 (6th Cir. 2000) - Indefinite leave of absence not a reasonable accommodation - pilot who had been on leave of absence for 18 months because of automobile accident was terminated rather than being granted additional leave - pilot did not provide requested information as to whether or when he would be able to return to work.

Treanor v. MCI Telecommunications Corp., 200 F.3d 570, 10 A.D. Cas. 80 (8th Cir. 2000) - Request for part-time work lawfully denied - no part-time position existed at that time - no obligation to create such a position.

Kennedy v. Dresser Rand Co., 193 F.3d 120, 9 A.D. Cas. 1335 (2d Cir. 1999), cert. denied, 120 S. Ct. 1244 (2000) - Replacing a supervisor whose alleged mistreatment triggered plaintiff's depression is not a reasonable accommodation - there is no per se rule that replacement of a supervisor can never be a reasonable accommodation since a per se rule is inconsistent with the requirement that accommodations be evaluated case by case, but a presumption exists that a request to change supervisors is unreasonable.

Pond v. Michelin North America, Inc., 183 F.3d 592, 9 A.D. Cas. 795 (7th Cir. 1999) - Reasonable accommodation does not require bumping - no vacancies in position identified by disabled employee as position she could

perform despite fact that disabled employee had more seniority than some employees in position - simply no obligation to bump.

Loulseged v. Akzo Nobel Inc., 178 F.3d 731, 9 A.D. Cas. 783 (5th Cir. 1999) - Laboratory technician with back injury criticized employer's suggestions about lifting problems but offered no suggestions of her own and quit one week before her job was going to require lifting - remaining mute and quitting constituted failure to participate in the interactive process which negates her claims.

Smith v. Midland Brake, Inc., 180 F.3d 1154, 9 A.D. Cas. 738 (10th Cir. 1999) - Must reassign disabled employee to vacant position as accommodation even though employee is unable to perform essential functions of his existing job - one may be a qualified individual with a disability if one can perform the essential functions of a job to which one could be assigned with a reasonable accommodation.

Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 8 A.D. Cas. 1862 (11th Cir. 1999) - No obligation to provide accommodation unless specific request for accommodation is made - manager told employee with lifting problems that job required lifting of up to 50 pounds - plaintiff told employer she could not meet those requirements and resigned - her failure to request a specific accommodation bars her claim.

Mole v. Buckhorn Rubber Products, Inc., 165 F.3d 1212, 8 A.D. Cas. 1873 (8th Cir.), cert. denied, 120 S. Ct. 65 (1999) - Failure to request accommodations bars claim of employee with multiple sclerosis who had been provided with a variety of accommodations prior to receiving notice of termination - contention that employer should have known how to afford her further accommodations rejected.

Cehrs v. Northeast Ohio Alzheimer's Research Center, 155 F.3d 775, 8 A.D. Cas. 825 (6th Cir. 1998) - Presumption adopted by some circuits that regular attendance is an essential job requirement is erroneous - a medical leave can be a reasonable accommodation - even though the medical leave is to be indefinite, employer should be forced to prove that it would cause an undue hardship.

Willis v. Pacific Maritime Association, 162 F.3d 561, 8 A.D. Cas. 1632 (9th Cir. 1998) - Accommodation is not reasonable if it violates collective bargaining agreement - job is not vacant if someone else has contractual right to claim the job - requesting job someone else

entitled to under collective bargaining agreement is not a reasonable accommodation.

Moritz v. Frontier Airlines, Inc., 147 F.3d 784, 8 A.D. Cas. 385 (8th Cir. 1998) - Airline station agent with multiple sclerosis asked that she be allowed to work exclusively at ticket counter or to have assistant while performing gate duties - this would not be reasonable accommodation - airline not required to revise bidding system, to eliminate gate duties, or to use two employees to do a job normally done by one.

Brickers v. Cleveland Board of Education, 145 F.3d 846, 8 A.D. Cas. 534 (6th Cir. 1998) - School bus attendant unable to lift children due to back condition - she requested that she be assigned to a bus route in which risk of being required to lift child is minimized (a route servicing only children with minimal or no physical handicaps) - attendant is not qualified individual with disability- ADA does not require that employer exempt disabled employee from essential function of job - what employee wants is not accommodation but exemption.

Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 7 A.D. Cas. 1872 (7th Cir. 1998) - ADA does not require employers to find jobs for employees who are disabled and unable to continue - duty to reassign requires only that the employer consider a transfer to a position in which the disabled employee will be able to satisfy legitimate nondiscriminatory qualifications - employees with repetitive-stress problems not qualified for any openings that existed - employer not obliged to consider transfers to jobs that would be promotions - employer is obliged to consider transfers to jobs to which it regularly transfers employees without additional training - jobs to which employee is reasonably matched with respect to skills must be considered - no showing such jobs available herein.

Ralph v. Lucent Technologies, Inc., 135 F.3d 166, 7 A.D. Cas. 1345 (1st Cir. 1998) - Part-time work must be provided to employee who had mental breakdown - mental breakdown was caused by same-sex harassment on the job leading to major depression and post-traumatic stress disorder - therapist described opportunity to return to work on a part-time basis is essential - EEOC Guidelines expressly authorize part-time work as a possible accommodation - duty to provide accommodation not exhausted by paid disability leave.

Hypes v. First Commerce Corp., 134 F.3d 721, 7 A.D. Cas. 1546 (5th Cir. 1998) - Chronic obstructive lung disease caused extensive tardiness and absenteeism of loan review analyst - essential function of job was to be in the office as near to normal business hours as possible - proposed flex

time accommodation to allow employee to come to work up to one hour late would not have enabled him to perform essential functions of job since that accommodation would rarely have been enough to ameliorate his tardiness and absenteeism - coming to work regularly is essential function of job.

Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 7 A.D. Cas. 1223 (3d Cir. 1998) - Transferring an employee away from co-workers who causes the employee stress is not required by the ADA - supervisors would have to consider a stress level whenever assigning projects to teams - this would impose extraordinary administrative burdens.

Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 7 A.D. Cas. 1514 (D. Or. 1998), aff'd, 204 F.3d 994 (9th Cir. 2000), pet. for cert. filed, 69 U.S.L.W. 3023 (July 5, 2000) (No. 00-24) - Golf professional with atrophied leg is disabled and can use a cart in competing in professional tournaments - cart is reasonable accommodation under ADA - permitting disabled golfer to use cart will not fundamentally alter the nature of the game.

Disability - Effect of Representations in Applying for Disability Benefits (Ch. 9)

Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 9 A.D. Cas. 491 (1999) - Receipt of social security disability benefits does not automatically estop a plaintiff's ADA claim or erect a strong presumption against it - however, to survive a summary judgment motion, plaintiff cannot ignore contention that she was too disabled to work, but must explain why that contention is consistent with ADA claim - Social Security Administration does not take into account possibility of reasonable accommodation - in some cases there will be a genuine conflict between disability claim and ADA claim and summary judgment will be appropriate - a sworn assertion in an application for disability benefits that plaintiff is unable to work appears to negate the essential element of an ADA claim - to defeat summary judgment the explanation must be sufficient to warrant a reasonable juror's concluding that assuming the truth of or the plaintiff's good faith belief in the earlier statement that plaintiff could nonetheless perform the essential functions of her job with or without reasonable accommodation - here, the parties should have an opportunity in the trial court to resolve that issue.

Di Santo v. McGraw-Hill Inc., 220 F.3d 61, 10 A.D. Cas. 1364 (2d Cir. 2000) (per curiam) - ADA action

dismissed - plaintiff failed to explain inconsistency between Social Security Administration representation that he was completely disabled and ADA claim that he can perform job with reasonable accommodation.

Reed v. Petroleum Helicopters, Inc., 218 F.3d 477, 10 A.D. Cas. 1426 (5th Cir. 2000) (per curiam) - Sworn statements in social security disability application inconsistent with ADA claim - court rejects explanation that English is not first language and therefore was not entirely clear in application.

EEOC v. Stowe-Pharr Mills, Inc., 216 F.3d 373, 10 A.D. Cas. 1153 (4th Cir. 2000) - Social Security disability application does not bar ADA lawsuit - worker was restricted only from working on concrete floors and believed she could have continued to work in a production job if transferred to a plant with wooden floors - the worker was advised to state on benefits application that she was unable to work and it did not take account of whether she could have worked with reasonable accommodation - plaintiff did tell Social Security Administration intake officer she could work with an accommodation but the intake officer advised that that not be stated on the application - application says "I became unable to work because of my disabling condition" - summary judgment reversed.

Parker v. Columbia Pictures Industries, 204 F.3d 326, 10 A.D. Cas. 396 (2d Cir. 2000) - Benefits application not determinative - employee discharged when due to back injury he was unable to return to work after disability leave expired - benefits application stated "completely incapacitated - disabled - treatment daily" and "became unable to work" - reasonable jury could find that statements in application were explanations for discharge rather than description of actual physical abilities.

Loeb v. Trans World Airlines, 198 F.3d 250, 9 A.D. Cas. 1634 (8th Cir. 1999) (unpublished decision) - Discharged employee applied for social security disability benefits after diagnosis of manic depression, obsessive compulsive disorder and alcoholism - summary judgment affirmed - plaintiff "failed to explain sufficiently how her sworn representations to [Social Security] that she was unable to work . . . were consistent with her claim that she could perform her job with accommodation."

Feldman v. American Life Insurance Co., 196 F.3d 783, 9 A.D. Cas. 1717 (7th Cir. 1999) - Contradiction between social security disability claim and ADA lawsuit mandates dismissal of lawsuit - benefits application stated that plaintiff was completely and totally disabled and could not perform any substantial gainful employment - ADA complaint alleged she was able to perform the essential functions of her job with or without accommodation - the application itself does not estop her, but requires a direct explanation of the apparent contradiction, which was not forthcoming.

Motley v. New Jersey State Police, 196 F.3d 160, 9 A.D. Cas. 1505 (3d Cir. 1999), cert. denied, 120 S. Ct. 1719 (2000) - ADA claim barred by assertions made when applying for disability benefits - former trooper alleged he was totally disabled in seeking benefits - there is insufficient evidence of the apparently inconsistent positions - assertions in benefits claims irreconcilable with ADA claim.

Norris v. Sysco Corp., 191 F.3d 1043, 9 A.D. Cas. 1262 (9th Cir. 1999), cert. denied, 120 S. Ct. 1221 (2000) - Employee who received total disability benefits from insurance carrier and state not judicially estopped - different definitions of disability - proof that party has made prior inconsistent statements is not a rare event - juries are regularly called upon to consider evidence of that sort - it is well known that nature of individual's disability may change over time.

Mitchell v. Washingtonville Central School District, 190 F.3d 1, 9 A.D. Cas. 1123 (2d Cir. 1999) - Amputee who represented in social security and workers' comp applications that he was unable to work because he could not stand or walk is judicially estopped from asserting an ADA action that with accommodation could perform work other than sedentary work - earlier assertions were accepted by administrative tribunals and resulted in determination in his favor.

Race and Color (Ch. 10)

Tetro v. Elliott Popham Pontiac, 173 F.3d 988, 79 FEP 699 (6th Cir. 1999) - White employee who alleges discharged because he has a biracial child has stated Title VII race claim - reliance on interracial association cases.

National Origin and Citizenship (Ch. 11)

Maarouf v. Walker Manufacturing Co., 210 F.3d 750, 82 FEP 1084 (7th Cir. 2000) - Summary judgment affirmed in national origin/religious discrimination case despite evidence that supervisor made numerous statements belittling religion and national origin - three other

supervisors independently perceived inadequacies in work performance and no evidence that they were bigoted - “Even discounting entirely [the bigoted supervisor’s] perceptions regarding [plaintiff’s] work performance, [plaintiff] has failed to demonstrate pretext because three other supervisors independently noted similar problems with his performance. Therefore, the taint of [the bigoted supervisor’s] discriminatory comments does not extend to those independent judgments regarding his performance.” Id. at 755.

Cordova v. State Farm Insurance Cos., 124 F.3d 1145, 74 FEP 1377 (9th Cir. 1997) - Plaintiff in hiring case can rely upon bigoted remark made by decisionmaker after the events in question and in another context - decisionmaker referred to an Hispanic insurance agent as a “dumb Mexican” and said he had been required to hire the person because he was a minority - the remark is so egregious and bigoted that it constitutes strong evidence of discriminatory animus - this is more than a stray remark - summary judgment reversed.

Native Americans (Ch. 12)

Dawavendewa v. Salt River Project Agricultural Improvement & Power District, 154 F.3d 1117, 77 FEP 1312 (9th Cir. 1998), cert. denied, 120 S. Ct. 843 (2000) - Job preferences for Native Americans do not permit discrimination in favor of individuals because of their membership in particular tribes - Indian who alleged he was barred from working on a project because he was Hopi and not Navajo can sue for national origin discrimination.

Sex (Ch. 13)

U.S. v. Morrison, 120 S. Ct. 1740, 82 FEP 1313 (2000) - Violence Against Women Act struck down - Congress did not have constitutional power to create federal civil remedy for victims of gender-motivated crimes of violence - 5-4 decision.

Frank v. United Airlines, Inc., 216 F.3d 845, 83 FEP 1 (9th Cir. 2000) - 1979 district court case brought on behalf of class of past, present and future flight attendants resulted in finding that weight standards were not facially discriminatory but they had been discriminatorily applied - case settled while on appeal - post-settlement weight policy required female flight attendants to weight between 14 and 25 pounds less than male colleagues of the same height and age - Ninth Circuit 2-1 holds that revised policies are unlawful - judgment entered in 1979 does not bar new employees who did not benefit from judgment from challenging new policy.

Vance v. Union Planters Bank, 209 F.3d 438, 82 FEP 1199 (5th Cir. 2000) - Head of bank on witness stand in sex discrimination case was asked why he pursued a series of male candidates after it appeared that a woman was the only viable candidate - he responded, "I wanted to get the best guy . . . and I saying [sic] that generically." - judgment for female plaintiff upheld - no such thing as a stray remark on the witness stand.

Kline v. City of Kansas City Fire Department, 175 F.3d 660, 83 FEP 367 (8th Cir. 1999), cert. denied, 120 S. Ct. 1160 (2000) - Evidence that different supervisors discriminated against women other than female plaintiffs was properly excluded - such evidence would not tend to prove that plaintiffs were discriminated against because of their sex - probative value of this evidence would be substantially outweighed by threat of confusion of issues and unfair prejudice - "[A]cts of people who did not supervise . . . the plaintiffs (and who in most cases did not even work in the same area as the plaintiffs) are not probative. . . . What little probative value such evidence might have . . . would be substantially outweighed by the threat of confusion of the issues and unfair prejudice." Id. at 668.

Olsen v. Marriott International, Inc., 75 F. Supp. 2d 1052, 81 FEP 855 (D. Ariz. 1999) - Health spa which hires predominantly female massage therapists defended on the ground that sex was a BFOQ for reasons of clients' privacy - however, the evidence showed that the real reason was not client privacy but client preference - both its male and female customers preferred female massage therapists - BFOQ defense rejected.

Stanley v. University of Southern California, 178 F.3d 1069, 79 FEP 1616 (9th Cir.), cert. denied, 120 S. Ct. 533 (1999) - Pay disparity between female coach of women's basketball team and male coach of men's team justified by markedly different levels of experience and qualifications - summary judgment affirmed - 2-1 decision with Hugg and Reinhardt in majority and Pregerson in dissent - no retaliation since University's offer of multi-year contract remained open following contentions of sex discrimination and plaintiff was terminated only when her contract expired and she was unable to negotiate a new one - this is not a termination.

Larimer v. Dayton Hudson Corp., 137 F.3d 497, 77 FEP 1545 (7th Cir. 1998) - Store manager's statement that he would not promote female employee because she was not "perky" and did not have "bounce" did not support a claim of sex or age discrimination - neither does claim that plaintiff had "no young, fresh ideas" - opinion of business psychologist who reviewed various documents and opined that plaintiff was more qualified than persons who got promoted simply second-guessed the decision of management and invited the court to assume the role of a super personnel board - summary judgment granted on discrimination claims.

Marshall v. American Hospital Association, 157 F.3d 520, 78 FEP 233 (7th Cir. 1998) - Newly hired employee announced would be taking pregnancy leave during busiest time of employer - discharge not motivated by pregnancy discrimination - Title VII does not require employer to overlook pregnant employee's absence unless it overlooks comparable absences of non-pregnant employees - no evidence produced that non-pregnant probationary employee who was going to be on extended leave during busy season would not have been terminated.

Urbano v. Continental Airlines, Inc., 138 F.3d 204, 78 FEP 839 (5th Cir.), cert. denied, 525 U.S. 1000 (1998) - Pregnant employee requested light-duty assignment - under company policy, light-duty assignments reserved for workers who suffer occupational injuries - "Because the PDA protects pregnant women only from being treated differently than similarly-situated non-pregnant employees, it does not guarantee light-duty assignments." - judgment as a matter of law affirmed - "Continental treated [plaintiff] in exactly the same manner as it would have treated any other worker who was injured off the job Urbano was not denied a light-duty assignment because of her pregnancy, but because her back troubles were not work related. Under the PDA, an employer is obliged to ignore a woman's pregnancy and 'to treat the employee as well as it would have if she were not pregnant.'" - PDA does not "grant preferential treatment to pregnant women."

Womack v. Runyon, 147 F.3d 1298, 77 FEP 769 (11th Cir. 1998) - Female employee given promotion over higher-rated male employee because she was paramour of decisionmaker - Title VII does not encompass claim based on favoritism shown to supervisor's paramour.

Garcia v. Women's Hospital of Texas, 143 F.3d 227, 77 FEP 417 (5th Cir. 1998) - Pregnant employee terminated after six-month leave of absence - leave of absence caused by doctor's orders that during pregnancy she not push or pull 150 pounds - case dismissed since she did not show she was treated differently from anyone else - no basis for disparate impact claim.

Galdieri-Ambrosini v. National Realty & Development Corp., 136 F.3d 276, 76 FEP 290 (2d Cir. 1998) - Not sex discrimination for male boss to assign female secretary personal business, including typing documents related to purchase of home and calling his dry cleaner - tasks were normal secretarial-type tasks - fact that male subordinates were not assigned such tasks irrelevant since they did not occupy secretarial position.

In Re: Carnegie Center Associates, 129 F.3d 290, 75 FEP 331 (3d Cir. 1997), cert. denied, 524 U.S. 938 (1998) - 2-1 decision - employer did not violate Pregnancy Discrimination Act by choosing plaintiff, off on maternity leave, for layoff when it had to eliminate one of several positions even though reason for choice was not

comparative performance but fact that plaintiff was on maternity leave - plaintiff did not prove that she was treated less favorably than an employee who was off on a temporary leave for a reason other than pregnancy would have been treated - "The PDA does not require that employers treat pregnant employees better than other temporarily disabled employees" - Hazen Paper Co. v. Biggins provides analogy - employer not required to ignore absences caused by pregnancy unless it overlooks comparable absences of non-pregnant employees - "Case is unusual in that Carnegie terminated an employee who had performed satisfactorily solely because of an economically justified reduction in force while she was away on maternity leave." - "The PDA is a shield against discrimination, not a sword in the hands of a pregnant employee." - "Employer is entitled to judgment when employee 'has failed to show by a preponderance of the evidence that she received disparate treatment when compared to non-pregnant employees'." - "We hold . . . an employee alleging a PDA violation must show that her employer treated her differently than it would have treated an employee on leave for a temporary disability other than pregnancy."

Sexual Orientation (Ch. 14)

Hammer v. St. Vincent Hospital, ___ F.3d ___, 83 FEP 1265 (7th Cir. 2000) - Title VII does not cover sexual orientation discrimination - homosexual employee harassed by supervisor could not have formed reasonable belief that harassment was based on sex rather than sexual orientation - therefore, grievance complaining of harassment did not constitute opposition to employment practice forbidden by Title VII.

Simonton v. Runyon, ___ F.3d ___, 83 FEP 993 (2d Cir. 2000) - Title VII does not cover discrimination based on sexual orientation - gay employee subjected to pornographic pictures and homophobic epithets and pranks by co-workers does not have cause of action - discrimination based on sex does not include discrimination based on sexual orientation - Congress has rejected amendments to expand Title VII to cover

sexual orientation - with respect to employee's argument that harassment was based on failure to conform to stereotypical gender norms, this could be cognizable under Title VII, but no basis in record to surmise plaintiff behaved in a stereotypical feminine manner and that harassment was based on his nonconformity with gender norms instead of sexual orientation - allowing suits based on sexual stereotyping will not bootstrap protection for sexual orientation into Title VII since not all homosexual men are stereotypically feminine and not all heterosexual men are stereotypically masculine.

Irizarry v. Board of Education of City of Chicago, ___ F. Supp. ___, 83 FEP 808 (N. D. Ill. 2000) - Providing health insurance benefits to unmarried employees/same-sex domestic partners while denying such benefits to unmarried employees/opposite-sex domestic partners does not violate Equal Protection Clause of Fourteenth Amendment since rational basis exists - same-sex couples cannot marry.

Foray v. Bell Atlantic, 56 F. Supp. 2d 327, 80 FEP 65 (S.D.N.Y. 1999) - Employer had policy of providing medical and other benefits to same-sex couple - employer refused to provide said benefits to unmarried male living with unmarried female - no sex discrimination - couples are not similarly situated, since opposite-sex couple can marry by law.

Equal Pay (Ch. 15)

Varner v. Illinois State University, ___ F. 3d ___, 83 FEP 1361 (7th Cir. 2000) - Despite Kimel, in which the Supreme Court held that states are immune from suit under the ADEA, states are not immune from liability under the Equal Pay Act - it will be rare that an equal pay violation would not also be a constitutional violation.

Kindred v. Northome/Industrial School District No. 363, 154 F.3d 801, 77 FEP 1029 (8th Cir. 1998), cert. denied, 525 U.S. 1109 (1999) - Female bus

driver assigned to longer route - claimed sex discrimination in denial of premium pay - summary judgment affirmed - route driven by male who got premium pay was 15 percent longer than reconfigured route, which included portions of route driven by male - "This distinction is sufficient to disqualify [plaintiff's] new assignment from a comparison with the [former] route, which . . . is nearly 15 percent longer"

Age - Summary Judgment, Directed Verdict,
JNOV, and Reversals of Jury Verdicts (Ch. 16)

Stone v. Autoliv ASP, Inc., 210 F.3d 1132, 82 FEP 1033 (10th Cir. 2000), pet. for cert. filed, 69 U.S.L.W. 3087 (July 10, 2000) (No. 00-95) - Summary judgment affirmed in RIF - reliance on fact that percentage of workers within protected age group went up slightly - summary judgment appropriate despite prima facie case - comment that employee's age might make it difficult for him to train for another job or find new job is stray remark.

Galabya v. New York City Board of Education, 202 F.3d 636, 82 FEP 196 (2d Cir. 2000) - Transfer of teacher from junior high school where he taught special education classes to mainstream high school where he taught same classes was not an actionable adverse employment action - summary judgment affirmed - a significant change in responsibilities could be an adverse employment action but in this case it was no setback to the teacher's career or materially less suited to his skills and expertise.

Godfredson v. Hess & Clark, Inc., 173 F.3d 365, 82 FEP 199 (6th Cir. 1999) - Summary judgment affirmed in RIF case - in RIF case McDonnell Douglas order and allocation of proof altered in that there is no successful applicant - "Instead, the plaintiff must present additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out [the plaintiff] for discharge for impermissible reasons." Id. at 371 (alterations in original; internal quotations omitted). - this is necessary for the prima facie case - if a prima facie case is established the ultimate issue is whether the reason for the termination, the reduction in force, was pretextual - with respect to contention about transfer, employer has no duty to transfer when an employer reduces the work force - further evidence that

it was not pretextual is that three different persons participated in the planning for the reduction in force.

Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 83 FEP 21 (1st Cir. 2000) - Summary judgment in age case reversed since key decisionmaker on multiple occasions referred to plaintiff as “old fart.”

Cruz-Ramos v. Puerto Rico Sun Oil Co., 202 F.3d 381, 81 FEP 1445 (1st Cir. 2000) - Summary judgment in RIF case - seven-person department reduced to five - allegation that plaintiff was replaced by the youngest person who was retained rejected - when functions of furloughed employee are absorbed there is no legally cognizable replacement - plaintiff contended that one of the evaluators stated that he evaluated plaintiff poorly since he was eligible for retirement - this is more than a stray remark but “factoring pension status into the decision makes a reduction in force situation seem unfair [but] it was not probative of age discrimination.”

Robin v. Espo Engineering Corp., 200 F.3d 1081, 81 FEP 1332 (7th Cir. 2000) - Summary judgment affirmed despite comments by CEO that plaintiff was an “old S.O.B.” and that plaintiff was “getting too old” - this is not direct evidence of age discrimination since the comments occurred two years before discharge and were made in the context of random office banter - discharge based on poor sales - when it became obvious employee was not going to come close to annual sales goal, no need to wait until end of year to act simply because of metaphysical possibility that goal could still be reached.

McCarthy v. NYC Technical College, 202 F.3d 161, 81 FEP 1193 (2d Cir. 2000) - JNOV following jury award of \$400,000 affirmed on appeal - plaintiff’s replacement was 64 years old, two years older than plaintiff - “Replacement by an older person may not necessarily be fatal to an age discrimination claim if, for example, a plaintiff can show that his age was the true motivation and the older replacement was hired temporarily as a means of insulating defendant from ADEA liability.” - but no such evidence here - fact that jury rejected employer’s explanation insufficient since inference from this is not age discrimination - reliance on Fisher v. Vassar College - “The several scraps of evidence on which the plaintiff’s case depends do not sufficiently support the inference that the defendant acted by reason of the plaintiff’s age.” - standard for JNOV is the same whether

trial was to a court or jury and is the same standard applied to summary judgment - question is whether a fairminded jury could return a verdict for the plaintiff - rationale of Fisher, which was a bench trial, no different when there is a jury trial.

Cullen v. Olin Corp., 195 F.3d 317, 81 FEP 190 (7th Cir. 1999), cert. denied, 120 S. Ct. 1423 (2000) - Jury verdict for plaintiff in age case reversed and remanded for new trial - improper in RIF case to admit evidence that person who took over plaintiff's duties performed poorly - that evidence was not available at time of decision and therefore irrelevant.

Mitchell v. USBI Co., 186 F.3d 1352, 81 FEP 1367 (11th Cir. 1999) - Summary judgment affirmed in RIF - plaintiff contended he should have been allowed to bump less senior employees and that he was qualified - employee presented testimony from co-workers that he was qualified - "This Court repeatedly has stated that it will not second-guess a company's legitimate assessment of whether an employee is qualified for a particular position." Id. at 1354. - "[F]ederal courts do not serve as a super personnel department that reexamines an entity's business decisions." Id. at 1355 (internal quotations omitted). - comments of non-decisionmakers do not raise an inference of discrimination - supervisor conceded he gave plaintiff lower performance evaluations because of his age - appellate court assumed that this may have affected layoff decisionmakers - however, since it was clear that plaintiff lacked the specific objective qualifications to bump the specified individuals summary judgment still appropriate - final contention was that company deviated from stated policy of first laying off employees who worked on the discontinued program - "Even assuming that [the company] did deviate from its policy, this deviation does not raise an inference of discrimination. Standing alone, deviation from a company policy does not demonstrate discriminatory animus." Id. at 1355-56.

Norville v. Staten Island University Hospital 196 F.3d 89, 81 FEP 324 (2d Cir. 1999) - Contradiction in hospital's justifications for not awarding job to plaintiff sufficient to create jury question of pretext but judgment as a matter of law in race and age claims appropriate - no evidence from which reasonable jury could conclude that the pretext was for age or race.

Smith v. Xerox Corp., 196 F.3d 358, 81 FEP 343 (2d Cir. 1999) - Plaintiff sued alleging both disparate treatment and disparate impact against older

workers and male employees in worldwide RIF by Xerox - summary judgment affirmed - plaintiff's statistics not entitled to weight because statistician looked at selected units or pockets of the company and ran separate analyses for selected work groups, which resulted in a distorted picture - statistician should have analyzed entire RIF to see if there was any gross statistical disparity.

Regel v. K-Mart Corp., 190 F.3d 876, 80 FEP 1546 (8th Cir. 1999) - Employee's contentions that no RIF was necessary because busy season was approaching and in due course new and larger store would be built is simply attack on employer's business judgment and not a valid means for challenging a RIF - no pretext demonstrated - summary judgment affirmed - evidence of bias on behalf of store manager and HR manager irrelevant since RIF decision made by higher official and decision was to eliminate two least senior full-time employees in non-skilled positions.

EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 80 FEP 1313 (8th Cir. 1999) - ADEA disparate impact claims may not be brought on behalf of protected age subgroups - there is an almost infinite variety of subgroups, and an employer to protect itself in RIF would have to try to achieve statistical parity among each of them - evidence that employees 55 or older were more than twice as likely to be laid off as younger workers is insufficient - employees age 55 or older comprise 14.7% of total work force before RIF and 13.6% of work force after RIF - this difference in before-and-after numbers is insignificant.

Dockins v. Benchmark Communications, 176 F.3d 745, 79 FEP 848 (4th Cir. 1999) - Summary judgment affirmed despite ageist comments - employer's explanation of poor sales performance accepted - plaintiff was referred to as a "dinosaur" and there was a reference to his "age and health" - the comment about dinosaur came from a person roughly the same age as plaintiff - "In any case, statements about age, unlike statements about race or gender, do not rest on a we/they dichotomy, and therefore do not create the same inference of animus. Barring unfortunate events, everyone will enter the protected age group at some point in their lives. . . . Thus, every individual speaks with the knowledge that there with the grace of God go I." - retention of other older employees also suggests lack of age discrimination - 2-1 decision - dissent argued that "direct and

unambiguous age-related comments . . . made by the decisionmaker” should have been sufficient to negate summary judgment.

Hollander v. American Cyanamid Co., 172 F.3d 192, 79 FEP 882 (2d Cir.), cert. denied, 120 S. Ct. 399 (1999) - Summary judgment affirmed despite statistical study showing adverse impact against individuals aged 55-69 - plaintiff was 58 - statistics do not bar summary judgment because they were skewed - there is impact against persons aged 60-69 but no impact against those aged 55-59 - by lumping the 58-year-old plaintiff with the older group, the statistics were skewed.

Ross v. University of Texas at San Antonio 139 F.3d 521, 79 FEP 788 (5th Cir. 1998) - Summary judgment despite expert testimony that statistics showed systematic age discrimination- chart showing that protected-age associate professor is paid less than younger recently hired assistant professors merely reflects market conditions - University’s study which showed that long-standing professors were entitled to an equity increase to make up for increased hiring rates does not create inference that failure to implement study was age discrimination - plaintiff’s assertion that performance appraisals showing relatively poor performance were unreliable because they are the result of age animus, a statement supported by expert witnesses, is ineffective to refute University’s fact-based judgment on his performance.

McKnight v. Kimberly Clark Corp., 149 F.3d 1125, 77 FEP 1408 (10th Cir. 1998) - 53-year-old fired after sexual harassment complaint - even if employer erroneously concluded he did it, good faith belief is defense to age discrimination discharge claim - age-hostile environment claim rejected on the ground that ageist comments were merely stray remarks by non-decisionmakers - “In order to rely on age related statements, [plaintiff] must show that they were made by a decisionmaker, and that there was a nexus between the discriminatory statements and the decision to terminate.” - in addition, age bias negated by the fact that plaintiff was 50 years old when hired and terminated three years later.

Debs v. Northeastern Illinois University, 153 F.3d 390, 77 FEP 1466 (7th Cir. 1998) - Age discrimination plaintiff can prove case by direct evidence or by indirect method - prima facie case under indirect method requires a showing that “substantially younger, similarly-situated employees were treated more favorably” - here prima facie case stipulated - employee unable to introduce evidence casting doubt on employer’s explanation for demotion - explanation was employee complaints about plaintiff’s oppressive conduct - does not matter whether allegations are true - all that matters is employer’s good faith belief - questions asking about retirement date do not affect summary judgment - with respect to allegation that supervisor asserted he was too old to continue working, “this allegation reflects only [plaintiff’s] subjective understanding of [the supervisor’s] remarks.”

Swanson v. Leggett & Platt, Inc., 154 F.3d 730, 77 FEP 1591 (7th Cir. 1998) - Summary judgment affirmed against two plaintiffs who were chosen for layoff by the company’s President and COO despite: (1) a statement by the CEO, who was not involved, to a vice president who was also laid off that “[a]ge was part of it;” (2) a statement by a database supervisor, who was not involved but who socialized with the decisionmakers, that “[w]e are going to get rid of all you old people;” (3) statement by member of team of consultants that “we have to get rid some of the old guys” since there is no evidence that consultant influenced choice of people for layoff; and (4) fact that seven of 15 senior managers over 40 were let go while only one senior manager under 40 was discharged, since such data does not include qualifications of employees retained.

Blackwell v. Cole Taylor Bank, 152 F.3d 666, 78 FEP 95 (7th Cir. 1998) - Summary judgment affirmed - employer eliminated seven branch manager positions - offered branch managers new position of sales manager on reduced salary but eligibility for a bonus or resignation with severance pay - employee could accept new position and resign within 90 days and still get severance pay - releases void since 21 days and not 45 days given for consideration and statistical data not supplied - but the program is not age discrimination - evidence that employer regarded branch managers as “not flexible” or “energetic” are not code words for ageism - the

argument “is a considerable insult to the tens of millions of workers in that age group” - the statute does not require employers to preserve jobs - it only prohibits discrimination - the bank created a new job and offered it to the incumbents of the old jobs whatever their age - we may assume each plaintiff turned down the new job “because it was a lousy, hopeless job” - but other people took the jobs, including younger people - the mere fact that the reconfigured job was less attractive to older than to younger workers would not establish a violation even if the employer could have made it more attractive to older workers without undue hardship.

Shorette v. Rite Aid of Maine, Inc., 155 F.3d 8, 78 FEP 736 (1st Cir. 1998) - Summary judgment against employee who claimed constructive discharge after demotion affirmed - inquiry as to age and when employee planned to retire is isolated remark that proves nothing - manager’s comment that plaintiff has “a perfect case of age discrimination, and you’d be crazy not to pursue it” not probative in view of fact that manager who made statement did not participate in any relevant decisions.

Norton v. Sam’s Club, 145 F.3d 114, 77 FEP 221 (2d Cir.), cert. denied, 525 U.S. 1001 (1998) - JNOV on appeal - jury wrong to conclude that employee’s dismissal must have been for age because it was preposterous for an employer to fire an employee over a small matter - employee had taken an hour for lunch and marked only a half -hour absence on his timecard - plaintiff was at-will employee who offered no affirmative evidence of age bias - no great weight should have been given to the fact that the supervisor was under 40 - Judge Calabresi wrote that employees are often “fired by managers who are different from them in some respect.” - employers can be held liable under ADEA only for discriminating, not for doing stupid or even wicked things.

Fisher v. Wayne Dalton Corp., 139 F.3d 1137, 76 FEP 946 (7th Cir. 1998) - Statistical evidence in support of age discrimination in layoff insufficient even though five of six oldest office workers lost their jobs - sample size too small - plaintiff not similarly situated to younger employee who retained job, despite common qualifications, where younger employee has more extensive computer skills - summary judgment affirmed.

Chiaramonte v. Fashion Bed Group, Inc., 129 F.3d 391, 76 FEP 251 (7th Cir. 1997), cert. denied, 523 U.S. 1118 (1998) - Summary judgment affirmed despite CEO's statement that "age had to be a factor . . . but I don't know" and low-level supervisor's statement that the company was "going to get rid of all you old people" - the CEO was speculating and was not involved in the decision - the low-level supervisor had no influence over the decision - "Statements by inferior employees are not probative of an intent to discriminate by the decisionmaker." - "Since Elting had sole responsibility for the terminations, any direct evidence supporting the discrimination claim must relate to his motivation." - inference of nondiscrimination where decisionmaker hires and fires individual - even though plaintiff was first hired seven years before his termination, the decisionmaker engaged in an affirmative act by retaining him when there was a merger only two years before his termination - this creates a presumption of nondiscrimination - court rejects plaintiff's contention that it should examine the financial necessity for a layoff - dischargee offered release that did not comply with OWBPA - that is not evidence of discrimination.

Ziegler v. Beverly Enterprises-Minnesota, Inc., 133 F.3d 671, 75 FEP 1493 (8th Cir. 1998) - Summary judgment affirmed - questions by supervisor over three-year period to employee who was later discharged concerning when employee was planning to retire do not suggest age-based animus - suggestions that employee consider retiring show no more than supervisor's desire to have employee leave employer by least contentious means - suggestion to employee who is not performing satisfactorily that she consider retiring does not provide reasonable basis for inferring age discrimination.

Grady v. Affiliated Central, Inc., 130 F.3d 553, 75 FEP 1416 (2d Cir. 1997), cert. denied, 525 U.S. 936 (1998) - Summary judgment affirmed - same individual hired and fired - even though evidence of falsity of employer's reason was presented, circumstantial evidence does not point to age discrimination - "The creation of a genuine issue of fact with respect to pretext alone is not sufficient - there must also be evidence that would permit a rational fact finder to infer that the discharge was actually motivated, in whole or in part, by discrimination on the basis of age."

Hennessey v. Good Earth Tools, Inc., 126 F.3d 1107, 75 FEP 200 (8th Cir. 1997) - Summary judgment granted - employer claimed termination was for inadequate job performance - plaintiff's "brief states that 'he was overpaid and doing an unnecessary job.' Even if Hennessey could prove that this was true, and that he therefore was not fired for poor work, this would not help his case. Employers do not violate the law by discriminating against overpaid, unnecessary employees Hennessey must raise a genuine issue of material fact as to whether Good Earth's claimed reason for firing him was a pretext for age discrimination, not for some other, legitimate motive." - moreover, he was hired at age 55 and fired at age 59, which suggests that employer was not influenced by ageism.

Hartley v. Wisconsin Bell, Inc., 124 F.3d 887, 75 FEP 701 (7th Cir. 1997) - Summary judgment affirmed in RIF case - individuals preferred over her were only six and seven years younger - "Finding no evidence of age discrimination based on this record should not be surprising. [Plaintiff] was 51, only six years older than [one employee who was retained] and seven years older than [a second employee who was retained]. Even before the Supreme Court decided O'Connor, we noted that the prima facie case under the ADEA required a sufficient disparity in ages between the plaintiff and those allegedly favored over her." - "The Supreme Court in O'Connor said '[i]n the age discrimination context, . . . an inference [of age discrimination] cannot be drawn from the replacement of one worker with another worker insignificantly younger.'" [Emphasis added.] - "The 'fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.'" [Emphasis added.] - in our case the two preferred individuals "were younger than Hartley, but not 'substantially' or 'significantly' so" - how much older does the plaintiff have to be to pass O'Connor's test? - prior to O'Connor the Third Circuit indicated eight years was enough while the Court of Appeals for the District of Columbia indicated an eight-year difference in average age of two groups was not enough - since O'Connor the Eighth Circuit has held that a five-year disparity is not substantial enough - "While we suspect that the answer depends to some extent on the circumstances in a case, we consider a ten-year difference in ages

(between the plaintiff and her replacement) to be presumptively 'substantial' under O'Connor. In cases where the disparity is less, the plaintiff still may present a triable claim if she directs the court to evidence that her employer considered her age to be significant. In that instance, the issue of age disparity would be less relevant." - "In indirect cases like this one, the employee basically is relying on inferences, which O'Connor recognizes result in some cases being built on 'very thin evidence' Ten years is a reasonable threshold establishing a 'significant' and 'substantial' gap, which is what O'Connor demands — the six- and seven-year differences between plaintiff and those retained are 'a presumptively insubstantial gap and the record reveals no evidence that [the employer] viewed the age of 51 itself to be significant.'"

O'Connor v. DePaul University, 123 F.3d 665, 75 FEP 1052 (7th Cir. 1997) - Summary judgment affirmed - plaintiff was discharged when he continued to send letters and unwanted gifts to pregnant coworker after being warned - fact that discharge may have violated company's own personnel guidelines is irrelevant to discrimination issue - evidence presented that in referring to older workers other than plaintiff, decisionmaker referred to them as "worthless old fucker," "miserable old fucker" and "old bastard" - these are stray remarks not related to the disputed employment action - these remarks "unaided by any additional evidence of pretext, cannot protect O'Connor from summary judgment."

Benson v. Tocco, Inc., 113 F.3d 1203, 74 FEP 376 (11th Cir. 1997) - Multi-plaintiff RIF case - summary judgment reversed for some plaintiffs because of error in refusing to consider expert declaration which indicated that employees over 40 years old were five times as likely to be included in the RIF as employees under 40, with a standard deviation of just more than three - summary judgment nevertheless affirmed for plaintiff Dollar since he was reluctant to acquire computer skills, and it is undisputed that the company preferred to have employees who were skilled in the use of computers.

Herrero v. St. Louis University Hospital 109 F.3d 481, 73 FEP 852 (8th Cir. 1997) - Summary judgment affirmed - no prima facie case since failure to produce evidence that prohibited criteria such as age was a factor -

statements by laboratory personnel, who evaluated plaintiff, are irrelevant since decision made by upper-level administrators - HR expert's declaration that layoffs are frequently used to get rid of "problem" employees creates no issue - "Such 'conclusory affidavits, even from expert witnesses, do not provide a basis upon which to deny motions for summary judgment.'" (Citation omitted.)

Grossmann v. Dillard Department Stores, Inc., 109 F.3d 457, 73 FEP 641 (8th Cir. 1997) - Jury verdict for discharged store manager hired at age 48 and fired four years later reversed - replacement was 26 - "Most tellingly, Franzke hired Grossmann when Grossmann was 48, fired him when he was 52, and the following year hired four operations managers over 40, two of them over 50. To uphold the jury's verdict, we would have to believe that Franzke, himself 58, was free of age bias when he hired Grossmann, suddenly turned against older workers four years later, then just as abruptly changed his mind again. That is more than reasonable people can swallow." - JNOV ordered.

Thornley v. Penton Publishing, Inc., 104 F.3d 26, 72 FEP 1488 (2d Cir. 1997) - Jury instruction that jury should consider whether discharged employee was sufficiently competent to satisfy the legitimate explanations of "an" employer, rather than "his" employer, was so erroneous as to warrant a new trial - absent a showing that the employer's demands on the employee were in bad faith, satisfactory performance depends on meeting his employer's criteria for the job, and not on whether the criteria seem reasonable to a jury or judge.

Age - Validity of Age Act Releases (Ch. 16)

Oubre v. Entergy Operations, Inc., 522 U.S. 422, 75 FEP 1255 (1998) - No requirement to "tender back" consideration paid under invalid ADEA release - employee can keep the money and sue - release will still be effective regarding other claims.

Age - General Issues (Ch. 16)

Kimel v. Florida Board of Regents, 120 S. Ct. 631, 81 FEP 970 (2000) - ADEA cannot be applied to the states under the enforcement section of the

Fourteenth Amendment - age is not a suspect classification under the Equal Protection Clause - unlike race or gender, age cannot be characterized as seldom relevant to the achievement of any legitimate state interest - the ADEA sweep is disproportionate to any unconstitutional conduct and unsupported by adequate congressional findings of unconstitutional age discrimination by the states - it therefore exceeds Congress's enforcement authority to apply it to the states - while Congress can under the Fourteenth Amendment enact "appropriate legislation" to "enforce" the Amendment, that is limited to constitutional rights - there must be "congruence and proportionality" between the legislation and the constitutional rights at issue - while Congress intended to apply the ADEA to the states, it does not satisfy the "congruence and proportionality" test - age classifications are not suspect and are frequently legitimate - old age does not define a discrete and insular minority - states may therefore discriminate on the basis of age without offending the Fourteenth Amendment if there is a rational relationship to a legitimate state interest - a state may rely on age as a proxy for other qualities, including ability - the ADEA is out of proportion with these realities - Hazen Paper for private employers means employers cannot rely on age as a proxy for an employee's characteristics but must focus on the characteristic directly - but states can rely on age as a proxy for other characteristics - the legislative history reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating - the dissent argued that Congress's power to authorize federal remedies against state agencies is coextensive with its power to impose those obligations in the first place, and that the Eleventh Amendment cannot properly be read as a basis for creating a doctrine of state sovereign immunity - open question whether decision forestalls ADEA lawsuits against government employers such as cities and counties - decision may have significance to issue of whether disparate impact analysis under Title VII can be applied to the states - case analyzed at 163 LRR 72.

Adams v. Moore Business Forms, Inc., ___ F.3d ___, 83 FEP 1241 (4th Cir. 2000) - OWBPA complied with when employer gave job classification and age data about all employees at plant that was closing - no need to give such information with respect to other plants, since employer had no plans to close other plants - information therefore would not be relevant to a

decision as to whether to sign a release waiving age claims.

Erie County Retirees Association v. Erie, 220 F.3d 193, 83 FEP 941 (3d Cir. 2000) - ADEA prohibits discriminatory retiree health benefits - Erie modified its retiree health program to save costs - prior to this decision it was thought that it was lawful to reduce or eliminate retiree health benefits at the commencement of Medicare - Third Circuit failed to follow legislative history to this effect - Third Circuit relied on Supreme Court's Robinson decision (post-employment retaliation actionable) to hold that the ADEA applies to retirees even when the alleged discrimination occurs long after retirement - discrimination on the basis of Medicare eligibility is age discrimination since Medicare eligibility normally occurs at age 65 - Medicare is a proxy for age under Hazen Paper - the only safe harbor is the "equal cost/equal benefit" rule - for this to be applicable the combination of employer and Medicare health benefits would at least have to equal the benefits provided to non-Medicare-eligible retirees - basic holding is that taking Medicare into account retiree health coverage must be at least as good after Medicare eligibility as before it.

Wyvill v. United Companies Life Insurance Co., 212 F.3d 296, 82 FEP 1760 (5th Cir. 2000) - "Me-too" anecdotal age discrimination evidence erroneously admitted - none of the "me-too" employees who testified held the same positions or had the same supervisors as the two claimants - allowing the testimony created "several trials within a trial." (Id. at 303)

Lewis v. Young Men's Christian Association 208 F.3d 1303, 82 FEP 1018 (11th Cir. 2000) - Mixed-motive age bias claim governed by Price Waterhouse and not Civil Rights Act of 1991 - the provisions of the Civil Rights Act intended to overrule Price Waterhouse apply only to race, color, religion, sex and national origin discrimination- since YMCA would not

have hired plaintiff even in the absence of discrimination, case totally dismissed.

Thorn v. Sundstrand Aerospace Corp., ___ F.3d ___, 82 FEP 550 (7th Cir. 2000) - Summary judgment reversed in RIF case - factual issue as to whether work in question was given to a less productive younger employee.

Stokes v. Westinghouse Savannah River Co., 206 F.3d 420, 82 FEP 391 (4th Cir. 2000) - In RIF, employees over a certain age were offered the option of electing either severance pay or a special retirement option designed to enhance the value of the pension plan - the employee offered option sued, alleging because of his age was he forced to choose - court found that older worker was in fact treated better because he could choose between the two offers - ADEA permits this kind of arrangement as long as the RIF was unrelated to age.

Migneault v. Peck, 204 F.3d 1003, 82 FEP 162 (10th Cir. 2000) - In light of Kimel, ADEA action cannot be brought against state university.

Carlton v. Mystic Transportation, Inc., 202 F.3d 129, 81 FEP 1449 (2d Cir.), cert. denied, 120 S. Ct. 2718 (2000) - Summary judgment reversed despite fact that same person hired and fired - "same actor" inference dissipates with time - here seven years passed between hiring at age 49 and terminating at age 56 - strong inference of lack of discrimination when same person hires and fires within less than two years but not when seven years elapse - allegation that termination was layoff negated by hiring much younger person three months later.

Showalter v. University of Pittsburgh Medical Center, 190 F.3d 231, 80 FEP 1161 (3d Cir. 1999) - Need not show preferred individual outside of protected group but must show "substantially younger" - Supreme Court decision in O'Connor applicable to layoff - there is no particular age difference that must be shown - here two retained individuals were eight and 16 years older, which clearly is sufficient - citation of pre-O'Connor case indicating that five years is sufficient but one year is not.

Auerbach v. Board of Education, 136 F.3d 104, 80 FEP 1143 (2d Cir. 1998) - Voluntary early retirement program that required teachers to retire

in “optimum year” - year in which they were at least 55 years old and had taught for 20 years - not illegal since voluntary - teacher could turn down program and keep teaching.

King v. Herbert J. Thomas Memorial Hospital, 159 F.3d 192, 78 FEP 239 (4th Cir. 1998), cert. denied, 526 U.S. 1098 (1999) - Discharged employee judicially estopped by receipt of Social Security disability benefits from asserting as part of ADEA prima facie case that she was able and competent to perform her job.

Cox v. Dubuque Bank & Trust Co., 163 F.3d 492, 78 FEP 1229 (8th Cir. 1998) - Employer may lawfully ask employee about retirement plans without incurring liability - reversible error for federal district court to refuse to instruct a jury to this effect - employer therefore entitled to new trial.

Mullin v. Raytheon Co., 164 F.3d 696, 78 FEP 1174 (1st Cir.), cert. denied, 120 S. Ct. 44 (1999) - Disparate impact method of analysis not applicable to ADEA cases - because of layoffs work force substantially reduced, and plaintiff had his grade and pay reduced - disparate treatment claim rejected since expressions of age bias by non-decisionmakers and questions about taking early retirement package does not show animus - language in majority and concurring opinions in Hazen Paper has caused appeals courts to rethink viability of disparate impact analysis under ADEA - disparate treatment is what Congress sought to prohibit with the ADEA - Title VII was adopted to equalize employment opportunities and thus Griggs makes sense - it will bar neutral non-essential practices having a discriminatory impact - but age-based discrimination correlates with contemporaneous employment-related conditions - the aging process is inevitable - Congress wanted to protect older workers against stereotypes - this is a different purpose and militates against a “mechanistic adherence” to Griggs in the ADEA context - unlike Title VII the ADEA contains a provision allowing an employer to take any action if the differentiation is based on reasonable factors other than age - if the exception does not preclude disparate impact liability would be meaningless - the Supreme Court’s treatment of similar language in the Equal Pay Act seems to negate disparate impact - the legislative history which focused on stereotyping also

supports this conclusion - furthermore, when Congress in 1991 amended Title VII and simultaneously amended the ADEA, it did not create a disparate impact cause of action - issue analyzed at 160 LRR 72, which states that a majority of the courts of appeal that have addressed the question after Hazen Paper have held that the ADEA does not recognize disparate impact analysis (First, Third, Sixth, Seventh and Tenth Circuits) - two circuits (Second and Eighth) have held to the contrary.

Fairchild v. Forma Scientific, Inc., 147 F.3d 567, 77 FEP 251 (7th Cir. 1998) - Summary judgment affirmed - fact that decisionmaker was six years older than plaintiff is significant in evaluating evidence of discrimination - plaintiff will have difficulty proving age discrimination because of this fact - salesman discharged for incompetence - summary judgment not affected by the fact that supervisor conceded he was “competent” or that employer acknowledged that in an evaluation shortly before termination his deficiencies were exaggerated - statement by manager that employer needed younger people is irrelevant as that manager was not decisionmaker.

Richter v. Hook-SupeRx, Inc., 142 F.3d 1024, 77 FEP 564 (7th Cir. 1998) - Laid-off plaintiff was 52 years old and replacement was 45 - this seven-year age disparity is “presumptively insubstantial.”

Kelley v. Airborne Freight Corp., 140 F.3d 335, 76 FEP 1340 (1st Cir.), cert. denied, 525 U.S. 932 (1998) - Not reversible error to refuse to give a business judgment instruction [note: prior opinion (74 FEP 1301) is disapproved].

Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 76 FEP 1007 (11th Cir.) (en banc), cert. denied, 525 U.S. 1019 (1998) - Once federal district court has refused to certify a class or has excluded individuals from a class, the limitations period begins to run and erstwhile class members have 90 days to bring their own suit - case analyzed at 158 LRR 9.

Retaliation (Ch. 17)

EEOC v. Total System Services, Inc., ___ F.3d ___, 83 FEP 873 (11th Cir. 2000) - No violation when employer discharged employee on the ground that she lied in an internal investigation of a supervisor's alleged sexual harassment - good-faith belief that employee lied in investigation is legitimate basis for termination - employee's conduct not covered by participation clause, which provides broader protection than opposition clause - no need to prove employee actually did lie.

Ray v. Henderson, 217 F.3d 1234, 83 FEP 753 (9th Cir. 2000) - In opinion by Judge Betty Fletcher, Ninth Circuit holds that adverse employment actions cover anything reasonably likely to deter employees from engaging in protected activity and not just ultimate employment actions such as hiring, firing, promoting and demoting - Ninth Circuit rejects the view of the Fifth and Eighth Circuits and adopts EEOC's interpretation.

Miller v. American Family Mutual Insurance Co., 203 F.3d 997, 82 FEP 113 (7th Cir. 2000) - Supervisor told plaintiff she would be paid more if she would "stop having kids" - while pregnant she was given a larger raise than her colleagues but continued to earn less than they did - she gave an ultimatum to management that she would quit if she did not immediately receive a larger raise and also called her supervisor incompetent and a political hack - her discharge was not because of pregnancy discrimination or retaliation - firing an employee who delivers such an ultimatum is a legitimate nondiscriminatory employment decision.

Cruz v. Coach Stores, Inc., 202 F.3d 560, 81 FEP 1762 (2d Cir. 2000) - Male and female co-workers both terminated for physical altercation at work - male employee made extremely inappropriate sexual remarks - female employee slapped male employee - male employee then placed female employee in a headlock - retaliation claim dismissed under Rule 12(b)(6) and affirmed - slapping was not appropriate opposition to unlawful practices - employee had other options for resisting co-worker's offensive conduct.

Boone v. Goldin, 178 F.3d 253, 81 FEP 1729 (4th Cir. 1999) - Summary judgment - reassignment to a different job with no cut in pay or benefits is

not an adverse employment action within the meaning of the laws prohibiting retaliation or race discrimination- Supreme Court defined tangible job employment action in Burlington as including “reassignment with significantly different responsibilities” - Congress did not intend Title VII to provide redress for trivial discomforts plaintiff must show that the reassignment had some significant detrimental effect - an allegation of increased stress because the work duties were unfamiliar is not sufficient - contention that wind tunnel created difficult working environment and working conditions insufficient - “[A]bsent any decrease in compensation, job title, level of responsibility, or opportunity for promotion, reassignment to a new position commensurate with one’s salary level does not constitute an adverse employment action even if the new job does cause some modest stress not present in the old position.” Id. at 256-57.

Payne v. Milwaukee County, 146 F.3d 430, 81 FEP 534 (7th Cir. 1998) - For retaliation must prove “a causal link between the protected activity and the adverse employment action” - “[Plaintiff] has not provided evidence that would suggest, let alone establish, a nexus between his discharge and the filing of the EEOC complaint.” Id. at 434. - 13-month gap between EEOC complaint and discharge “is not a close enough temporal link to infer a causal nexus” Id. - judgment as a matter of law in retaliation claim affirmed.

Robbins v. Jefferson County School District, 186 F.3d 1253, 80 FEP 795 (10th Cir. 1999) - Summary judgment affirmed - plaintiff lodged frequent, voluminous and sometimes acrimonious complaints and engaged in antagonistic behavior towards superiors - she accused one superior of slander, malicious intent, and lying - she called another supervisor a “puppet” - “Balancing the purpose of Title VII against the barrage of inflammatory memoranda . . . we hold that, as a matter of law, these activities were not reasonable and did not constitute protected opposition.”

Aviles v. Cornell Forge Co., 183 F.3d 598, 80 FEP 209 (7th Cir. 1999) - Employer retaliated against employee who filed EEOC charge by falsely telling the police that he was lying in wait with a gun outside the plant- the issue was whether retaliation covered by Title VII has to be job related - summary judgment for employer reversed - court notes that if employer shot employee for filing EEOC charge, clear retaliation - no analytical difference.

Lambert v. Ackerley, 180 F.3d 997, 5 WH.2d 677 (9th Cir. 1999) (en banc), cert. denied, 120 S. Ct. 936 (2000) - FLSA case - retaliation provisions protect employee who does no more than complain to employer about violations of the FLSA.

Clover v. Total System Services, Inc., 176 F.3d 1346, 79 FEP 1500 (11th Cir. 1999) - Reversing position taken in panel decision, employee who participated in employer's investigation of sexual harassment was protected from retaliation - even though the investigation was conducted by the employer and not the EEOC, this was participation in any manner in an investigation under Title VII since the employer's investigation was in response to a charge from the EEOC.

Sullivan v. National Railroad Passenger Corp., 170 F.3d 1056, 79 FEP 956 (11th Cir.), cert. denied, 120 S. Ct. 402 (1999) - Ruling for employer on sexual harassment claim is not inconsistent with ruling for plaintiff on retaliation claim for having complained of harassment - employer argued that jury must have accepted its contention that the complained-of incident never happened and therefore the retaliation claim cannot stand since it requires a good faith reasonable belief that a violation of the statute occurred - jury's finding rejecting sexual harassment claim does not mean that the complained-of incident could not have taken place or that the plaintiff could not have believed himself to be the victim of sexual harassment - however, court finds insufficient evidence to support jury's finding of retaliation and grants JNOV on appeal - "[C]ircumstantial evidence can suffice to support inferences that retaliation was the reason for the adverse action [H]owever, the evidence presented is far too speculative"

Burger v. Central Apartment Management, Inc., 168 F.3d 875, 79 FEP 489 (5th Cir. 1999) - Denial of request for purely lateral transfer was not ultimate employment action and thus cannot serve as basis for retaliation claim - employee wanted transfer in order to have shorter commute to work.

Glover v. South Carolina Law Enforcement Division, 170 F.3d 411, 79 FEP 276 (4th Cir. 1999), cert. dismissed, 120 S. Ct. 1005 (2000) - Employee

who gives unreasonable deposition testimony in a Title VII action is absolutely protected from retaliation - the reasonableness requirement for protection under the "opposition" clause is not applicable to the "participation" clause - in deposition testimony the plaintiff accused her superior of mismanagement, destruction of office documents, waste of funds, inappropriate behavior, dishonesty and discrimination.

Easley v. American Greetings Corp., 158 F.3d 974, 78 FEP 742 (8th Cir. 1998) - Plaintiff complained of harassment by Supervisor 1 in 1993, and Supervisor 1 was promptly terminated - plaintiff claimed retaliation when she was fired by Supervisor 2, a close friend of Supervisor 1, in 1996 - jury found for defense - no error in excluding details of harassment because of danger that relief might be granted because of harassment rather than retaliation - severity of harassment did not make it more or less likely that she was retaliated against.

Causey v. Balog, 162 F.3d 795, 78 FEP 1241 (4th Cir. 1998) - Plaintiff, a 62-year-old white male, was transferred, filed an EEOC charge claiming race and age discrimination, and 11 months later was laid off since his position was abolished - summary judgment affirmed - time gap too long - "Thirteen months passed between his initial charge and termination. A 13-month interval between the charge and termination is too long to establish causation absent other evidence of retaliation. [Citations omitted.] Causey introduced no other evidence to support a finding that a causal connection existed between his charge and termination."

Smith v. Riceland Foods, Inc., 151 F.3d 813, 77 FEP 1052 (8th Cir. 1998) - Plaintiff must personally have engaged in protected activity to bring valid retaliation claim - it is not enough that spouse or significant other who works for same employer has done so.

Sweeney v. West, 149 F.3d 550, 77 FEP 890 (7th Cir. 1998) - Reprimands and counseling statements do not constitute adverse employment actions that can be attacked under a retaliation theory.

Laughlin v. Metropolitan Washington Airports Authority, 149 F.3d 253, 77 FEP 269 (4th Cir. 1998) - Secretary removed personnel documents from

supervisor's desk, photocopied them, and sent copies to a woman who had recently resigned after complaining about sexual harassment - this is not legally protected opposition - Fourth Circuit uses a balancing test - employer's interest in maintaining security and confidentiality of sensitive personnel documents outweighs secretary's interest in supporting terminated employee.

Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 77 FEP 151 (4th Cir. 1998) - Summary judgment affirmed in retaliation case based on three-year time gap between EEOC charge and adverse action - "We note that over three years lapsed between the protected activity and the adverse employment action (this Court has held that evidence that the alleged adverse action occurred shortly after the employer became aware of the protected activity is sufficient to 'satisfy the less onerous burden of making a prima facie case of causation') We believe the opposite to be equally true. A lengthy time lapse between the employer becoming aware of the protected activity and the alleged adverse employment action . . . negates any inference that a causal connection exists between the two" - "were this not the case, an employee could guarantee his job security simply by filing a frivolous complaint with the EEOC on his first day of work. Title VII was not enacted to guarantee tenure in the workplace."

Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364, 77 FEP 40 (5th Cir. 1998), cert. denied, 525 U.S. 1068 (1999) - Black, female in-house counsel for U.S. government contractor discharged after she gave government copy of letter she wrote complaining of racial and sexual discrimination which discussed confidential matters she had handled for her employer as a lawyer - retaliation provisions of Title VII do not protect conduct by an attorney that breaches legal ethics - she could no longer function as in-house counsel once her relationship of trust with her client was broken.

McNutt v. Board of Trustees of University of Illinois 141 F.3d 706, 76 FEP 989 (7th Cir. 1998) - "But for" standard applies in retaliation cases - mixed-motive amendment of Civil Rights Act of 1991 not applicable to retaliation - alleged retaliation was in job assignments - jury found plaintiff had not proven racial discrimination but that retaliation was a factor in his assignments, but the same assignments would have been made without

any retaliatory motive - plaintiff obtained injunction and attorneys' fees - both vacated because mixed-motive relief not available in retaliation case.

Andrews v. Lakeshore Rehabilitation Hospital, 140 F.3d 1405, 76 FEP 1617 (11th Cir. 1998) - § 1981 bans retaliation for filing EEOC charges - reliance on Civil Rights Act of 1991.

Robinson v. Shell Oil Co., 519 U.S. 337, 72 FEP 1856 (1997) - Despite ambiguity in language, Title VII prohibits retaliation against former employees - discharged employee can pursue claim that he was given a bad employment reference because he filed an EEOC charge.

Merritt v. Dillard Paper Co., 120 F.3d 1181, 74 FEP 1511 (11th Cir. 1997) - Alleged harasser subpoenaed for deposition and admitted that he and several male colleagues had engaged in sexually harassing activities - he was fired - this violates the anti-retaliation provisions of Title VII that protect an employee who participates in "any manner" in a Title VII proceeding - the anti-retaliation protections are not limited to those who "aid" and "assist" Title VII claimants - but such protection only attaches to protection from being fired because of the testimony, "not from being fired because of his sexually harassing behavior and its ill effects on the company" - in this case the president of the company stated that "[Y]our deposition was the most damning to [our] case, and you no longer have a place here." - this direct evidence indicates it was the testimony and not the harassing conduct that was the motivation for the discharge.

Paquin v. Federal National Mortgage Association, 119 F.3d 23, 74 FEP 1078 (1997), aff'd, 194 F.3d 174 (D.C. Cir. 1999) - An attorney's letter accusing an employer of discharging a senior vice president for age-related reasons and offering a settlement is protected activity under the ADEA - it would be unlawful for the employer to withdraw its previously offered severance package in retaliation for the letter having been sent - however, that did not occur in this case, and the employer continued to bargain so summary judgment on the retaliation claim based on this letter is affirmed.

Mattern v. Eastman Kodak Co., 104 F.3d 702, 72 FEP 1441 (5th Cir.), cert. denied, 522 U.S. 932 (1997) - Retaliation prohibitions of § 704(a) require adverse ultimate employment decisions - employee who claimed that co-

workers became hostile toward her and sabotaged her work and stole her tools for complaining about sexual harassment thus has no claim under § 704(a) - by contrast the general discrimination prohibition sections, §§ 703(a)(1) and (2), are much broader in that they prohibit any discrimination with respect to conditions or privileges of employment, but they are not involved in this case - 2-1 decision in favor of employer - dissent claimed that anti-retaliation provisions afford independent cause of action based on hostile work environment.

Promotion (Ch. 19)

Brown v. Coach Stores, Inc., 163 F.3d 706, 78 FEP 917 (2d Cir. 1998) - 2-1 decision affirming dismissal of promotion claims of black employee who failed to allege that she sought specific position - employee was a receptionist who alleged that she repeatedly sought promotions but did not allege specific positions for which she applied - insufficient to merely assert that on several occasions requested promotion generally - if a general request for a promotion was sufficient employers would be unfairly burdened in promotion efforts - rather than simply keeping track of specific applicants employers would have to keep track of all employees who had generally expressed an interest in promotion and consider them for any opening - case analyzed at 160 LRR 9.

Sexual and Other Forms of Harassment - Cases Interpreting Faragher/Ellerth (Ch. 20)

Faragher v. City of Boca Raton, 524 U.S. 775, 77 FEP 14 (1998) - The Supreme Court established the following rule on employer liability for supervisory harassment under Title VII:

“In order to accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII’s equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate

(or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence The defense comprises two necessary elements: (a) that the employer exercise reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense . No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."

Under that standard, City was held absolutely liable - plaintiff was lifeguard who was harassed by first- and second-level superiors - City had not promulgated and publicized policy with grievance procedure - therefore no need for remand - what is or is not sexually harassing conduct not at issue in case - cited Harris for proposition that "in order to be actionable . . . a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so" - "These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become 'a general civility code.' . . . Properly applied, they will filter out complaints attacking 'the ordinary tribulations of the workplace, such as a sporadic use of abusive language, gender-related jokes, and occasional teasing.' . . . We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of

employment. . . . [citing Employment Discrimination Law at pp. 805-807 (“collecting cases granting summary judgment for employers because the alleged harassment was not actionably severe or pervasive”)] - in Harris the employer was liable because the harasser was the president of the company and could be treated as the organization’s proxy - reliance on the “aided-by-agency-relation principle embodied in Section 2.19(2)(d) of Restatement” - “When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor.” - “The employer has a greater opportunity to guard against misconduct by supervisors.” - with respect to affirmative defense, Title VII’s primary objective “is not to provide redress but to avoid harm” - “It would therefore implement clear statutory policy . . . to recognize the employer’s affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty.” - “The requirement to show that the employee has fulfilled a coordinate duty to avoid or mitigate harm reflects an equally obvious policy imported from the general theory of damages, that a victim has a duty ‘to use such means as are reasonable under the circumstances to avoid or minimize the damages’ that result from violations of the statute.” [citing Ford Motor Co. v. EEOC, 458 U.S. 219, 29 FEP 121 (1982)] - “If the plaintiff unreasonably failed to avail herself of the employer’s preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who has taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.” - “Although racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment.”

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 77 FEP 1 (1998) - Court adopted same test as in Faragher - Ellerth was subjected to constant sexual harassment by supervisor, which included requests for sex tied with threats to deny a promotion - Ellerth rejected all advances and none of the threats were carried out - she was promoted - summary judgment had been granted below for the employer, but reversed by the Seventh Circuit - question was whether an employee who refuses unwelcome advances yet

suffers no adverse tangible job consequences can recover - Ellerth was aware of the company's anti-sexual harassment policy, but failed to utilize its grievance procedure - she informed no one of the objectionable conduct - Court assumed that the conduct was severe and pervasive enough to constitute actionable harassment - "The terms quid pro quo and hostile work environment are helpful, perhaps, in making a rough demarcation in cases in which threats are carried out and those where they are not or absent altogether, but beyond this are of limited utility." - rule of absolute liability for quid pro quo encouraged plaintiffs to state their claims as quid pro quo claims - but the terms are not generally useful - "Because Ellerth's claim involved only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct." - "We express no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment." - categories quid pro quo and hostile work environment not controlling on issue of vicarious liability- "The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment." - Restatement creates vicarious liability when servant "was aided in accomplishing the tort by the existence of the agency relationship" - in some sense all workplace tortfeasors are aided by the existence of the agency in that it creates proximity- that is not enough - employer will be absolutely liable if a tangible employment action is taken - "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." - cites cases holding that bruised egos are not enough, demotion without change in pay or benefits or duties or prestige not enough, and "reassignment to more inconvenient job insufficient" - "A tangible employment action in most cases inflicts direct economic harm." - "A tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." - "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context . . . and the EEOC's policy of encouraging the development of grievance procedures." - "To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose."-

“Title VII borrows from tort law the avoidable consequences doctrine, see Ford Motor Co. v. EEOC” - case must be remanded to allow Ellerth to plead and prove tangible harm, if she can - Burlington should have an opportunity to assert and prove the affirmative defense to liability- Justices Thomas and Scalia dissented, arguing that the affirmative defense is vague and it is unfair to impose liability on an employer that was not negligent - dissent argued that it's unclear as to when summary judgment can be granted and that employer liability may be the rule but this is not what Congress intended.

Williams v. City of Kansas City, ___ F.3d ___, 83 FEP 1338 (8th Cir. 2000) - Evidence that following harasser's failure to use City's internal grievance procedure City did not take serious action after investigating subsequent incident of alleged harassment against co-worker should not have been introduced into evidence - since events occurred after plaintiff's failure to use City's internal grievance procedure, facts could not have affected her decision not to use the grievance procedure.

Breda v. Wolf Camera & Video, ___ F.3d ___, 83 FEP 1067 (11th Cir. 2000) - Harasser followed company policy by reporting sexual harassment to manager - policy stated that if employee did not get satisfaction employee should contact personnel department, which she did not do - employer properly put on notice since sole inquiry when employer has clear and published policy is whether employee reported the harassment in compliance with the policy - fact that employee did not contact personnel department irrelevant to determination of whether employer was on notice.

Madray v. Publix Supermarkets Inc., 208 F.3d 1290, 82 FEP 1071 (11th Cir. 2000), pet. for cert. filed, 69 U.S.L.W. 3087 (July 12, 2000) (No. 00-66) - Sexual harassment policy designated only one person at each store to be notified - the store manager - but provided alternate avenues of complaint away from the store - harassers merely complained to mid-level managers in

informal settings - that was insufficient - store took prompt and effective action when employees contacted district manager - affirmative defenses therefore bar complaint.

Montero v. Agco Corp., 192 F.3d 856, 80 FEP 1658 (9th Cir. 1999) - Employee endured harassment by co-workers and supervisors for two years before utilizing employer's policies - employer quickly responded with investigation, discharge and discipline - it took employer only 11 days to complete its investigation and take action "in a decisive and meaningful fashion" - the employer therefore satisfied the first prong of the Faragher affirmative defense - second prong also satisfied by showing that clerk unreasonably waited two years to complain - resignation four months after offensive conduct ceased not constructive discharge - case brought under Title VII and also asserted "several state law claims" - summary judgment affirmed - no indication whether FEHA claim involved.

Mikels v. City of Durham, N.C., 183 F.3d 323, 80 FEP 248 (4th Cir. 1999) - Higher ranking police officer grabbed female police officer on each side of her face, pulled her to him, and kissed her on the mouth - male was reprimanded and disciplined by suspension - City Manager later withdrew formal reprimand but suspension was allowed to stand - City's response adequate - "We have not required that particular remedial responses be the most certainly effective that could be devised . . . and have given great weight to the fact that a particular response was demonstrably adequate to cause cessation of the conduct in question." - this is particularly true where there had been no prior improper acts by the harasser - furthermore, although harasser was of higher rank, under Faragher and Ellerth "not all harassment even by supervisory personnel is necessarily 'aided by the agency relation'" - Ellerth noted that some acts by a supervisor "might be the same acts a co-employee would commit" and "there may be some circumstances where the supervisor's status makes little difference" - if the harassment was aided by the supervisory relationship, vicarious liability is absolute absent the affirmative defense - in other words, employer is governed by a more stringent test if the harassment was aided by the agency relationship - where this is not clear "the victim's response in context may be highly probative on the issue of whether any agency authority possessed by the harasser has actually aided his conduct by increasing [the victim's] sense of vulnerability and defenselessness" -

Faragher noted that “when a fellow-employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor” - the key to whether agency relationship aided the harasser might well be whether the victim felt free to tell the offender where to go - even though harasser was a corporal and victim a private, “the clincher lies in [the victim’s] demonstrated lack of any sense of special vulnerability” by her conduct - following the kiss, she “rebuffed him in an obscenity and profanity-laced outburst” and then filed a grievance against him - summary judgment affirmed.

Watts v. Kroger Co., 170 F.3d 505, 81 FEP 6 (5th Cir. 1999) - Summary judgment issued before Burlington/ Ellerth reversed - supervisorial harassment intensified in the spring of 1994 - reasonable jury could find that waiting until July to complain was not unreasonable - using union grievance procedure rather than company sexual harassment policy reasonable under the circumstances - Kroger cannot show as a matter of law that it satisfies the affirmative defense.

Greene v. Dalton, 164 F.3d 671, 79 FEP 375 (D.C. Cir. 1999) - Affirmative defense not available to employer where rape victim waited a month to report the rape - part of affirmative defense is that reasonable person would have come forward early enough to prevent the supervisor’s harassment from becoming severe or pervasive - employer did not establish that harassment became severe or pervasive enough prior to the rape - summary judgment reversed and remanded for trial.

Indest v. Freeman Decorating, Inc., 164 F.3d 258, 78 FEP 1527 (5th Cir. 1999) - Judgment as a matter of law upheld under Faragher and Ellerth because employer “promptly and effectively responded to [plaintiff’s] equally prompt complaint” - at a trade show running the course of a week, an executive made crude sexual comments and sexual gestures to plaintiff, which plaintiff promptly reported - the employer promptly investigated and issued a verbal and written reprimand to the executive, informing plaintiff of the reprimand - the executive was suspended without pay for seven days and given other discipline - the CEO confirmed the discipline in a letter to the plaintiff - plaintiff alleged that as a result of the episode she has suffered psychological damage - “The recent Supreme Court

decisions guide our analysis.” - Oncale emphasized that Title VII is not a general civility code - Faragher said the same thing - “We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment” - Ellerth emphasized that “the conduct must be severe or pervasive” - “Taken together, these cases hold that sexual harassment which does not culminate in an adverse employment decision must, to create a hostile work environment, be severe or pervasive.” - “Discourtesy or rudeness, ‘offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in “terms and conditions of employment.”” - “All of the sexual hostile environment cases decided by the Supreme Court have involved patterns or allegations of extensive, longlasting, unredressed, and uninhibited sexual threats or conduct that permeated the plaintiffs’ work environment.” - “This is not to say that [the harasser] behaved like a gentleman or a responsible company officer. On the contrary, his crude remarks and implied threat deserve censure.” - “His vulgar remarks and innuendos (about his own anatomy) were no more offensive than sexual jokes regularly told on major network television programs. Significantly, [the alleged harasser] never touched [the plaintiff]. His ‘threat’ . . . to ‘prove herself to him’ was far more ambiguous than those uttered in Ellerth.” - whether plaintiff was subjected to a sexually hostile working environment might be a close question on this record but is a question that need not be answered - “Ellerth and Faragher do not . . . directly speak to the circumstances before us, a case in which the plaintiff quickly resorted to [the employer’s] policy and grievance procedure against sexual harassment, and the employer took prompt remedial action.” - “For purposes of imposing vicarious liability, a case presenting only an incipient hostile environment corrected by prompt remedial action should be distinct from a case in which a company was never called upon to react to a supervisor’s protracted or extremely severe acts that created a hostile environment.” - although Ellerth/Faragher does not control “it informs on the principles determinative of this case.” - “To the extent redress is sought, is justified, and is adequately provided by the company, the complained-of incidents will not likely have become severe or pervasive enough to create an actionable Title VII claim.” - “By promptly invoking the company’s grievance procedure, a plaintiff has received the benefit Title VII was meant to confer. In such

cases, an actionable hostile environment claim will rarely if ever have matured.” - there is another reason for distinguishing Ellerth/Faragher - the Supreme Court squared its limited vicarious liability standard “with Meritor’s holding that an employer is not “automatically” liable for harassment by a supervisor who creates’ a hostile working environment.” - Congress left Meritor intact - imposing vicarious liability on an employer for a supervisor’s creation of a hostile environment despite its swift and appropriate remedial response to the victim’s complaint would undermine Meritor and Title VII’s deterrent policy - “Vicarious liability would amount to strict liability even though the plaintiff had suffered neither a severe and pervasive change in her working conditions nor any adverse employment action.” - “A standard imposing vicarious liability notwithstanding the employer’s having nipped a hostile environment in the bud would also conflict with the premise of Ellerth/Faragher, founded in agency law, that a supervisor who creates a hostile environment is aided by his agency status with the employer in doing so. . . . Where the company, on hearing a plaintiff’s complaint . . . , moves promptly to investigate and stop the harassment, it eradicates any semblance of authority the harasser might otherwise have possessed.” - because plaintiff “promptly complained . . . , and because the company promptly responded, disciplined [the harasser] appropriately, and stopped the harassment, the district court properly granted judgment as a matter of law to [the employer]. Even if a hostile work environment claim had been stated, which is dubious, [the employer’s] prompt remedial response relieves it of Title VII vicarious liability.”

Durham Life Insurance Co. v. Evans, 166 F.3d 139, 78 FEP 1434 (3d Cir. 1999) - Employee was victim of supervisorial hostile environment sexual harassment and did not utilize employer’s complaint mechanism when the hostile environment harassment was occurring - that was followed by a tangible job detriment, conduct intentionally designed to force her out of her job - despite her failure to complain, which would have been an affirmative defense to a hostile environment claim, the affirmative defense is not available when there is a tangible job detriment - employer’s argument that if she had reported the harassment at the beginning it would have been investigated and the problem would have stopped rejected - affirmative defense is simply not available when harassment becomes an adverse

employment action - concurring opinion indicates that case is a "mixed" case with both hostile environment and tangible job detriment and that the affirmative defense is available to the hostile environment portion.

Duran v. Flagstar Corp., 17 F. Supp. 2d 1195, 77 FEP 1436 (D. Colo. 1998) - Numerous claims - sexual harassment dismissed on summary judgment - the employer had the requisite policy, and plaintiff transferred out of the offending environment before complaining - plaintiff's allegation that she had used the 1-800 number to complain and nothing happened rejected since no record of the call exists.

Montero v. Agco Corp., 19 F. Supp. 2d 1143, 77 FEP 1443 (E.D. Cal. 1998), aff'd, 192 F.3d 856, 80 FEP 1658 (9th Cir. 1999) - Employer had adequate policy - employee alleging harassment waited two years claiming she feared retaliation - summary judgment granted on Title VII claim.

Nuri v. PRC, Inc., 13 F. Supp. 2d 1296, 77 FEP 1451 (M.D. Ala. 1998) - Case tried to jury before Faragher - plaintiff prevailed - post-trial motions denied - although policy adequate and vigorously enforced, it was never disseminated - employees in plaintiff's office received neither the sexual harassment training nor the mailings and newsletters communicating the policy - plaintiff did not know of the policy.

Butler v. Ysleta Independent School District, 161 F.3d 263, 78 FEP 561 (5th Cir. 1998) - Two women school teachers began receiving anonymous mailings at their homes, some of which commented on their personal appearance ("Don't you have a mirror at home?"), some of which commented on their sex life ("What you need is a few good men."), and others used derogatory terms for women - they were overwhelmingly hostile - it turns out they came from the school's principal, who had been sending similar nasty communications to male school employees which contained similar comments (You are a stain "[o]n the under wear of life" and you make "love to yourself") - the principal was fired, and the two women sued the school - the case was dismissed - the court analyzed the "second generation of sexual harassment law" (i.e., following Faragher and

Ellerth), and stated “While the nuances of these writers’ [scholarly works by law professors] approaches to sexual harassment differ, all emphasize that sexual harassment is discrimination based on sex, not merely workplace behavior with sexual overtones.” - the claim of harassment was dismissed - there was reliance on the infrequency of the harassment, that it was not public, and that it was not done at work, but the most important fact was that it was not sent to women as women - it did not create a hostile environment for women since the messages were “not aimed at undermining female employees’ sense of competence based on their sex” - Oncale distinguished as “not a hostile environment case” - the principal’s acts of sending offensive material to both men and women while the messages were sexually charged were not sexually charged in a way that made the workplace hostile for men or women - the problem of the “bisexual harasser” is analyzed at 159 LRR 424.

Wilson v. Tulsa Junior College, 164 F.3d 534, 78 FEP 1189 (10th Cir. 1998) - Jury finding of sexual harassment in favor of custodian whose supervisor exposed himself to her and stated he would make her life hell if she did not have sex with him upheld - policy inadequate since night shift custodian could not go to personnel office which was closed - reaction of college to police report of criminal activity inadequate since it did not move immediately to deal with harasser - in fact, college put him on notice of complaint without warning custodian.

Sexual and Other Forms of Harassment - General (Ch. 20)

Hocevar v. Purdue Frederick Co., ___ F.3d ___, 2000 WL 1162228., 83 FEP 1196 (8th Cir. 2000) - 2-1 decision affirming summary judgment on sexual harassment claim - 2-1 decision overturning summary judgment on retaliation claim - employee claimed supervisor constantly used the “F”, “B”, and “A” words - she also complained about a compliment about her “great legs” while she was giving a business presentation - she also alleged being offended at a company official’s suggestion to a room of 150 people that he would be having a sexual liaison with

three female employees who had just performed a skit - summary judgment sustained on harassment claim because plaintiff admitted herself using the "F" and "B" words - in addition, the complaint of language was not based on sex since it was used to describe both men and women - use of foul language in front of both men and women is not sex discrimination - in addition, as a matter of law employee cannot show harassment was sufficiently severe or pervasive even though the use of foul language was pervasive - dissenting judge indicated that employee asserted she endured a constant litany of vulgar and inappropriate behavior and the fact that she used the words in question on occasion does not establish that she welcomed their use by the supervisor - the dissent also pointed to supervisor's threats of violence, the supervisor's dissemination of sexually explicit material at meetings, the supervisor's condonation of sexually graphic behavior at meetings, and the behavior of other managers - the dissent indicated that this cannot be disregarded simply because the female employee admitted to the infrequent use of foul language - factual issue required reversal of summary judgment on all allegation that employee discharged for having filed EEOC charge - close proximity in time between her discharge and her supervisor's return to work after three-month unpaid suspension for sexual harassment - issue of welcomeness analyzed at 164 LRR 329.

DeClue v. Central Illinois Light Co., ___ F.3d ___, 83 FEP 737 (7th Cir. 2000) - Power company's failure to supply bathroom facilities for only female linemen cannot be challenged as sexual harassment - sexual harassment is form of sex discrimination that consists of efforts by co-workers or supervisors to make workplace intolerable for women - failure to correct a work condition that might have a disparate impact is not sexual harassment - practice might be challenged under disparate impact theory - 2-1 decision.

Brooks v. City of San Mateo, 214 F.3d 1082, 83 FEP 55 (9th Cir. 2000) - One severe instance of co-worker harassment insufficient to violate Title VII - co-worker put his hand on plaintiff's stomach, pinned her in chair, forced hand under her sweater and bra and fondled her bare breasts - she immediately reported it, harasser was immediately suspended, and later resigned - although highly offensive and reprehensible, a single instance of sexual harassment must be extremely severe and this was not - retaliation claim also rejected - allegations of shunning rejected - "[0]stracism suffered at the hands of coworkers cannot constitute an adverse employment action" (Id. at 1093) - employer cannot force employees to socialize with one another - indeed, if such conduct were compelled it could violate the First Amendment - claim that performance review downgraded rejected as not an adverse employment action - same finding with respect to allegations of unfavorable shift and denial of vacation preference. [Note: Not clear whether judgment as a matter of law was summary judgment or at trial.]

Holman v. Indiana, 211 F.3d 399, 82 FEP 1287 (7th Cir. 2000), pet. for cert. filed, No. 00-230 (July 31, 2000) - Sexual harassment by equal opportunity harasser not covered by Title VII - male and female employees both harassed in comparable sexual ways by supervisor who sought sexual relations with each of them - both employees were alleging harassment by the same supervisor - Oncale requires disparate treatment - court rejects argument that sexual harassers will go out of their way to harass people of both sexes to avoid liability - equal opportunity harasser issue analyzed at 164 LRR 105.

Tutman v. WBBM-TV, 209 F.3d 1044, 82 FEP 1178 (7th Cir. 2000) - Co-employee harassment - employer need only respond with appropriate remedial action reasonably likely to prevent recurrence - employer does not have to mete out punishment proportionate to the offense - harasser required to attend three-day sensitivity

seminar, write an apology and steps taken to minimize workplace contact.

K. S. v. ABC Professional Corp., 749 A.2d 425, 82 FEP 1174 (N. J. Sup. Ct., App. Div., 2000) - Former law firm associate alleging rape by partner cannot conduct discovery into other partner's consensual sexual relationships at the firm

Burnett v. Tyco Corp., 203 F.3d 980, 81 FEP 1513 (6th Cir. 2000), pet. for cert. filed (June 14, 2000) (No. 00-233) - Two offensive comments and an unwelcome touching committed by an employer's personnel manager over six months do not add up to sexual harassment - 2-1 decision affirming summary judgment - at a meeting of female plaintiff's department, personnel manager placed a pack of cigarettes containing a lighter inside the employee's tank top and brassiere strap - two weeks later, at another departmental meeting, while plaintiff was coughing, personnel manager gave her a cough drop while stating, "Since you have lost your cherry, here's one to replace the one you lost." - six months later he made another offensive comment - another employee submitted an affidavit which contained a suggestion form alleging that lots of female employees had heard filthy remarks from the personnel manager - the court found this evidence irrelevant to a hostile environment claim because she was not aware of it at the time - the cigarette pack incident was serious because there was physical contact and an element of physical invasion - nevertheless holds as a matter of law the conduct was not severe enough - a single battery coupled with two offensive remarks over six months does not create a factual issue - not sufficiently severe - dissent - severity sufficient because of reaching inside the employee's blouse and placing a cigarette pack under her bra strap.

Kahn v. Objective Solutions, International, 86 F. Supp. 2d 377, 82 FEP 495 (S.D.N.Y. 2000) - Male employer had consensual sexual relationship with employee - no violation of Title VII when female employee was discharged at the insistence of male employer's spouse - no hostile environment simply because after employer had sex with plaintiff he told her she was terminated at his wife's insistence but she could call his wife and beg for her job back - participation in a consensual affair does not constitute actionable gender discrimination when the termination of the affair results

in discharge - "It may constitute unfair and certainly unchivalrous behavior" Id. at 382.

Bibby v. Philadelphia Coca Cola Bottling Co., 85 F. Supp. 2d 509, 82 FEP 207 (E.D. Pa. 2000) - Harassment because of sexual orientation is not prohibited same-sex harassment - male plaintiff was not harassed by male co-workers because of his sex but because of his sexual orientation - Oncale did not reach the issue of sexual orientation discrimination - case analyzed at 163 LRR 329.

Jones v. U.S. Gypsum, ___ F. Supp. 2d ___, 81 FEP 1695 (N.D. Iowa 2000) - Female employee struck male supervisor in the groin - this may be severe enough to create a hostile work environment - employer may be liable since supervisor presented evidence that management knew employee had hit other male employees in the groin in the past and had failed to act.

Hubbard v. United Parcel Service, 200 F.3d 556, 81 FEP 1218 (8th Cir. 2000) - Male co-employee exposed himself to female co-worker - male was transferred to opposite end of facility and female's allegations were noted in male's personnel record - JNOV following trial upheld - "Sexual harassment by a co-employee is not a violation of Title VII unless an employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action." (Id. at 557 (internal quotations omitted).) - action of transferring male and explaining company's sexual harassment policy and noting the complaint in the employee's record was sufficient and appropriate.

Malik v. Carrier Corp., 202 F.3d 97, 81 FEP 1275 (2d Cir. 2000) - Alleged harasser sued employer for negligent infliction of emotional distress on account of sexual harassment investigation - jury awarded \$400,000 which trial judge cut to \$220,000 - Second Circuit reverses - employer's investigation of sexual harassment complaint is not a gratuitous or optional undertaking but required by law - it would undermine federal policies and reduce employer's incentives to take reasonable corrective action if these actions might result in a negligence cause of action - virtually any investigation and allegations of sexual harassment would expose an employer to liability - denials by the accused cannot end the matter - it is inevitable that the existence of the investigation may give the allegations

temporary or even permanent credibility - from the employer's point of view worst-case scenarios must govern its conduct - if another employee later brought an action alleging inappropriate sexual conduct by the alleged offender, scrutiny of the employer's conduct would start with its first notice of harassment and how it responded - as to the allegation that the employer led the employee twice to believe the matter was closed, "it would be an uncommon investigation into allegations of sexual harassment that did not result in similar misunderstandings given the emotional and confrontational circumstances that generally attend them." - case analyzed at 163 LRR 137.

Ribando v. United Airlines, 200 F.3d 507, 81 FEP 897 (7th Cir. 1999) - Female plaintiff was accused by male co-worker of sexual harassment - making a "derogatory or harassing sexual remark" - United investigated, convening a panel of management and union representatives - plaintiff and male employee alleging harassment were summoned before the panel - no adverse action taken against female but "letter of concern" placed in her personnel file - her supervisor instructed that her work and personal habits and any inappropriate comments she might make in the workplace be documented - nothing came of this - she alleged that the investigation and documentation were themselves harassment - summary judgment affirmed - "No actionable claim for retaliation or discrimination will lie unless the plaintiff has suffered some adverse employment action." - citing a prior case, "Not everything that makes an employee unhappy is an actionable adverse action." - negative evaluations are not by themselves actionable - a letter of concern is thus not actionable - far from creating inappropriate environment, "it seems United did what an employer should do when an employee lodges a complaint of sexual harassment against another: it investigated, documented and counseled."

Mendoza v. Borden Inc., 195 F.3d 1238, 81 FEP 470 (11th Cir. 1999) (en banc), cert. denied, 120 S. Ct. 1674 (2000) - By 7-4 vote, en banc court affirms judgment as a matter of law for defendant on sexual harassment claim - plaintiff's testimony was that her supervisor followed her constantly, stared at her, made sniffing noises while looking at her crotch, and rubbed his hip against hers while touching her shoulder and smiling - plaintiff admitted that the supervisor never said anything intimidating or hostile - she was fired when she was absent for three consecutive days without calling in - the harassment viewed objectively did not alter the terms or

conditions of employment - the majority cites cases from six different circuits rejecting sexual harassment claims based on conduct it viewed as more serious - the statement "I'm getting fired up" made by the supervisor while rubbing his hip against hers could be sexual but the circumstances did not indicate that the statement had sexual or gender-related connotations - every-day observation of fellow employees in the workplace is natural - there were only three sniffing incidents over 11 months - case analyzed at 162 LRR 425, which cites several other "staring" cases.

Bollard v. California Province of the Society of Jesus, 196 F.3d 940, 81 FEP 660 (9th Cir. 1999) - Ministerial exception to Title VII does not exempt priests charged with sexual harassment - resolution of this dispute does not implicate the civil courts into issues of religious practice or belief- jury would only be required to make secular judgments - candidate for priesthood claims he was sexually harassed while preparing for the priesthood.

Smith v. Cashland, Inc., 193 F.3d 1158, 80 FEP 1783 (10th Cir. 1999) - Reversible error to deny employer the right to argue alternatively that employee quit when confronted with poor work performance or, if there was a discharge, that employee was discharged for poor work performance - employee claims he was discharged for refusal to submit to sexual harassment - judgment for plaintiff reversed and case remanded.

Brennan v. Metropolitan Opera Association, 192 F.3d 310, 80 FEP 1483 (2d Cir. 1999) - Sexually provocative pictures of nude men that male employee put up in office he shared with female employee does not support hostile environment claim despite exposure to pictures every working day - pictures could not reasonably be characterized as physically threatening or humiliating - management's failure to act on complaints do not magnify the severity of the situation.

Volpe v. US Airways, Inc., 184 F.R.D. 672, 81 FEP 169 (M.D. Fla. 1998) - employee entitled to all investigative notes made when U.S. Airways investigated complaint of sexual harassment - by relying on internal investigation as an affirmative defense to liability, all privilege claims waived - matter analyzed at 162 LRR 329.

Scusa v. Nestle USA Co., Inc., 181 F.3d 958, 80 FEP 239 (8th Cir. 1999) - co-worker harassment - summary judgment affirmed - much of conduct not sexual but simply rude - management responded to complainant each time she made management aware of a specific problem - complainant engaged in same type of conduct (jokes and rude comments) that she complained about - ostracism by co-workers is not retaliation.

Hurley v. Atlantic City Police Department, 174 F.3d 95, 79 FEP 808 (3d Cir. 1999), cert. denied, 120 S. Ct. 786 (2000) - Sexual harassment liability judgment affirmed - proper to admit evidence of sexual harassment of women other than plaintiff - relates to overall working conditions, whether the acts were sexual in nature, and whether the employer was on notice - evidence of tolerated pattern of such conduct goes to issue of whether sexual harassment policy was effective.

Minor v. Ivy Tech State College, 174 F.3d 855, 79 FEP 648 (7th Cir. 1999) - Summary judgment affirmed in sexual harassment case - second-level superior constantly called plaintiff, almost every day, and talked in a "sexy" voice - "We are concerned about the legal risk that would be placed on employers if a plaintiff in a sexual harassment case could get to a jury on the basis of nebulous impressions concerning tone of voice, body language, and other nonverbal, nontouching modes of signaling. It is one thing to tell a supervisor that he should not propose sex to a subordinate, display pornographic pictures to her, or touch her in a suggestive fashion It is another thing for an employer to be required under pain of legal sanctions to make sure that its supervisors never inflect their voice or posture in such a way that a woman might think they were 'coming on' to her."

Shepherd v. Comptroller of Public Accounts of the State of Texas, 168 F.3d 871, 79 FEP 508 (5th Cir.), cert. denied, 120 S. Ct. 395 (1999) - Summary judgment in sexual harassment case affirmed - the following conduct by a co-worker was held insufficient to alter the terms and conditions of employment: (1) statement that "your elbows are the same color as your nipples"; (2) "You have big thighs," while pretending to look under her dress; (3) attempting to look down her clothing; (4) touching her arm on several occasions and rubbing one of his hands from her shoulder down to her wrist; and (5) suggesting that she sit in his lap - "[T]he comments made

by Moore were boorish and offensive” but “were not severe” - “We find each comment . . . to be the equivalent of a mere utterance of an epithet that engender offensive feelings” which the Supreme Court has held is not actionable - “Moore’s stares and the incidents in which he touched Shepherd’s arm, although they occurred intermittently for a period of time, were not severe” - “Moore’s harassing actions, although offensive, are not the type of extreme conduct that would prevent Shepherd from succeeding in the workplace.”

Hardin v. S. C. Johnson & Son, Inc., 167 F.3d 340, 78 FEP 1542 (7th Cir.), cert. denied, 120 S. Ct. 178 (1999) - Summary judgment in favor of employer in sex and race harassment case affirmed - co-worker “was a crude and boorish person, prone to offensive language and behavior. In the time they worked together, [co-worker] often used expletives, directed at [plaintiff] and other workers. . . .” - statements included “get your head out of your ass” or “dumb motherfucker” - there were also complaints about touching - when plaintiff complained supervisor told co-worker profanity inappropriate - co-worker “did not get the message, and continued using foul language and behaving crudely” - as evidence of bias, plaintiff submitted affidavit of co-worker’s former girlfriend who stated that for years co-worker routinely referred to plaintiff and other black women as “stupid black bitches,” “stupid Niggers,” and “black cunts” although such statements were not made directly to plaintiff - plaintiff continually complained to management and each time management reiterated its warnings to co-workers - continuing violation doctrine not applicable - “[T]he continuing violation doctrine has delineated limits. Where a pattern of harassment spreads out over years, and it is evident long before the plaintiff sues that she was a victim of actionable harassment, she ‘cannot reach back and base her suit on conduct that occurred outside the statute of limitations.’” - “[T]he continuing violation doctrine is inapplicable here.” - plaintiff constantly complained to management - this eliminates the noxious statements to the ex-girlfriend - conduct within the statute of limitations included “his persistent cursing and use of abusive language” - the persistent cursing does not indicate that women are thought of as inferior - co-worker “cursed at all employees on the line, white and black, male and female” - the conduct is not egregious enough in any event - “[T]he facts of other cases such as [citations omitted] involved more intimidating and threatening actions, yet were not found to be sufficiently severe or pervasive to create a hostile working environment.”

Adusumilli v. City of Chicago, 164 F.3d 353, 78 FEP 1669 (7th Cir. 1998), cert. denied, 120 S. Ct. 450 (1999) - Summary judgment affirmed in co-worker hostile environment case - “[T]he most salient feature of the harassment is its lack of severity. As the Supreme Court recently cautioned, “simple teasing,” offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the “terms and conditions of employment”. . . . Yet, that is precisely what we have here. [Plaintiff] complains of no more than teasing about waving at squad cars, ambiguous comments about bananas, rubber bands, and low-neck tops, staring . . . and four isolated incidents in which a co-worker briefly touched her arm, fingers or buttocks.”

Shepherd v. Slater Steels Corp., 168 F.3d 998, 79 FEP 311 (7th Cir. 1999) - Co-worker sexual harassment found - irrelevant that harasser admitted that male co-worker would have harassed him whether he were male or female - what matters is whether the co-worker sexually harassed members of both genders - factfinder could infer sex-based harassment from connotations of sexual interest - not necessary to also conclude that harasser was in fact sexually interested - task of deciding whether harassment amounts to sex discrimination will be up to factfinder when the context of the harassment leaves room for inference that a sexual overlay to the harassment was not incidental - factfinder can conclude from relentlessly sexual tenor of harassment that employee was harassed because he was a man, since the conduct went beyond casual obscenity.

Morrow v. Wal-Mart Stores, Inc., 152 F.3d 559, 77 FEP 1446 (7th Cir. 1998) - Male who made comment about female’s breasts and male who showed picture of male genitalia discharged following complaints of female employees - may seem unfair since females who engaged in comparable activity were not discharged - however, differentiating factor was that there were no complaints of sexual harassment that grew out of the females’ conduct - summary judgment affirmed - male employee failed to show comparably situated females who had been the subject of complaints of sexual harassment.

Quinn v. Green Tree Credit Corp., 159 F.3d 759, 78 FEP 371 (2d Cir. 1998) - Employer’s obligations with respect to harassment by outsiders such as customers can be no greater than owed with

respect to harassment by co-workers - summary judgment against female former employee who alleged sexual harassment by co-workers and customers affirmed - no liability unless employer knew or should have known and failed to take action - no evidence showing that employer failed to provide reasonable complaint procedure or that it knew she was being harassed and failed to take action - retaliation complaint protesting her discharge two months after she complained of harassment and 10 days after she filed a charge reinstated - factual issue exists because of strong temporal correlation between charge and termination.

Smith v. National Railroad Passenger Corp., 25 F. Supp. 2d 578, 78 FEP 730 (E.D. Pa. 1998) - Plaintiff began a sexual relationship with a high executive - he told her they could not marry if she continued to be an Amtrak employee, so she resigned - several months later, she learned that her lover had no intention of marrying her and that there was no rule barring married couples from working at Amtrak - while the conduct is deplorable, no rights were violated - the sexual relationship was welcome at the time of her resignation and for some time thereafter - plaintiff "cannot deem unwelcome retroactively what she welcomed at the time."

Llampallas v. Mini-Circuits Lab, Inc., 163 F.3d 1236, 78 FEP 1104 (11th Cir. 1998), cert. denied, 120 S. Ct. 327 (1999) - Female supervisor and female subordinate had 13-year love affair which ended - supervisor harassed subordinate on job but subordinate did not report it - supervisor told company she would quit if subordinate was not terminated because she could no longer work with her - employer investigated and subordinate merely stated that problems with supervisor were "personal" - this was not enough to put employer on notice of sexual harassment or breakup of affair - this is not case where biased supervisor by herself terminated subordinate - chain of causation broken by employer's investigation, and subordinate's failure to put employer on notice - \$1.7 million verdict for plaintiff reversed.

Parkins v. Civil Constructors of Illinois, Inc., 163 F.3d 1027, 78 FEP 1329 (7th Cir. 1998) - Employer not liable for co-worker harassment

since foreman to whom she complained did not qualify as supervisor for purpose of imputing liability - summary judgment affirmed - essence of supervisory status is authority to affect terms and conditions of employment - this requires power to hire, fire, demote, promote, transfer or discipline - foreman was hourly employee, paid overtime, did not substitute for the true supervisor, and had almost no control over the alleged harassers.

Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 76 FEP 1667 (10th Cir. 1998) - Harassee reported harassment by Harasser No. 1, who was disciplined - this was effective in stopping further harassment by Harasser No. 1, but plaintiff was harassed by other employees - that does not mean that the remedial effort was inadequate or imposes absolute liability on the employer - employer will be judged by its response to the reported additional instances of harassment.

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 76 FEP 221 (1998) - Same-sex sexual harassment covered by Title VII - plaintiff who worked on eight-man crew on oil platform subjected to sex-related, humiliating actions, including physical assault in a sexual manner and threats of rape - no justification in statutory language to exclude same-sex harassment claims - same-sex plaintiffs must still prove that they were discriminated against "because of sex" - it is not enough that the conduct was tinged with offensive sexual connotations - easier to prove "because of sex" in male-female sexual harassment and in homosexual sexual harassment, but harassing conduct need not be motivated by sexual desire - this will not transform Title VII into a general civility code for the workplace - objective severity of the harassment must be judged from the perspective of a reasonable person in the plaintiff's position - Title VII does not cover conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment - the environment must be such that a reasonable person would find hostile or abusive - "We have always regarded that requirement as crucial, and sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace - such as male-on-male horseplay or intersexual flirtation - for discriminatory 'conditions of employment.'" - must look to social context - different standards apply to football team locker room and interrelationship between football coach and coach's secretary back at the office.

Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 75 FEP 1111 (10th Cir. 1997) - Summary judgment affirmed in sexual harassment and equal pay case - on sexual harassment, plaintiff must show the conduct was sufficiently severe or pervasive as to alter the conditions of her employment and create an abusive working environment - there were five separate incidents over a span of 16 months - they included a request "to undo that top button" - references to "that time of the month" - the harasser looking down her dress - the harasser referencing "neck chains" - "It appears to us that unpleasant and boorish conduct by Kowalski was shown, but that [plaintiff] was not, in fact, subjected to such offensive comments or conduct as to create a 'hostile or abusive' work environment" - the harasser became plaintiff's supervisor after three of the events occurred - equal pay claim rejected because men had additional responsibilities plaintiff did not share.

Perry v. Harris Chernin, Inc., 126 F.3d 1010, 75 FEP 71 (7th Cir. 1997) - Employer which had published policies against sexual harassment not liable for environmental harassment by store manager when employee did not complain prior to quitting - employer reasonably responded to complaint by conducting what investigation it could, hampered by plaintiff's refusal to participate - sexual harassment complainant has no legal duty to participate in investigation but reasonableness of employer's investigation will be judged in that context - no constructive discharge where employer after quit offered her job at another store away from manager in question - offer showed that resignation was not only choice available to her.

Hartsell v. Duplex Products, Inc., 123 F.3d 766, 74 FEP 1495 (4th Cir. 1997) - Summary judgment in sexual harassment case affirmed - following comments as a matter of law not severe or pervasive enough: (1) "We made every female in this office cry like a baby. We will do the same to you. Just give us time. We will find your weakness.;" (2) sales assistants like plaintiff were "the little people;" (3) a female employee was referred to as a "slave" and plaintiff was told she "would become the slave;" (4) plaintiff's superior upon

seeing a buxom woman in a magazine asked in plaintiff's presence, "[W]hy don't we have sales assistants that look like that?;" (5) after the birth of her child a female employee was asked whether she was going to be a "minivan driving mommy" or "be a salesperson and play with the big boys;" (6) "[W]hy don't you go home and fetch your husband's slippers like a good little wife, that's exactly what my wife is going to do for me." - harasser was sales rep and plaintiff assistant sales rep - reliance on banter back and forth in which plaintiff participated - critical element of sexual harassment claim is that it was "sufficiently severe or pervasive to create an abusive working environment" - this element is not met as a matter of law - several of the allegedly offensive comments are not even related to gender ("little people" and "slave") - "An insulting or demeaning remark does not create a federal cause of action for sexual harassment merely because the 'victim' of the remark happens to belong to a class protected by Title VII" - with respect to the comments that were sexual in nature, they are simply insufficient - Title VII does not attempt to purge the workplace of vulgarity - "There is no allegation that [the harassee] was inappropriately touched, propositioned, flirted with, taunted or even ogled." - "None of the alleged comments were even vulgar, much less obscene." - "Title VII is not a federal guarantee of refinement and sophistication in the workplace - in this context, it prohibits only harassing behavior that is so severe or pervasive as to render the workplace objectively hostile or abusive." - summary judgment is appropriate here where all that has been alleged is that the people plaintiff worked with "were at times difficult to work with, insensitive, immature and even insulting."

Fleming v. Boeing Co., 120 F.3d 242, 74 FEP 1307 (11th Cir. 1997) - Co-worker harassment - summary judgment for employer affirmed - when plaintiff complained employer spoke to co-worker and asked plaintiff to notify employer if there were any further problems - when EEO officer inquired if there were problems, and plaintiff said yes, coworker was demoted and employee was assigned to a different supervisor.

Gleason v. Mesirov Financial, Inc., 118 F.3d 1134, 74 FEP 1365 (7th Cir. 1997) - Summary judgment affirmed in sexual harassment

and pregnancy discrimination case - manager's references to female customers as "bitchy" and "dumb" plus ogling and comments on anatomy of other female employees are not sufficiently offensive - comments that manager had dream where he held hands with female employee and that he had spent weekend at nudist camp are inappropriate but not sexual per se - reliance on Baskerville v. Culligan International Co., 50 F.3d 428, 67 FEP 564 (7th Cir. 1995) - paragraph summarizing Baskerville conduct as follows: "(1) called the plaintiff a 'pretty girl,' (2) made grunting sounds when the plaintiff wore a leather skirt, (3) said to the plaintiff that his office was not hot 'until you walked in here,' (4) stated that a public address announcement asking for everyone's attention meant that 'all pretty girls [should] run around naked,' and (5) alluded to his wife's absence from town and his loneliness, stating that he had only his pillow for company while making an obscene gesture." - the conduct herein was clearly less offensive than in Baskerville and therefore summary judgment was appropriate.

EEOC v. Mitsubishi Motor Manufacturing, 990 F. Supp. 1059, 75 FEP 1379 (C.D. Ill. 1998) - EEOC can maintain pattern or practice action under § 707 against an employer that allegedly ignored complaints of sexual harassment - pattern or practice action challenges overall practices rather than discrete applications of policy - practices must constitute standard operating procedure - anecdotal evidence is helpful - employer position that proving a pattern or practice is inappropriate because in each instance must prove that the conduct is subjectively unwelcome rejected - the subjective findings will become relevant once pattern or practice liability is established when victims seek relief for themselves- if EEOC shows a pattern or practice it should be able to obtain injunctive relief regardless of whether the conduct was welcome to some employees - EEOC must show that the employer had notice of the harassment and was negligent in addressing it - the Teamsters' presumption of liability at the remedy phase will not be applicable - that presumption shifts the burden of proof - in a sexual harassment pattern or practice action individual relief requires a claimant to prove she was subjectively harmed - however, proof needed to establish a subjective perception of abuse in a typical individual case

is minimal and the employee's testimony about how she found the conduct to be hostile or abusive will suffice unless the employer produces evidence to the contrary - but if the employer intervened in an appropriate way to prevent the harassment, a claimant would still have to bear the ultimate burden of proof.

Childress v. City of Richmond, 134 F.3d 1205, 75 FEP 1167 (4th Cir.) (en banc), cert. denied, 524 U.S. 927 (1998) - White male police officers have standing to contest a "hostile environment" caused by supervisor's disparaging remarks to and about black and female colleagues - white officers asserted that the disparaging remarks destroyed the necessary sense of teamwork and endangered lives.

Torres v. Pisano, 116 F.3d 625, 73 FEP 1771 (2d Cir.), cert. denied, 524 U.S. 997 (1997) - An NYU secretary told a supervisor she was being harassed at work, but asked him to keep it confidential - this made the supervisor's failure to take immediate remedial action "not unreasonable" - summary judgment affirmed on hostile work environment based on race and sex claim.

Knabe v. Boury Corp., 114 F.3d 407, 73 FEP 1877 (3d Cir. 1997) - Employer's investigation into sexual harassment complaint was incomplete, but it did respond, and its response was sufficient to put an end to the offensive action - summary judgment affirmed - "[T]he law does not require that investigations into sexual harassment complaints be perfect." - "[T]o determine whether the remedial action was adequate, we must consider whether the action was 'reasonably calculated to prevent further harassment.'" - "[T]aking punitive action against the harassing employee, e.g., reprimand, suspension or dismissal, is not necessary to insulate the employer from liability for a hostile work environment."

Pray v. New York City Ballet Co., ___ F. Supp. ___, 73 FEP 1714 (S.D.N.Y. 1997) - Sexual harassment claims - law firm asked to conduct investigations and give advice- all of this is discoverable- matters discoverable include initial communications from employer to law firm, the investigation itself, and post-investigation communications and recommendations - both associates and partners can be questioned about their investigations and advice.

Folkerson v. Circus Circus Enterprises, Inc., 107 F.3d 754, 73 FEP 219 (9th Cir. 1997) - “Kelbi the Living Doll,” a mime, was so realistic casino patrons could not tell if she was real or not - a casino patron told onlookers, “I will show you how real she really is,” moved toward her with open extended arms, as though he planned to hug her, and touched her on the shoulder area, whereupon “the Living Doll” punched him in the mouth - “the Living Doll” was thereupon terminated and sued, alleging that she was opposing sexual harassment - “the Living Doll” was not engaged in protected opposition - the opposition must be directed at an unlawful employment practice of an employer, not an act of discrimination by a private individual - the employer here could be held liable for sexual harassment on the part of a private individual if it ratified the conduct or did not take appropriate corrective action - but “the Living Doll” must show sufficient facts to impute the actions of the casino patron to her employer - in fact, Circus Circus took reasonable steps to insure her safety - summary judgment affirmed.

Black v. Zaring Homes, Inc., 104 F.3d 822, 72 FEP 1631 (6th Cir.), cert. denied, 522 U.S. 865 (1997) - \$250,000 jury verdict based on company official’s sex-based comments at meetings attended by female manager reversed - comments not severe or pervasive enough to create an objectively hostile work environment - they were “merely offensive” - conduct was only verbal - offensive comments may impact the workplace without affecting a “term, condition or privilege” of employment - “Viewing the totality of the circumstances . . . we find that even when construed in a light most favorable to the plaintiff, the conduct does not appear to have been more than ‘merely offensive’” - “Although the verbal comments were offensive and inappropriate, and the record suggests that defendant’s employees do not always conduct themselves in a professional manner, Title VII was ‘not designed to purge the workplace of vulgarity,’ Baskerville v. Culligan International Co., 50 F.3d 428, 430, 67 FEP 564 (7th Cir. 1995).

Although the EEOC in its amicus brief urges us to reject the court’s analysis in Baskerville, we find that case helpful.” - footnote 4 lists in summary fashion the offensive conduct found not to constitute sexual harassment in Baskerville.

Casenas v. Fujisawa USA, Inc., 58 Cal. App. 4th 101, 75 FEP 1524 (1997) - Summary judgment in sexual harassment/retaliation case affirmed - employer's response to sexual harassment claim "is a textbook example of how to respond appropriately to an employee's harassment complaint. We do not know what more the employer could have done to accommodate [plaintiff], short of ceding its managerial prerogative to her [Plaintiff] was not entitled to present her case to a fact finder; as a matter of law, no reasonable employee in her position would have found the working conditions so egregious as to compel resignation." - employer promptly investigated her sexual harassment complaint, conducted a textbook investigation, reprimanded the alleged harasser, reiterated the employer's sexual harassment policy, directed the alleged harasser not to talk about plaintiff or contact her, and unequivocally warned him that violation of these directives would result in immediate termination.

Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 73 FEP 87 (8th Cir. 1997) - Punitive damage award reduced from \$5 million to \$350,000 - no abuse of discretion in admitting harassing actions against plaintiff outside the statute of limitations - Wal-Mart argued that the Title VII \$300,000 cap should be viewed as a national consensus - no intent of Congress that awards under state law cannot be larger than \$300,000 - court examined awards in other sexual harassment cases under Missouri law - court cited awards of \$125,000, \$200,000, and \$400,000, describing the factual situations for each - "The harassing conduct was certainly objectionable but was not the most egregious type of sexual harassment [T]here was no serious sexual assault or physical touching, no quid pro quo harassment, or no retaliation for complaints." - Wal-Mart has an appropriate corporate policy although there was conflicting testimony on whether it was effective - "Considering all the aggravating and mitigating circumstances, including the nature of the harassment and the involvement of managers in it, the lack of responsiveness to complaints, the existence of a corporate policy against harassment, the failure to train supervisors about the policy or of on-site managers to carry it out, the amount awarded in actual damages [\$35,000], and the relative size of Wal-Mart, an award of punitive damages in the amount of \$350,000 would be reasonable under Missouri law. The district court abused its discretion by not reducing the award to such reasonable amount. . . ." - dissent argued for a \$2 million award, noting "Wal-Mart had net assets of \$32 billion. The majority's reduced award constitutes less than 2/1000ths of one percent of Wal-Mart's net worth. Such a minuscule penalty hardly represents more than a slap on the hand for a company of Wal-Mart's size."

Discharge - General (Ch. 21)

Spears v. Missouri Department of Corrections, 210 F.3d 850, 82 FEP 1278 (8th Cir. 2000) - Summary judgment affirmed in constructive discharge case - lower performance evaluation and transfer to less desirable facility was not constructive discharge even though working environment not ideal - transfer is not an adverse action - "It is well established that a transfer involving only minor changes in working conditions and no reduction in pay or benefits will not constitute an adverse employment action. [Internal quotes omitted.]" (Id. at 253)

Nance v. Maxwell Federal Credit Union, 186 F.3d 1338, 80 FEP 960 (11th Cir. 1999) - Employer decided to demote or discharge based on age, communicated the decision, and then changed its mind - employee received normal salary and benefits in interim period between employer's decision and its revocation - when employee was notified of original decision, went on leave of absence - did not return after revocation - technical violation even though court not comfortable with this holding - court feels this result is required by Supreme Court decision in Chardon v. Fernandez, which holds that time limits start to run when decision is made and communicated, not when pay loss begins - however, since no constructive discharge, jury's award of back and front pay reversed.

Phillips v. Taco Bell Corp., 156 F.3d 884, 78 FEP 84 (8th Cir. 1998) - Summary judgment on constructive discharge affirmed despite remand on sexual harassment issue - "To constitute constructive discharge, a plaintiff must show more than just a Title VII violation by her employer." - employer's actions must have been intended to force employee to quit, meaning the employee's resignation must be a reasonably foreseeable consequence of the employer's actions - plaintiff must show working conditions were objectively intolerable - the issue is "not the plaintiff's subjective feelings" - "Finally, to be reasonable 'an employee has an obligation not to assume the worst and not to jump to conclusions too quickly. An employee who quits without giving [her] employer a reasonable chance to work out a problem has not been constructively discharged.'" - plaintiff's "failure to give Taco Bell a fair opportunity to demonstrate that it had remedied the situation that had given rise to her complaints vitiated the continued validity of her claim. Accordingly, her constructive discharge claims fail as a matter of law."

Serrano-Cruz v. DFI Puerto Rico, Inc., 109 F.3d 23, 78 FEP 621 (1st Cir. 1997) - Cannot establish prima facie case of constructive

discharge when plaintiff rejected newly created job without trying it - employee was demoted to newly created position, which she refused - objective standard applied to constructive discharge - there was no cut in salary or benefits - but salary and benefits never the issue in constructive discharge - some demotions could be to such a low position that they would be absolutely unacceptable - "Serrano, by not trying out, or finding out more about, the newly created position, cannot possibly muster proof that . . . could lead a jury to find that the newly created position would compel a reasonable person with her background to refuse the offer and resign." - "The precise contours of the new position, which appears to have been created for Serrano, are unclear." - the constructive discharge claim "rests on speculations regarding the new position" - "Loss of prestige in a job transfer, standing alone, cannot support a finding of constructive discharge." - position might have been totally objectionable but "the decisive consideration here is that, by not accepting the newly created and ambiguous position, Serrano foreclosed the possibility of presenting concrete evidence, rather than mere assertions, to a jury regarding the nature of her new working conditions" - "We have long expected that those who seek to initiate ADEA claims will do so while still employed, and the instant case reminds us of the wisdom of this expectation." - mere transfer is not adverse employment action.

Kempcke v. Monsanto Co., 132 F.3d 442, 75 FEP 1403 (8th Cir. 1998) - Employee discovered on his office computer documents comprising what he believed to be a discriminatory outplacement plan - he gave the materials to his lawyer and told his supervisor that the attorney would negotiate concerning their return - he was discharged - district court upheld the discharge, stating that insubordination is a legitimate reason to discharge him whatever the files contained - appeals court reverses and remands, stating that the employee arguably was engaged in opposition or litigation activity and in any event a reasonable jury could find that the firing of the employee over his use of the innocently acquired documents was itself a pretext for age discrimination.

Discharge - After-Acquired Evidence (Ch. 21)

McDill v. Environamics Corp., 15 IER1868 (N.H. 2000) - After-acquired evidence is complete bar to liability in breach of contract action for wages and benefits - if employer can demonstrate that it would have discharged

employee had it known of misconduct, employer not liable for periods of time after misconduct.

O'Day v. McDonnell Douglas Helicopter Co., 191 Ariz. 535, 13 IER 1868 (1998) - After-acquired evidence is defense to breach of implied contract suit - misconduct discovered after discovery began may be used as defense to liability - employer must be able to demonstrate it would have fired the employee had it known of the misconduct (searching a supervisor's desk and copying documents on the night after being denied a promotion).

Lewis v. Fisher Service Co., 329 S.C. 78, 13 IER 1043 (1998) - After-acquired evidence may be utilized in a contract case on the issue of liability - the public policy concerns about utilizing after-acquired evidence on the issue of liability in discrimination cases are not applicable to contract disputes that simply involve the rights of private parties.

Crawford Rehabilitation Services, Inc. v. Weissman, 938 P.2d 540, 12 IER 1671 (Colo. 1997) - After-acquired evidence of résumé fraud bars contract-based claims of wrongful discharge - résumé fraud is a complete defense to a contract claim if it is proved that the fraud is material and that a reasonable employer would not have hired the employee had it discovered the misrepresentation at the outset.

The Civil Rights Acts of 1866 and 1871 (Ch. 24)

Bogan v. Scott-Harris, 523 U.S. 44, 76 FEP 146 (1998) - a mayor and city council member are absolutely immune from liability for their legislative action in eliminating the job of an African-America official - legislative discretion should not be inhibited by judicial interference.

Zubi v. AT&T Corp., 219 F.3d 220, 83 FEP 417 (3d Cir. 2000) - State tort statute of limitations and not four-year federal statute of limitations enacted in 1990 and applicable to federal statutes enacted after December 1, 1990 applies to § 1981 lawsuit - amendments to § 1981 in the Civil Rights Act of 1991 do not qualify as a separate enactment - 2-1 decision - issue analyzed at 164 LRR 425 - contrary ruling would mean two different statutes of limitation applicable to § 1981 actions depending upon whether the type of relief sought was available before 1991 or only after the Civil Rights Act of 1991.

Lauture v. IBM Corp., 216 F.3d 258, 83 FEP 286 (2d Cir. 2000) - Former at-will employee could seek relief under 42 U.S.C. § 1981 - employment relationship is still contractual even though it could be terminated at will.

Anderson v. Conboy, 156 F.3d 167, 77 FEP 1278 (2d Cir. 1998), cert. granted, 526 U.S. 1086, and cert. dismissed, 119 S. Ct. 2418 (1999) - Section 1981 prohibits discrimination based on alienage as well as race.

Haddle v. Garrison, 525 U.S. 121, 14 IER 1057 (1998) - At-will employee who alleged that he was fired for obeying a federal grand jury subpoena states a claim under the Civil Rights Act of 1871, § 1985 - there is no requirement that the individual suffer an injury to a constitutionally protected property interest - third party interference with at-will relationships has long been a compensable injury under tort law - "The kind of interference with at-will employment relations alleged here is merely a species of the traditional torts of intentional interference with contractual relations and intentional interference with prospective contractual relations."

Olmsted v. Taco Bell Corp., 141 F.3d 1457, 76 FEP 1833 (11th Cir. 1998) - Plaintiff's attorney confused § 1981a, which is Title VII, and § 1981(a), which is the Civil Rights Act of 1866 and allows uncapped damages - pretrial order specified only § 1981a - thus \$3.5 million judgment must be reduced to \$300,000.

Reverse Discrimination and Affirmative Action (Ch. 27)

Texas v. Lesage, 120 S. Ct. 467, 81 FEP 499 (1999) - Plaintiff was rejected for a Ph.D. program limited to 20 persons and a minority candidate with lower qualifications was admitted - case dismissed because Lesage would not have been admitted in any event - 73 applicants had both higher GPAs and higher graduate record examination scores - Fifth Circuit decision that candidate rejected when race is a factor automatically suffers an implied injury reversed - summary judgment directed - "[E]ven if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration." (Id. at 468.) - under those circumstances there is no cognizable injury - this would not be the case if plaintiff were challenging an ongoing program - Mt. Healthy reaffirmed.

Schurr v. Resorts International Hotel Inc., 196 F.3d 486, 81 FEP 364 (3d Cir. 1999) - Casino preferred black candidate over equally qualified white

candidate because it had not met its goal for minority employment - this is illegal reverse discrimination - goal was not an affirmative action plan based on any finding of historical discrimination or a manifest imbalance in a relevant job category.

Maitland v. University of Minnesota, 155 F.3d 1013, 77 FEP 1661 (8th Cir. 1998) - Male university professor's challenge to consent decree mandating pay increases for female colleagues reinstated - not at all clear there was discrimination - three different studies showed that the disparity was, respectively, 10%, 6%, and 2% - if 2%, this is statistically insignificant, and would not support a consent decree or affirmative action.

Dallas Fire Fighters Association v. City of Dallas, 150 F.3d 438, 77 FEP 1025 (5th Cir. 1998), cert. denied, 526 U.S. 1038, 526 U.S. 1046 (1999) - Affirmative action plan that resulted in faster promotions for minorities and women violates U.S. Constitution since no evidence City ever engaged in egregious or pervasive discrimination - plan called for promoting members of protected groups based on lower test scores - preferential promotions could not exceed one-half of total promotions.

Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 76 FEP 857 (D.C. Cir. 1998) - FCC affirmative action regulations requiring special efforts to recruit and hire minority employees unconstitutional - strict scrutiny applied - "We do not think it matters whether a government hiring program imposes hard quotas, soft quotas or goals" - any of this "will result in individuals being granted a preference because of their race" - no compelling interest in fostering diversity in broadcasting - but even if there was, regulations not narrowly tailored to reach this goal since no evidence that low-level employees at a station would have an impact on programming.

Federal Contractor Compliance (Ch. 28)

Trinity Industries, Inc. v. Herman, 173 F.3d 527, 79 FEP 854 (4th Cir. 1999) - Company that performs federal contracts at many facilities must comply with affirmative action reporting requirements at allegedly autonomous facility not involved in federal contract work which makes independent employment decisions - U.S. Department of Labor could in its discretion exempt such facilities from affirmative action requirements, but contractor did not seek the required waiver.

EEOC Administrative Process (Ch. 29)

Paolitto v. John Brown E. & C., Inc., 151 F.3d 60, 77 FEP 1351 (2d Cir. 1998) - Findings by EEOC or comparable state agency should not be permitted as evidence automatically in employment discrimination cases - trial judge should make case-specific determination - agency reports vary in quality and factual detail - trial may deteriorate into protracted struggle over how the evidence admitted at trial compares to the evidence considered by the agency - this conflicts with positions of Fifth and Ninth Circuits that such reports should be admitted categorically.

EEOC v. Hearst Corp., 103 F.3d 462, 72 FEP 1541 (5th Cir. 1997) - EEOC cannot continue to investigate private individual's charge after that individual brings suit following the issuance of a right-to-sue letter - EEOC limited to intervention on commissioner's charge.

Title VII Coverage (Ch. 30)

Kyles v. J.K. Guardian Security Services, Inc., ___ F.3d ___, 83 FEP 404 (7th Cir. 2000) - Testers posing as job applicants have standing to sue under Title VII but not under § 1981 - Title VII coverage exists because it prohibits employers from limiting, segregating or classifying job applicants and a black tester applicant suffers injury when she is not considered because of her race - § 1981 does not apply since the testers do not really seek a contractual relationship.

Walters v. Metropolitan Educational Enterprises, Inc., 519 U.S. 202, 72 FEP 1211 (1997) - In determining whether an employer has 15 or more individuals for each working day in 20 or more calendar weeks in the current or preceding calendar year, the "payroll" method is used - although Title VII uses the phrase "for each working day," only whole workweek should be counted - it is irrelevant whether the person was actually at work for every day in the workweek - a test focusing on whether the employee is actually at work on given days would be impossible to administer.

Association of Mexican-American Educators v. State of California, 195 F.3d 465 (9th Cir. 1999), reh'g en banc granted, 208 F.3d 786 (9th Cir. 2000) - California licensing requirement that teachers in the public schools who pass an English-language test for basic skills in reading, writing and mathematics upheld - test is valid licensing examination and not an employment application test - test therefore not covered by Title VII - individual school districts, not the state, are the employers - furthermore,

lower court, despite disproportionate impact on minorities, did not err in ruling that the test was a valid measure of job-related skills.

Papa v. Katy Industries, Inc., 166 F.3d 937, 78 FEP 1665 (7th Cir.), cert. denied, 120 S. Ct. 526 (1999) - Integrated enterprise test used by NLRB to determine whether separate entities should be considered a single bargaining unit not appropriate for determining whether an affiliated corporation's employee should be aggregated in order to meet the 15-employee test under Title VII or the 20-employee test under the ADEA - there are only three situations where the policy behind the small-employer exemption will be ignored: (1) if the parent would be liable for the torts or breaches of contract of its subsidiary under a "piercing the corporate veil" theory; (2) if an enterprise split itself into a number of corporations for the purpose of avoiding coverage under the employment laws; or (3) if the parent corporation directed the discriminatory act - case analyzed at 160 LRR 201.

Bender v. Suburban Hospital, Inc., 159 F.3d 186, 78 FEP 321 (4th Cir. 1998) - Hospital's non-renewal of doctor's staff privileges not harm to an employer-employee relationship covered by Title VII - doctor's claim that non-renewal interfered with relationships with preferred provider organizations, patients and other hospitals rejected - applicability of Sibley Memorial Hospital v. Wilson, 488 F.2d 1338, 6 FEP 1029 (D.C. Cir. 1973), rejected - Sibley found Title VII covered hospital's registry system referring private-duty nurses - every circuit court to consider Sibley has followed its lead in allowing claim for indirect liability for an employer's interference with an individual's employment with third parties - however, Fourth Circuit refuses to follow Sibley with respect to the necessity that the plaintiff show an employment relationship with a third party - Fourth Circuit requires plaintiff to allege harm to an employer-employee relationship as defined by the law of agency - the operative word in Title VII is "employment" - doctors are not employed by healthcare providers or patients - a patient is a doctor's customer, not his employer - a doctor is an independent contractor with provider organizations - the hospital is not the doctor's employer - issue analyzed at 159 LRR 361.

Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 78 FEP 1026 (10th Cir. 1998) - Sexual harassment verdict affirmed against franchisee, which was subordinate of franchisor, the parent company - reversed as to parent - what is required is day-to-day control of employment decisions to find parent is joint employer - does not matter that subsidiary utilized policies and benefit plans of parent, or that employee of parent represented subsidiary in dealing with EEOC.

Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 77 FEP 777 (4th Cir. 1998) (en banc), cert. denied, 525 U.S. 1142 (1999) - Undocumented alien cannot obtain Title VII remedy for alleged retaliation - alien worked several years for employer without a valid work permit - he resigned in April 1993, but when plans changed, sought reemployment two months later - an employment offer was revoked two days after it was extended because the employee corroborated many allegations of sexual harassment - by 8-4 vote, Fourth Circuit held that alien could not recover - panel decision that undocumented status would simply be legitimate nondiscriminatory reason rejected - plaintiff cannot obtain remedies unless "qualified" for employment and undocumented status means not qualified - Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) (LMRA relief extended to illegal aliens) distinguished - case decided before Immigration Reform and Control Act made employment of undocumented aliens illegal - dissent asserted holding inconsistent with McKennon (after-acquired evidence does not defeat liability).

Bermudez v. TRC Holdings, Inc., 138 F.3d 1176, 76 FEP 467 (7th Cir. 1998) - White cannot sue alleging offended by discrimination against blacks - EEOC Guidelines rejected - laws must be enforced by victims rather than third parties - if unease on observing wrongs perpetrated against others were enough to support litigation all doctrines of standing and justiciability would go out the window.

Martin v. PGA Tour, Inc., 984 F. Supp. 1320 (D. Or. 1998), aff'd, 204 F.3d 994 (9th Cir. 2000), pet. for cert. filed, 69 U.S.L.W. 3023 (July 5, 2000) (No. 00-24) - Golfer seeks to use golf cart - can sue Professional Golf Association Tour, which is a commercial organization of the type Congress intended to cover with the ADA - the Tour does not qualify for the ADA's "private club" exemption.

Serapion v. Martinez, 119 F.3d 982, 74 FEP 601 (1st Cir. 1997), cert. denied, 520 U.S. 1047 (1998) - Former law firm partner was actually partner and not employee - she had ownership interest in the firm, her compensation depended substantially on the firm's fortunes, and she had significant voting rights - fact that her views rarely prevailed is irrelevant - issue is one of federal and not state law - factors to be considered involved ownership, remuneration and management - with respect to ownership this includes investment, ownership of firm assets, and liability for firm debts and obligations - with respect to remuneration issue is whether compensation is based on firm's profits and to what extent with second potentially relevant factor relating to fringe benefits - with respect to management issues include right to engage in policy-making, participation in and voting power, ability to assign work and to direct activities of

employees, and ability to act for firm and its principals - summary judgment affirmed - no reasonable factfinder could conclude that individual was other than bona fide equity partner - plaintiff was first an associate, then a junior (nonproprietary) partner, and then became a proprietary partner, although her compensation was not equal to the four name partners who were all male - plaintiff received a four percent equity interest in the firm (1% from each name partner), was responsible for debts and losses and became a voting member of the five-member executive committee - her compensation was to rise over time and eventually equal to four name partners - when a dispute over compensation arose the three remaining name partners dissolved the firm and formed a new firm without her - a single individual in a single occupational setting cannot be both an employer and an employee - numerous cases starting with Hishon v. King & Spalding, 467 U.S. 69, 34 FEP 1406 (1984), have held that partners are not protected as employees under federal antidiscrimination laws - "Partnerships are mutable structures, and partners come in varying shapes and sizes." - "[P]artnerships cannot exclude individuals from the protection of Title VII simply by draping them in grandiose titles which convey little or no substance." - Sixth Circuit in Simpson v. Ernst & Young, 100 F.3d 436, 72 FEP 343 (6th Cir. 1996), cert. denied, 520 U.S. 1248 (1997), focused on lack of right to participate in firm's management and that compensation was not determined on the basis of the firm profits - Tenth Circuit in Wheeler v. Hurdman, 825 F.2d 257, 44 FEP 707 (10th Cir.), cert. denied, 484 U.S. 986 (1987), which found an accounting partner to be a partner, focused on participation in firm's profits and losses, her exposure to liability, her investment in the firm and her voting rights - the Eleventh Circuit in Fountain v. Metcalf, Zima & Co., 925 F.2d 1398, 55 FEP 428 (11th Cir. 1991), found an accounting firm shareholder to be a partner - "The court dismissed an assertion that the 'autocratic' actions of the firm's president constituted a reasonable basis for concluding that the plaintiff was an employee. 'Domination by another "autocratic" partner over others is not uncommon and does not support a finding that the others are 'employees.'" - with respect to compensation a potentially relevant factor is fringe benefits - an individual who receives fringe benefits more than those received by employees is more likely to be a proprietor - with respect to management, factors include right to engage in policy-making, participation in and voting power, ability to assign work and direct the activities of employees, and the ability to act for the firm and its principles - status determinations are made along a continuum - the polar extreme cases are easy - the close cases will require a case-specific assessment - "[T]his constellation of complaints assumes that all partners except those equivalent in stature and authority to the most powerful partners of a law firm are employees for Title VII purposes. The assumption lacks any solid legal underpinning. A person with the requisite attributes of proprietary

status is properly considered a proprietor, not an employee, regardless of the fact that others in the firm may wield more power.” - “Elsewise, all the partners in a law firm . . . save only the managing partner(s), would be treated as employees for Title VII purposes regardless of the extent of their ownership or the correlation between their remuneration and the entity’s profits.” - “We take judicial notice of the fact that many law firms have partner/associate ratios near one-to-one, yet few lawyers working for these firms would deny that the partners enjoy a status fundamentally different from that of the associates.”

Schweitzer v. Advanced Telemarketing Corp., 104 F.3d 761, 73 FEP 170 (5th Cir. 1997) - Jury instructed that they could find that subsidiary, which employed plaintiff, and parent were single employer based on interrelationship of operations, common officers and directors, common ownership, common financing, inadequate capitalization, and centralized control of labor relations - this was error - the issue is whether the parent actually exercises control over the employment decisions of the subsidiary - new trial therefore necessary.

Timeliness - General Issues (Ch. 31)

Jackson v. Rockford Housing Authority, 213 F.3d 389, 83 FEP 149 (7th Cir. 2000) - Black employee not selected for promotion - 300-day EEOC charge-filing period had run - he allegedly did not have sufficient information to conclude that white candidate was less qualified - while court understood that plaintiff did not want to “agitate” without the facts to back it up which might endanger his job, this is not justification for letting charge-filing period expire - plaintiff could have conducted innocuous investigation.

Martini v. Federal National Mortgage Association 178 F.3d 1336, 80 FEP 1 (D.C. Cir. 1999), cert. dismissed, 120 S. Ct. 1155 (2000) - Suit cannot be instituted by charging party less than 180 days after filing EEOC charge - court of appeals invalidates EEOC regulation authorizing early issuance of notice of right to sue - argument that it is futile to require someone to wait if EEOC cannot get to case for 180 days rejected - Title VII judgment vacated and remanded with instructions to dismiss complaint without prejudice - EEOC stopped processing charge 21 days after it was filed - new suit may be filed only after Commission has attempted to resolve her charge for an

additional 159 days - verdict below after remittitur had been \$903,500.

Timeliness - Continuing Violations (Ch. 31)

Fielder v. UAL Corp., 218 F.3d 973, 83 FEP 494 (9th Cir. 2000) - Continuing violation doctrine applicable even though nothing occurred within 300-day period - indeed employee was not even at work during 300-day period - other than the employee's resignation, which is contended to be a constructive discharge - employee can litigate harassment claims - employer can be liable for co-employee retaliation when put on notice.

Snider v. Belvidere Township, 216 F.3d 616, 83 FEP 110 (7th Cir. 2000) - No continuing violation when male comparator left more than 340 days before EEOC charge alleging unequal pay - claim barred.

Van Steenburgh v. Rival Co., 171 F.3d 1155, 83 FEP 133 (8th Cir. 1999) - 300-day limitations period began on May 3, 1995 - sexual harassment occurred between 1990 and March of 1995 - continuing violation even though no incident within charge-filing period - a hostile environment is an "ongoing nightmare" and therefore "in legal parlance, a continuing violation" (Id. at 1159) - the supervisor's pattern of harassment involved waiting several months between incidents of direct physical contact but that during the periods when no touching occurred the harasser stared at the plaintiff and kept her in constant fear - thus the hostile environment did not abruptly end after the last incident but continued until the plaintiff left the company.

Hardin v. S. C. Johnson & Son, Inc., 167 F.3d 340, 78 FEP 1542 (7th Cir.), cert. denied, 120 S. Ct. 178 (1999) - Continuing violation doctrine not applicable - "[T]he continuing violation doctrine has delineated limits. Where a pattern of harassment spreads out over years, and it is evident long before the plaintiff sues that she was a victim of actionable harassment, she 'cannot reach back and base her suit on conduct that occurred outside the statute of limitations.'" - "[T]he continuing violation doctrine is inapplicable here."

Draper v. Coeur Rochester, Inc., 147 F.3d 1104, 77 FEP 188 (9th Cir. 1998) - Female employee doing manual labor continuously sexually harassed - she identified no specific act of harassment within the 300-day charge-filing period - however, within the 300-day period, she confronted her supervisor, accusing him of continuing to harass her despite her complaints to management - her supervisor responded in a snide and humiliating manner - the supervisor's snide laughter and humiliating response could reasonably be perceived as a continuation of the previous harassment - thus an event of harassment did occur within the 300-day charge-filing period - in addition, since she alleged that the reason she confronted the supervisor was that she perceived the harassment was continuing, that is sufficient to avoid summary judgment even though she could not identify a discrete act.

Pollis v. New School for Social Research, 132 F.3d 115, 76 FEP 173 (2d Cir. 1997) - Continuing violation doctrine does not allow professor alleging discriminatory pay to recover for pay disparities that precede the statute of limitations - each paycheck is a separate wrongful act - "a claim of discriminatory pay is fundamentally unlike other claims of ongoing discriminatory treatment because it involves a series of discrete, individual wrongs rather than a single and indivisible course of wrongful action" - plaintiff "had the right to bring [a] claim at anytime during the course of her employment. The statute of limitations requires that such claims should be brought promptly to protect the defendant against stale or fabricated claims. The fact that it might have been awkward for [plaintiff] to bring her suit . . . while continuing to teach there is not a sufficient reason to exempt her from the statute of limitations.

Dasgupta v. University of Wisconsin Board of Regents, 121 F.3d 1138, 74 FEP 1313 (7th Cir. 1997) - Professor claimed University discriminated against him because of national origin - claim was that discrimination took place early in career but that pay was still lower because of discrimination - "A continuing violation is one that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character as a violation did not become clear until it was repeated during the limitations period." - here the allegations of what occurred outside the charge-filing period were, if true, clear instances of discrimination which would have supported the lawsuit - plaintiff's "failure to bring such a suit cannot be ascribed to the ambiguous or incomplete nature of the discrimination -- to his being a victim of a campaign whose discriminatory character was not apparent at the time" - "A lingering

effect of an unlawful act is not itself an unlawful act, and it does not revive an already time-barred illegality.”

Election and Exhaustion of Remedies (Ch. 32)

Circuit City Stores, Inc. v. Adams, 120 S. Ct. 2004 (2000) - Supreme Court grants certiorari to review Ninth Circuit’s position that FAA does not apply to employment contracts - all other appeals courts have held it does apply except to employees directly engaged in the moving of goods in interstate commerce - review limited to that legal question.

Air Line Pilots’ Association, International v. Northwest Airlines Inc., 199 F.3d 477, 81 FEP 830 (D.C. Cir. 1999), pet. for cert. filed, No. 00-260 (Aug. 16, 2000) - Northwest requires newly-hired pilots to agree to mandatory arbitration of employment discrimination claims - this is not a mandatory subject of bargaining and thus the demand did not violate the Railway Labor Act.

Haskins v. Prudential Insurance Co. of America, ___ F.3d ___, 83 FEP 1329 (6th Cir. 2000) - Arbitration required under securities industry U-4 form even though employer did not provide plaintiff with copy of code specifying complaints he was required to arbitrate - Sixth Circuit refuses to follow First Circuit’s decision in Rosenberg v. Merrill Lynch, et al., 170 F.3d 1, 79 FEP 707 (1st Cir. 1999) - strong federal policy favoring arbitration and Congress’ use of the expression “[w]here [arbitration is] appropriate” in Civil Rights Act of 1991 makes it unwise to require a heightened standard for ordering arbitration - the term “appropriate” does not indicate what Congress intended.

Bailey v. Federal National Mortgage Association, 209 F.3d 740, 82 FEP 1089 (D.C. Cir. 2000) - Employee who merely continued to work but never assented to employer’s newly issued dispute resolution policy need not arbitrate - conflicting cases on this and related issues analyzed at 164 LRR 72.

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Nixon, 210 F.3d 814, 82 FEP 1080 (8th Cir. 2000) - After arbitrator rejected discrimination claims, state antidiscrimination

agency may pursue injunctive relief but not monetary relief.

Armendariz v. Foundation Health Psychcare Services, Inc., ___ Cal. 4th ___, 83 FEP 1172 (Cal. S. Ct. 2000) - Extremely extensive opinion on arbitrability of statutory and contract claims pursuant to predispute arbitration agreement - in order to be enforceable, arbitration agreement must: (1) provide for neutral arbitrator - (2) provide for more than minimal discovery - procedure approved where "depositions may only be taken with the approval of the arbitrator" - "[W]e hold that the employer, by agreeing to arbitrate the FEHA claim, has already impliedly consented to such [reasonable] discovery. Therefore, lack of discovery is not grounds for holding a FEHA claim inarbitrable." (83 FEP at 1183) - (3) provide for a written award so that limited judicial review is possible - (4) provide for all of the types of relief that would be available in court - "The principle that an arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees appears to be undisputed." (Id. at 1181) - (5) not "require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court" [emphasis in original] (Id. at 1185) - in addition to the above requirements applicable to statutory claims, unconscionability requires, in the case of adhesion contracts such as predispute arbitration agreements, that (6) the agreement be bilateral in the sense that it require both parties to arbitrate all claims unless the employer can establish "some reasonable justification for . . . one-sidedness based on 'business realities'" (Id. at 1189) - "[I]f an employer does have reasonable justification for the arrangement -- i.e., a justification grounded in something other than the employer's desire to maximize its advantage based on the perceived superiority of the judicial forum -- such an agreement would not be unconscionable. Without such justification, we must assume that it is." (Id. at 1191) - "This is not to say that an arbitration clause must mandate the arbitration of all claims between employer and employee in order to avoid invalidation on grounds of unconscionability But an arbitration agreement imposed in an

adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences. . . . An employee terminated for stealing trade secrets, for example, must arbitrate his or her wrongful termination claim under the agreement while the employer has no corresponding obligation to arbitrate its trade secrets claim against the employee.” (*Id.*) - severance is generally possible if a discrete illegal clause can be excised - in this case two factors weigh against severance - first, there is more than one unlawful provision - there is an unlawful damages provision and an unconscionably unilateral arbitration clause - second, there is no single provision a court can strike - it would have to reform the contract by augmenting it with additional terms - moreover, if an employer puts a knowingly unlawful clause in an arbitration agreement, in bad faith, severance would allow the employer to reap the benefits of the unlawful clause with no risk other than severance - in such circumstances severance will not take place - with respect to whether an employer can unilaterally agree not to enforce illegal provisions in an arbitration agreement:

“Moreover, whether an employer is willing, now that the employment relationship has ended, to allow the arbitration provision to be mutually applicable, or to encompass the full range of remedies, does not change the fact that the arbitration agreement as written is unconscionable and contrary to public policy. Such a willingness can be seen, at most, as an offer to modify the contract; an offer that was never accepted. No existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change it.”
[Citations and internal quotations omitted.]

Id. at 1194. Duffield extensively analyzed and rejected - applicability of Section 1 of the FAA irrelevant since California law favors arbitration also,

and does not contain such a restriction - "There is . . . one major difference between the FAA and the CAA. The former generally preempts state legislation that would restrict the enforcement of arbitration agreements . . . , while the CAA obviously does not prevent our Legislature from selectively prohibiting arbitration in certain areas." (Id. at 1179) - opinion constitutes a broad endorsement of predispute arbitration agreements meeting minimal requirements - arbitration agreement in case at bar ruled unenforceable because of damages limitation and fact that it was not bilateral.

Desiderio v. National Association of Security Dealers, 191 F.3d 198, 80 FEP 1731 (2d Cir. 1999), pet. for cert. filed, 68 U.S.L.W. 3497 (Jan. 31, 2000) (No. 99-1285) - Mandatory predispute arbitration agreement upheld against contention it violated constitutional and statutory civil rights- court notes that only Ninth Circuit has held to the contrary - Ninth Circuit view rejected.

Michalski v. Circuit City Stores, Inc., 177 F.3d 634, 79 FEP 1160 (7th Cir. 1999) - Agreement to arbitrate upheld even though employer had not agreed to arbitrate its claims against employee - 2-1 decision - employer's agreement to be bound by arbitration and employee's claim constituted sufficient consideration.

EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 79 FEP 936 (6th Cir. 1999) - EEOC may sue for monetary relief on behalf of an employee who agreed to arbitrate statutory discrimination claims - agency represents broader interest when it exercises its authority to sue - individual by agreement does not have authority to take power away from the EEOC.

Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1 (1st Cir. 1999) - Discrimination claims are generally subject to proper arbitration agreements - Duffield rejected - claim of bias in U-4 proceedings rejected - analysis identical under Title VII, ADEA and ADA - "We hold that neither the language of the statute nor the legislative history demonstrates an intent in the 1991 CRA to preclude pre-dispute arbitration agreements" - the OWBPA does not indicate an intent to bar pre-dispute arbitration agreements - EEOC's views as amicus rejected - arbitration not ordered in this case because plaintiff not provided with New York Stock Exchange rules which were necessary for her to know what claims were subject to arbitration agreement - dissent agreed with "the rejection of Duffield . . . as unpersuasive" - dissent would enforce the arbitration agreement - rationale

of majority was that it would be “inappropriate” within the meaning of the Civil Rights Act of 1991 to enforce an arbitration agreement that did not specify what was to be arbitrated.

Wright v. Universal Maritime Service Corp, 525 U.S. 70, 8 A.D. Cas. 1429 (1998) - Injured longshoreman covered by labor contract not required to arbitrate ADA claim - unanimous ruling - the contract does not contain a clear and unmistakable waiver of the covered employee’s right to a judicial forum so Court need not reach whether a union contract can constitute such a waiver.

Koveleskie v. SBC Capital Markets, Inc, 167 F.3d 361, 79 FEP 73 (7th Cir.), cert. denied, 120 S. Ct. 44 (1999) - Joining all federal courts of appeals that have ruled on the issue except the Ninth Circuit, Seventh Circuit upholds securities industry arbitration agreement required as a condition of employment - Title VII and ADEA encourage such agreements - refuses to follow Ninth Circuit decisions in Craft v. Campbell Soup (“Other circuits which have addressed this issue” have held “that such employment contracts are not excluded from the purview of the FAA”) and Duffield (“We respectfully disagree with the Ninth Circuit on this issue, and instead concur with the majority of circuits that have held that Congress did not intend Title VII to preclude enforcement of predispute arbitration agreements.”).

Craft v. Campbell Soup Co., 177 F.3d 1083, 79 FEP 1508 (9th Cir. 1999) - Collective bargaining agreement had nondiscrimination clause and arbitration clause - employee grieved discrimination, but also sued - no jurisdiction to stay suit and order arbitration since FAA does not apply to either collective bargaining agreements or individual employment contracts in interstate commerce - Ninth Circuit disagrees with all other circuits and holds that FAA exclusion is not limited to workers directly involved in interstate commerce - 2-1 decision - issue analyzed at 159 LRR 488 - majority was Tashima and Graber - dissent by Brunetti.

Shankle v. B-G Maintenance Management of Colorado, Inc., 163 F.3d 1230, 78 FEP 1057 (10th Cir. 1999) - Arbitration agreement unenforceable since employee had to pay half the fee which could amount to \$5,000 - employee could not afford the fee and it is unlikely that similarly situated employees could afford it - court refused to strike the fee-splitting provision and enforce the rest of it.

EEOC v. Kidder, Peabody & Co., 156 F.3d 298, 77 FEP 1212 (2d Cir. 1998) - Arbitration agreement between employer and employee that any

ADEA claims must be arbitrated precludes EEOC from seeking monetary damages on behalf of such individual - competing public interests - giving the EEOC broad authority and encouraging parties to arbitrate - proper balance is to prevent EEOC from pursuing monetary remedies such as back pay if there is an arbitration agreement but to allow it to seek injunctive relief on behalf of entire classes.

Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 77 FEP 182 (2d Cir. 1998), cert. denied, 526 U.S. 1034 (1999) - Arbitration award in favor of securities firm in ADEA case vacated by Second Circuit on ground that arbitrators manifestly disregarded the law and the evidence - securities salesman with outstanding sales record terminated when young man succeeded his father as CEO - plaintiff testified to numerous ageist comments - plaintiff had notes of numerous conversations designed to force him to leave - written award but award contained no explanation or rationale - Section 10 of FAA allows vacation when award is procured by fraud, corruption, or undue means, or where there is partiality or corruption in the arbitrators or the arbitrators refuse to hear pertinent evidence or acted in excess of their powers - in Wilko v. Swan, 346 U.S. 427, 436-37 (1953), the Supreme Court articulated the concept of manifest disregard - the doctrine is "severely limited" - manifest disregard means more than error or misunderstanding - it requires the arbitrators to know the governing legal principle and yet refuse to apply it - here the evidence was overwhelming - there was both overwhelming evidence of discriminatory comments and powerful evidence of good performance - case clearly did not involve a voluntary quit - although arbitrators have no obligation to explain their award, when it appears there is a manifest disregard, the failure of explanation can be taken into account - arbitration award vacated and order dismissing ADEA lawsuit vacated since there is now no enforceable award to bar suit on res judicata principles - not clear what happens on remand - court did not answer question of whether it will be a new arbitration before a new panel, which is what Eleventh Circuit did in Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456, 4 WH.2d 385 (11th Cir. 1997) (FLSA case), or an ADEA lawsuit - case analyzed at 158 LRR 360.

Seus v. John Nuveen & Co., 146 F.3d 175, 77 FEP 751 (3d Cir. 1998), cert. denied, 525 U.S. 1139 (1999) - Order referring Title VII and ADEA case to arbitration under U-4 agreement affirmed - Federal Arbitration Act entirely consistent with ADEA, OWBPA and Title VII- EEOC amicus brief contending that Civil Rights Act of 1991 impliedly repealed application of FAA to Title VII rejected - Supreme Court made it clear in Gilmer that to disregard public policy favoring arbitration clear congressional intent would have to be found - it is not present - Gilmer was decided several months after OWBPA provided that individual may not waive any right or claim

under ADEA unless waiver is knowing and voluntary - OWBPA limited to waivers of substantive rights, not procedural issues - Gilmer referred to OWBPA - ADEA as amended by OWBPA does not reflect congressional intent to exempt from FAA predispute agreements to arbitrate ADEA claims - U-4 agreement does cover employment disputes - majority of courts which have examined it have concluded it covers employment disputes - only the Seventh and Ninth Circuits have held to the contrary - cannot say with positive assurance that such disputes are not covered - all ambiguities must be resolved in favor of arbitrability- plaintiff asked to be able to depose the NASD to show that its agreements and procedures are inadequate in light of its recent determination to abandon the policy of requiring agreements to arbitrate as a condition of employment - this was properly denied - detailed provisions of NASD code of arbitration procedures are sufficient to provide the kind of evaluation conducted in Gilmer.

Johnson v. Circuit City Stores, 148 F.3d 373, 77 FEP 139 (1998), aff'd, 203 F.3d 821 (4th Cir.), cert. denied, 120 S. Ct. 2744 (2000) - Arbitration agreement under which job applicant and employer agree to use arbitration to resolve any claims is binding - lower court's conclusion that there was no consideration rejected - employer agreed to be bound by arbitration process, so no further consideration is required.

Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 76 FEP 1450 (9th Cir.), cert. denied, 525 U.S. 982 and 525 U.S. 996 (1998) - Pre-hire arbitration agreement ineffective to require arbitration of Title VII or state antidiscrimination statute claims - it is enforceable for state tort claims - even though Gilmer decided before Civil Rights Act of 1991, section of 1991 Civil Rights Act that encourages arbitration "where appropriate and to the extent authorized by law" really means that Congress intended to preclude mandatory pre-hire arbitration agreements - Duffield seems clearly erroneous and it is likely that the Supreme Court will in due course resolve the conflict.

McWilliams v. Logicon, Inc., 143 F.3d 573, 8 A.D. Cas. 225 (10th Cir. 1998) - Arbitration agreement, signed in job-acceptance letter, was binding - must arbitrate and cannot litigate ADA claim.

Bercovitch v. Baldwin School, Inc., 133 F.3d 141, 8 A.D. Cas. 259 (1998), aff'd, 191 F.3d 8 (1st Cir. 1999) - ADA claims are subject to arbitration - Section 513 of the Act expressly encourages arbitration - legislative history is not sufficiently clear to rebut clear statutory mandate - case not an employment case.

Oldroyd v. Elmira Savings Bank, FSB, 134 F.3d 72, 13 IER 1025 (2d Cir. 1998) - Bank vice president must arbitrate retaliatory discharge claim brought under whistleblower theory - arbitration clause makes arbitrable any dispute or controversy - this is the type of broad provision that justifies presumption of arbitrability.

In Re: Prudential Insurance Co. of America Sales Practice Litigation All Agent Actions, 133 F.3d 225, 13 IER 1029 (3d Cir.), cert. denied, 525 U.S. 817 (1998) - Insurance agents must arbitrate under claim they were retaliated against for refusing to participate in a fraud - while arbitration agreement is ambiguous, it cannot be said with positive assurance that the parties did not intend to arbitrate employment disputes requiring resolution of an insurance business issue - therefore the presumption of arbitration applies.

Great Western Mortgage Corp. v. Peacock, 110 F.3d 222, 73 FEP 856 (3d Cir.), cert. denied, 522 U.S. 915 (1997) - Arbitration agreement enforced despite one-year statute of limitations, no attorney's fees, and no punitive or exemplary damages - arbitrator will determine validity of these waivers - Section 1 of FAA exclusion applies only to persons actually engaged in interstate commerce - the First, Second, Fifth, Sixth and Seventh Circuits have also so ruled - court determines only arbitrability - "As to the waiver of state law rights unrelated to the provision of a judicial forum, we hold only that the inclusion of such waivers . . . cannot be asserted to avoid the arbitration agreed to therein. Rather, the party challenging the validity of such waivers must present her challenge to the arbitrator, who will determine the validity and enforceability of the waiver of asserted state law rights. Thus, here we leave it to the arbitrator to determine whether Peacock has waived her right to attorney's fees or to a two-year statute of limitations [or] whether Peacock has waived her right to punitive damages. . . . (emphasis added)."

Cole v. Burns International Security Services, 105 F.3d 1465, 72 FEP 1775 (D.C. Cir. 1997) - Arbitration agreement held enforceable - court notes EEOC and NLRB views to the contrary - agreement in question allows all types of relief that would be available in court - it provides for neutral arbitrators and a written award - it "does not require employees to pay either unreasonable costs or any arbitrator's fees or expenses as a condition of access to the arbitration forum" - agreement does not affect an employee's ability to seek relief from the EEOC - extensive analysis - cites Graham Oil Co. v. ARCO Products Co., 43 F.3d 1244 (9th Cir. 1994), cert. denied, 516 U.S. 907 (1995), for proposition that waiver of remedies and shortening statute of limitations might be unenforceable - question of who pays arbitrator's fees not at issue in Gilmer because under stock exchange

rules employers pay all the arbitrator's fees - arbitration is supposed to be a reasonable substitute for a judicial forum - it would undermine Congress's intent to require employees seeking to vindicate statutory rights to have to pay for arbitrator's services when they would never be required to pay for a judge in court - no doubt that filing fees are reasonable - if an employee like Cole is required to pay arbitrator's fees ranging from \$500 to \$1,000 a day in addition to administrative and attorney's fees, such employees would not be able to pursue statutory claims - AAA rules do not indicate arbitrator's fees can be reduced or waived in cases of hardship - concurring and dissenting opinion disagreed on dicta requiring employer to assume all arbitrator expenses - this judicial fee-shifting finds no support in the Arbitration Act or Gilmer - the issue was introduced only after argument at the panel's request.

Litigation Procedure (Ch. 33)

Novitsky v. American Consulting Engineers, LLC, 196 F.3d 699, 81 FEP 409 (7th Cir. 1999) - Jewish employee who filed charge protesting religious bias and anti-Semitic comments cannot litigate failure to accommodate by a refusal to allow her to take time off for a religious holiday - contention that EEOC intake personnel told about failure to accommodate insufficient.

EEOC Litigation (Ch. 34)

EEOC v. Lutheran Social Services, 186 F.3d 959, 80 FEP 1009 (D.C. Cir. 1999) - Employer's failure to comply with EEOC regulations for contesting EEOC subpoena (filing objections within five days of receipt) does not bar court from considering claim of privilege - work-product privilege protects report prepared by outside counsel even though no litigation had been brought at time counsel prepared report, where counsel had been hired to prepare for possibility of lawsuit.

Federal Employee Litigation (Ch. 36)

West v. Gibson, 527 U.S. 212, 79 FEP 1537 (1999) - EEOC has authority under Title VII to award compensatory damages against federal agencies.

Brown v. Brody, 199 F.3d 446, 81 FEP 1161 (D.C. Cir. 1999) - Federal employee temporarily reassigned to undesirable position and later not given a lateral transfer which was desired - "A plaintiff who is made to undertake or who is denied a lateral transfer . . . in which she suffers no

diminution of pay or benefits . . . does not suffer an actionable injury unless there are some other material adverse consequences . . .” (Id. at 457) - rule is the same for federal employees as it is for private employees even though Title VII provision on federal employment merely requires that federal employee be “aggrieved.”

Class Actions (Ch. 37)

Lemon v. Operating Engineers Local 139, 216 F.3d 577, 83 FEP 63 (7th Cir. 2000) - Class action sought injunction plus compensatory and punitive damages - trial court erred in certifying it under 23(b)(2) - should have considered certification under 23(b)(3) or giving class members notice and opportunity to opt out.

Sokol v. New United Motor Manufacturing, Inc., 9 A.D. Cas. 1767 (N.D. Cal. 1999) - Class certification denied in purported ADA class action - citation of Lintemuth v. Saturn Corp., 3 A.D. Cas. 1490 (M.D. Tenn. 1994) for proposition that typicality is the critical analysis- "Courts have been cautious to certify disability discrimination claims as class actions due to the individualized determinations required by such claims. [Citation to Mantolite v. Bolger, 767 F.2d 1416, 1425 (9th Cir. 1985) omitted.]" Id. at 1770. - classes which have been certified involved conduct carried out pursuant to formal written policies that were easily identifiable and uniformly applied - policies alleged in this case "are not the type of discrete policies with broad application that were certified for class treatment" (Id. at 1771.) - since individual issues predominate, typicality fails.

Jefferson v. Ingersoll International, Inc., 195 F.3d 894, 81 FEP 170 (7th Cir. 1999) - After amendments of Civil Rights Act of 1991 allowing compensatory and punitive damages, Rule 23(b)(3) may be most appropriate avenue for class certification even though traditionally Rule 23(b)(2) has been a basis for certifying Title VII cases - district court must decide whether damages aspects of the case require 23(b)(3) - district judge should also consider whether injunctive aspects of case can be certified under 23(b)(2) while damages aspects are certified under 23(b)(3) - 23(b)(2) is appropriate only when monetary relief is incidental so that due process does not require notice to affected parties - EEOC's intervention does not moot the dispute since EEOC may not seek or obtain the same relief that private litigants want - case is a hiring case in which compensatory and punitive damages are sought - one problem with 23(b)(2) certification is it could be collaterally attacked by class members who did not get notice - defendant wants the outcome to be final no matter which side wins - matter is before the court of appeals court on interlocutory appeal - trial judge certified hiring case under 23(b)(2) - Supreme Court emphasized that actions for money damages require personal notice and an opportunity to opt out [Ortiz v. Fiberboard Corp., 527 U.S. 815 (1999)] - it is an open question as to whether 23(b)(2) can ever be used to certify a no-notice no-opt-out class when compensatory or punitive damages are sought - when substantial damages are sought,

23(b)(3) is more appropriate - if there were to be divided certification the trial court would have to try the damages claim first to preserve the right to a jury trial - this would complicate the management of the case - the Seventh Amendment right to a jury trial strengthens the conclusion that Rule 23(b)(3) must be employed - alternatively perhaps a judge could treat a 23(b)(2) class as if it were under 23(b)(3) and require notice and an opportunity to opt out - but 23(b)(2) could only be used if the damages were incidental - on this point we agree with Allison - plaintiffs argue that a short statement in connection with the denial of rehearing in Allison overcomes what the Fifth Circuit said in the body of the opinion - "We do not read it so; the order appears to suggest the possibility of a partial or split class certification, just as we did above, so that a class under Rule 23(b)(2) could seek injunctive relief while notice and opt-out rights were preserved for damages issues. But no matter what the panel in Allison may have meant by its order, the controlling authority today is Ortiz, which says in no uncertain terms that class members' right to notice and an opportunity to opt out should be preserved whenever possible." (Id. at 898-99.) - the district court must squarely resolve whether monetary damages are more than incidental - if yes, the district court should certify the class under 23(b)(3) for all purposes or bifurcate the proceedings (certifying a Rule 23(b)(2) class for equitable relief and a Rule 23(b)(3) class for damages) - while EEOC's intervention does not affect the necessity to resolve this issue, if the plaintiffs withdraw and simply allow the EEOC to proceed, that might be different - certification vacated and matter remanded.

Allison v. Citgo Petroleum Corp., 151 F.3d 402, 81 FEP 501 (5th Cir. 1998) - Class certification rejected - purported discrimination class action - class sought compensatory and punitive damages - a class action may be certified under 23(b)(2) only if injunctive or declaratory relief is the predominant relief sought - here, monetary relief predominates - actions for class-wide injunctive relief can be certified under (b)(2) because they involve uniform group remedies - monetary relief predominates unless it is incidental to the requested injunctive or declaratory relief - the claims for compensatory damages are not sufficiently incidental - medical and psychological testimony will be necessary - the claim for punitive damages is not sufficiently incidental - each class member was affected differently - cannot be certified under (b)(3) - there are too many individual specific issues - too many manageability problems in an action that must be tried to a jury and involves more than 1,000 potential plaintiffs - potential problem under the Seventh Amendment if different juries are used - dissenting judge indicated little difference between back pay and compensatory damages - dissent indicated no Seventh Amendment problem with a separate jury at the remedial stage - a petition for en banc review was filed - treating the suggestion for reh'g en banc as a petition for panel rehearing, the panel

majority observed that the trial court utilized consolidation under Rule 42 rather than class certification under Rule 23 to manage the case and that the panel was “not called upon to decide whether the district court would have abused its discretion if it had elected to bifurcate liability issues that are common to the class and to certify for class determination those discrete liability issues”- en banc review was then denied.

Sprague v. General Motors Corp., 133 F.3d 388 (6th Cir.), cert. denied, 524 U.S. 923 (1998) - Certification of a nationwide class reversed - the issue was early retirees’ entitlement to fully paid health insurance - since liability was based on representations to early retirees which were not uniform, “given these myriad variations . . . plaintiff’s claim clearly lacked commonality” - “because each plaintiff’s claim depended upon facts and circumstances peculiar to that plaintiff, class-wide relief was not appropriate” - “the class of early retirees fails the typicality test of Rule 23(a) as well” - “The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class. That premise is not valid here.”

Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997) - Nationwide class against Motel 6 alleging discrimination in assigning rooms to African-Americans overturned - claims too individual-specific - “district court certification of the Jackson class was erroneous as a matter of law.”

Discovery (Ch. 38)

Paquin v. Federal National Mortgage Association, 119 F.3d 23, 74 FEP 1078 (1997), aff’d, 194 F.3d 174 (D.C. Cir. 1999) - Summary judgment to discharged senior vice president reversed in order to allow additional discovery - employer’s explanation for discharge is that evaluations of senior vice president slipped and were very poor compared to the employer’s other 31 senior vice presidents - the employer produced the numerical scores of the other senior vice presidents for three years, but, affirmed by the district court, refused to produce the actual evaluations - the actual evaluations must be produced - if they do not indicate pretext, summary judgment may be granted again - it does not matter that the words which attach to the numeric evaluations (“frequently exceeds requirements” or “successfully meets requirements”) are complimentary - it does not matter what words apply to the numeric ratings if the numeric rating placed him near the bottom of senior vice presidents - expert opinion that criticisms such as “lack of creativity” are stereotypes for age discrimination does not create an issue for summary judgment.

Statistical Proof (Ch. 39)

Bullington v. United Air Lines, Inc., 186 F.3d 1301, 80 FEP 926 (10th Cir. 1999) - 30% of women versus 47% of men passed airline's interviews for flight officer positions - since this has a disparate impact on women, it is relevant to plaintiff's disparate impact claim - it is not particularly probative with respect to disparate treatment claim - "[I]n an individual disparate treatment case, the focus is on how and why an employer treated a particular individual the way it did."

Council 31, A.F.S.C. & M. Employees v. Doherty, 169 F.3d 1068, 79 FEP 411 (7th Cir. 1999) - In analyzing discrimination in a RIF, it is appropriate to look to either layoff rates or retention rates.

Coward v. ADT Security Systems, Inc., 140 F.3d 271, 76 FEP 899 (D.C. Cir. 1998) - Multiple-regression analysis offered by black employees in effort to prove that blacks are paid less than whites is so incomplete as to be entirely inadmissible - it does not account for job title or any other variable representing type of work performed - it simply compares all employees in all categories and thus reveals nothing - some individuals created prima facie case and had summary judgment against them reversed.

Monetary Relief (Ch. 41)

Kolstad v. American Dental Association, 527 U.S. 526, 79 FEP 1697 (1999) - Punitive damages are not limited to cases involving especially egregious intentional discrimination - however, an employer may not be vicariously liable for punitive damages based on the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII - plaintiff discriminated against on the basis of her sex in promotion - decisionmakers were acting head of her office and the executive director in the foundation's home office - "We reject [the] conclusion that eligibility for punitive damages can only be described in terms of an employer's 'egregious' misconduct." - "The terms 'malice' and 'reckless' ultimately focus on the actor's state of mind." - "The terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." - for punitive damages to be applicable "an

employer must at least discriminate in the face of a perceived risk that its actions will violate federal law” - “There will be circumstances where intentional discrimination does not give rise to punitive damages liability.” - for example, “There will be cases . . . in which the employer discriminates with the distinct belief that its discrimination is lawful.” - “The inquiry does not end with a showing of the requisite ‘malice or . . . reckless indifference’ on the part of certain individuals The plaintiff must impute liability for punitive damages to [the employer].” - “The common law has long recognized that agency principles limit vicarious liability for punitive awards.” - “[O]ur interpretation of Title VII is informed by ‘the general common law of agency, rather than . . . the law of any particular State.’” - restatement allows punitive damages if “‘the agent was employed in a managerial capacity and was acting in the scope of employment’” - restatement suggests “that an employee must be ‘important,’ but perhaps need not be the employer’s ‘top management, officers, or directors,’ to be acting ‘in a managerial capacity’” - under one view, “even an employer who makes every effort to comply with Title VII would be held liable for the discriminatory acts of agents acting in a ‘managerial capacity’” - “Holding employers liable for punitive damages when they engage in good faith efforts to comply with Title VII . . . is in some tension with the very principles underlying common law limitations on vicarious liability for punitive damages-- that it is ‘improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously.’ . . . Where an employer has undertaken such good faith efforts of Title VII compliance, it ‘demonstrates that it never acted in reckless disregard of federally protected rights.’” - “In light of the perverse incentives that the Restatement’s ‘scope of employment’ rules create, we are compelled to modify these principles to avoid undermining the objectives underlying Title VII.” - “[I]n the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer’s ‘good-faith efforts to comply with Title VII.’” - case must be remanded - “Although trial testimony established that Allen made the ultimate decision . . . while serving as petitioner’s interim executive director, respondent’s highest position . . . it remains to be seen whether petitioner can make a sufficient showing that Allen acted with malice or reckless indifference Even if it could be established that [the head of the Washington office made the decision], several questions would remain, e.g., whether [he] was serving in a ‘managerial capacity’ and whether he behaved with malice or reckless indifference It may also be necessary to

determine whether the Association had been making good faith efforts to enforce an antidiscrimination policy.” - 5-4 decision - dissent essentially contended that vicarious liability for punitive damage issue should not have been taken up since it was not briefed.

Williams v. Trader Publishing Co., 218 F.3d 481, 83 FEP 668 (5th Cir. 2000) (per curiam) - General manager with discriminatory bias did not have authority to discharge and recommended discharge of plaintiff to his superior - his superior had no discriminatory bias and made the decision - punitive damages cannot be awarded because only person with discriminatory bias was not acting as a managerial employee.

EEOC v. W&O, Inc., 213 F.3d 600, 83 FEP 117 (11th Cir. 2000) - Punitive damages cap for employer of this size was \$100,000 - in EEOC suit, EEOC can seek \$100,000 punitive award for each of three former employees on whose behalf it brought the litigation.

Passantino v. Johnson & Johnson Consumer Products, Inc., 207 F.3d 599, 82 FEP 707 (9th Cir. 2000), amended at 212 F.3d 493 (9th Cir. 2000) - Constructive discharge not necessary for award of front pay - lifetime front pay award of \$2 million affirmed under Washington law - Judges Reinhardt and Fletcher.

Lowery v. Circuit City Stores, Inc., 206 F.3d 431, 82 FEP 353 (4th Cir. 2000), pet. for cert. filed, 68 U.S.L.W. 3775 (June 12, 2000) (No. 99-1998) - Supreme Court's analysis in Kolstad also applies to requests for punitive damages under the Civil Rights Act of 1866 - Fourth Circuit originally reversed punitive damages because the conduct was not egregious enough - this was remanded for further consideration after Kolstad - plaintiffs presented evidence that vice presidents and senior vice presidents had made remarks deprecating blacks - the employer presented evidence that it required all managers to attend a week-long seminar on the antidiscrimination laws and offered hotlines - under Kolstad, punitive damages available only if decisionmaker perceived risk was violating federal law, that the decisionmaker was a managerial person, that the decisionmaker acted within the scope of her employment, and that the employer did not engage in good-faith efforts to comply with the law - court affirms awards - reasonable juror could find either way on whether Circuit City engaged in good-faith efforts to comply with the law - therefore punitive damages must be affirmed - reliance on racial remarks by two top Circuit City executives- case analyzed at 163 LRR 392.

U.S. v. City of Miami, 195 F.3d 1292, 81 FEP 397 (11th Cir. 1999), pet. for cert. filed, 68 U.S.L.W. 3741 (May 9, 2000) (No. 99-1858) - White police officers were discriminated against when police department deliberately chose two black officers for promotion - trial court's award of full promotion relief to each member of the class overturned - each should receive a proportionate share of the monetary relief - under the trial court's order 23 adversely affected individuals would receive full relief because of one promotion and 12 white candidates would receive full relief because of the other promotion - it will now be 1/12th and 1/23rd.

Davoll v. Webb, 194 F.3d 1116, 9 A.D. Cas. 1533 (10th Cir. 1999) - Front pay limitation of two years remanded for reconsideration - "A front pay award must specify an end date and take into account any amounts that plaintiffs could earn using reasonable efforts." - purpose of front pay is to allow plaintiffs a "reasonable amount of time to find comparable employment" - no holding that two years was inappropriate.

EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241, 9 A.D. Cas. 1057 (10th Cir. 1999) - Employer liable for punitive damages despite written policy against discrimination - employer did not make good-faith effort to educate employees about ADA's prohibitions - one supervisor not aware of reasonable accommodation requirement until three years after plaintiff's termination - personnel manager received no training in employment discrimination.

Sposato v. Electronic Data Systems Corp., 188 F.3d 1146, 80 FEP 918 (9th Cir. 1999), cert. denied, 120 S. Ct. 1244 (2000) - Estate of wrongfully discharged employee who was accidentally killed some time after termination can recover face value of life insurance policy - not limited to premiums employer would have paid - 2-1 decision - conflicting circuit decisions on this issue analyzed at 162 LRR 9.

Koster v. Trans World Airlines, Inc., 181 F.3d 24, 80 FEP 343 (1st Cir.), cert. denied, 120 S. Ct. 532 (1999) - Age discrimination upheld in layoff case - remittitur of emotional distress damages on appeal - one factor is absence of medical testimony - court looked to emotional distress damages awarded in other cases - high burden to convince appellate court to reduce damages on appeal but many courts have done so - \$466,000 in emotional distress damages remitted to \$250,000 - reliance on fact that another award of \$250,000 involved much greater evidence of emotional distress.

Quint v. A.E. Staley Manufacturing Co., 172 F.3d 1, 9 A.D. Cas. 242 (1st Cir. 1999), pet. for cert. filed, No. 98-9984 (June 21, 1999) - Only partial back pay awarded to unlawfully discharged employee who never sought work elsewhere even though employer did not try to prove that substantially equivalent jobs were available in the geographic area - four courts of appeals have ruled that the burden is on the employer to show the availability of jobs even if the claimant made no effort, whereas the First Circuit joins three that have relieved the employer of that burden - better policy is to provide inducement to former employee to secure alternative employment - would be extraordinary case in which a decision to withdraw from the job market would be justifiable.

Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 79 FEP 136 (11th Cir. 1999) - Punitive damages should not have been assessed for a discriminatory demotion of an employer by low-level managers at one store - punitive damages are intended only to punish wrongdoing and it is inappropriate to levy them against a corporation when there is no evidence it had knowledge of discriminatory acts undertaken by two people at one of its 2,000 stores - plaintiff was victim of racial discrimination and is entitled to compensatory damages - to win punitive damages plaintiff would have to show that discriminating party was high up in the corporate hierarchy or that parties in position of authority were aware of the discrimination.

EEOC v. Wal-Mart Stores, Inc., 156 F.3d 989, 77 FEP 1611 (9th Cir. 1998) - Efforts to cover up discriminatory conduct by providing false reasons can support an award of punitive damages - there is a heightened legal standard for the award of punitive damages but it is met if evidence was fabricated.

Kramer v. Logan County School District No. R-1, 157 F.3d 620, 78 FEP 165 (8th Cir. 1998) - Front pay award not subject to Title VII's cap on damages - creates split in circuits.

Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 8 A.D. Cas. 1265 (2d Cir. 1998) - No front pay because employee did not diligently pursue alternate employment - temporary employment and training program insufficient - employer has no obligation to prove that suitable employment was available where employee makes no effort.

Denesha v. Farmers Insurance Exchange, 161 F.3d 491, 78 FEP 691 (8th Cir. 1998), cert. denied, 526 U.S. 1115 (1999) - \$4 million in punitive damages remitted to \$700,000 - "Though the [Missouri law] does not place a cap on damages, \$4 million exceeds other awards upheld under Missouri law." - "While there is no precise

mathematical formula for determining punitive damages . . . considerations of due process, relation to prior awards under Missouri law, and the nature and extent of the plaintiff's injuries convince us that remittitur in the amount of \$700,000 more properly vindicates the policy objectives at issue."- "[R]emittitur in the amount of \$700,000 . . . brings the award in line with our prior decisions."

McCue v. State of Kansas, 165 F.3d 784, 78 FEP 1183 (10th Cir. 1999) - Front pay is for the court and not the jury - jury award of front pay vacated and remanded to district court.

Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 8 A.D. Cas. 154 (4th Cir. 1998) - \$117,500 in compensatory damages to supervisor demoted following brain surgery is against the weight of the evidence - maximum is \$10,000 - there was some emotional trauma and anxiety because of the demotion but no evidence it persisted over time - did not affect his ability to do the job or cope with his medical condition - he did not need counseling or medication - he did not suffer physical symptoms of stress such as depression or loss of sleep.

Attorney's Fees (Ch. 42)

Chris v. Tenet, ___ F.3d ___, 83 FEP 724 (4th Cir. 2000) - Cannot sue under Title VII to recover attorneys' fees for attorney work performed during administrative process which led to settlement where no substantive lawsuit ever filed - case analyzed at 164 LRR 489.

Thorne v. Welk Investment, Inc., 197 F.3d 1205, 82 FEP 367 (8th Cir. 1999) - In reviewing high amount of claimed attorneys' fees, court should have considered fee awards in similar cases to determine whether or not excessive.

Lee v. American Eagle Airlines Inc., 93 F. Supp. 2d 1332 (S.D. Fla. 2000) - Antagonistic and unruly behavior on the part of winning plaintiff's lawyers warranted significant cut in attorneys' fees - requested \$1.6 million cut to \$312,000 - judge also found inflation of hours.

Quaratino v. Tiffany & Co., 166 F.3d 422, 78 FEP 1849 (2d Cir. 1999) - Reduction of lodestar due to only partial success in obtaining monetary award inappropriate since all claims were intertwined - not appropriate for court to apply "billing judgment" to lodestar.

Gudenkauf v. Stauffer Communications, Inc., 158 F.3d 1074, 77 FEP 1742 (10th Cir. 1998) - Female employee in mixed-motive case proved discrimination but jury found she would have been discharged anyway so obtained no relief - properly awarded half of attorney's fees - reduction of 50% to account for degree of success - case and other authorities analyzed at 159 LRR 201.

Gumbhir v. Curators of University of Missouri, 157 F.3d 1141, 78 FEP 296 (8th Cir. 1998), cert. denied, 526 U.S. 1005 (1999) - Partially prevailing plaintiff recovered 42.5% of lost salary damages which he sought and will therefore recover 42.5% of attorney's fees.

Migis v. Pearle Vision, Inc., 135 F.3d 1041, 78 FEP 1379 (5th Cir. 1998) - Federal district court abused discretion in awarding \$81,000 in attorney's fees - this was more than six and one-half times the amount of discharged employee's damages award, and discharged employee had sought more than 26 times the damages actually awarded - inadequate attention given to monetary results achieved and partial success.

Canup v. Chipman-Union, Inc., 123 F.3d 1440, 75 FEP 220 (11th Cir. 1997) - Attorney's fees denied in mixed-motive case where there was no relief - jury found that race was a factor but that employee would have been discharged for legitimate reasons anyway - extent of success should be the starting point for determining whether fees should be awarded.

Settlement (Ch. 43)

Beatty v. Wood, 204 F.3d 713, 82 FEP 97 (7th Cir. 2000) - Because of attorney error, timely appeal was not taken from EEOC's erroneous dismissal of administrative complaint - in context of malpractice case, plaintiff tried to prove that his underlying case, erroneously dismissed, was meritorious, and did not succeed - the holding was that had his case been litigated he "could not withstand summary judgment on the ADEA claim because he has no evidence of pretext" - alternatively, plaintiff argued "that his ADEA claim would have netted him money in a settlement, even if he could not have ultimately succeeded on the merits" and he should recover that amount from his attorneys - but malpractice "is not a vehicle for compensating a litigant for the damages that could have been extracted by pursuit of a meritless case" - "A malpractice plaintiff cannot prevail merely by showing that his claim which his lawyer booted, though baseless, had some nuisance value." Id. at 719 (internal quotations omitted).

Torres v. Metropolitan Life Insurance Company, 1999 WL 424305, 80 FEP 104 (3d Cir. 1999) - Waiver that does not specifically mention attorney's fees is not a valid release of attorney's fees - settlement waiver stated employee "specifically releases all claims, charges, or demands asserted or assertable in the Pending Lawsuit."

Sheng v. Starkey Laboratories, Inc., 117 F.3d 1081, 74 FEP 278 (8th Cir. 1997) - Employer bound by settlement reached during mediation even though, unknown to either party, federal district court had already granted employer's motion for summary judgment.

U.S. ex rel. Hall v. Teledyne Wah Chang Albany, 104 F.3d 230, 12 IER 732 and 12 IER 1216 (9th Cir. 1997) - Release engineer executed bars claim he was discharged for informing federal government of improper manufacture - qui tam suit under False Claims Act dismissed - Northrop Corp. case distinguished - that case held that enforcement of a release impairs the public interest.

