Basics of Employment Discrimination Law for Law Clerks

A BROADCAST FROM THE FEDERAL JUDICIAL CENTER AND
THE ABA’S LABOR & EMPLOYMENT LAW SECTION

Faculty

Jana Howard Carey
Venable, Baetjer & Howard, LLP

Mark Dichter
Morgan, Lewis & Bockius, LLP

Wendy L. Kahn
Zwerdling, Paul, Kahn & Wolly, PC

Richard T. Seymour
Lieff, Cabraser, Heimann & Bernstein, LLP

Peter Zinober
Zinober & McCrea

moderator

first broadcast August 27, 2003, updated August 2005

These materials were prepared in furtherance of the Federal Judicial Center’s statutory mission to develop and conduct education programs for judicial branch employees. The views expressed are those of the authors and not necessarily those of the Federal Judicial Center.
Basics of Employment Discrimination Law for Law Clerks

Program Outline

Importance of Employment Law in Federal Court
Equal Employment Opportunity cases accounted for about 8 percent of all civil filings in the year 2001.
Federal-question EEO cases made up more than 12 percent of all federal question civil cases.
In courts of appeals, EEO cases made up more than 21 percent of all civil federal question cases decided after oral argument in 2001.
Between 1990 and 2000 the number of employment discrimination cases filed in federal court increased by almost 250 percent.

Overview
Title VII of the Civil Rights Act of 1964 is one of the first and most important laws in this area.
• When doing research remember to look at 1991 amendments.
Title VII covers
• private and public employers
• federal, state and local governments
• labor unions, employment agencies, and hiring halls.
Title VII forbids discrimination based on
• race
• color
• national origin
• gender
• religion.

Prohibitions Under Title VII
National origin discrimination
National origin discrimination is discriminating against someone because of their country of origin or their ancestors’ country of origin. Under EEOC guidelines, protection extends to people discriminated against because of:
• marriage to or association with people of a certain national origin
• membership in or association with an organization that is identified with or promotes the interests of a national origin group
• attendance at or participation in schools or churches generally used by persons of a particular national origin group
• persons whose names or spouses names are associated with a national origin group, even if they don’t belong to that group.
Prohibition against national origin discrimination affects:
- natives of a recognized nation
- persons with distinct cultural or ethnic identity
- discrimination between people of different national origins.

**Leading case:** *Espinoza v. Farrah Manufacturing*, where the Supreme Court concluded that Title VII does not prohibit discrimination on the basis of citizenship unless the citizenship discrimination has the purpose or effect of national origin discrimination.

Promulgation of English Only rules has been one ongoing source of litigation under this part of Title VII.

Employers who are charged with national origin discrimination because of an English Only rule have a Bona Fide Occupational Qualification (BFOQ) defense if English is required for a legitimate business purpose.

The EEOC has taken the position that if the English Only rule applies at all times rather than just at certain times when legitimate business needs require it, it may constitute national origin discrimination.

Employees have to be on notice of such a rule and the consequences of violating it.

**Sex discrimination**

Failure to promote someone because she is a woman is a clear violation of Title VII. Title VII does *not* prohibit discrimination based on:

- sexual activity
- sexual orientation
- marital status.

Cannot discriminate based on:

- pregnancy
- childbirth or related medical conditions.

This was not always the case, so Congress enacted the Pregnancy Discrimination Act (PDA).

**Leading case:** *California Federal Savings and Loan v. Guerra*: Supreme Court held that the PDA did *not* preempt a state statute that required employers to provide paid leave to employees who were disabled by pregnancy, childbirth, or related conditions.

Issues under the PDA:

- Was a particular condition related to pregnancy or childbirth?
- Was an action by the employer related to pregnancy or childbirth?
- Was alleged employee misconduct related to pregnancy?

**Religious discrimination**

Religious discrimination is discriminating against somebody because they engage in religious observances. Religions that are covered:

- agnostics
Basics of Employment Discrimination Law for Law Clerks: Program Outline

- atheists
- people who have a belief that is not even adopted by the religion that they are in name a part of.

Basic rule is it has to be a religious type of belief and has to be held with the strength and conviction with which religious beliefs are normally held. It covers discriminating against someone;
- because they engage in religious observances, e.g., clothing
- who refuses to allow any invasion of their body because they consider that to be contrary to their religious beliefs, e.g., TB test
- who wants to observe their Sabbath whenever it may be
- Interesting point: Prohibition against discrimination based on religion is the only basis for discrimination in Title VII where employers not only have to refrain from discriminating, but are also required to accommodate their employees.

**Leading case:** *Trans World Airlines v. Hardison:* The Supreme Court held that employers are not required to bear more than a de minimis cost to accommodate an employee’s religious beliefs. The Court also held that employers are not required to make exceptions to their seniority systems, if doing so would violate a collectively bargained system.

Title VII recognizes that employers which qualify as “religious organizations” may engage in certain otherwise prohibited discrimination practices
- which favor members of their own religion
- which discriminate against persons not holding such membership or views
- or which discriminate against persons not following the religious teachings of the employer.

only when the employee’s conduct is inconsistent with employer’s religious precepts

BFOQ defense is allowed in religious discrimination cases where belonging to a specific religion or religious institution is considered a necessary qualification of working there.

**Regulated Behaviors**

Employers are prohibited from discriminating in
- hiring
- discharge
- compensation
- terms, conditions, privileges of employment
- promotions
- tests and other selection criteria
- employee benefits
- training
- work assignments.
Employment agencies are prohibited from
• failing or refusing to refer someone for employment based on a protected characteristic
• referring someone solely on the basis of those protected characteristics.

Labor organizations are covered both as representatives of employees and, if they are large enough, as employers. As a labor organization, they are prohibited from
• excluding or expelling members
• discriminating against members or applicants
• failing or refusing to refer
• causing or attempting to cause an employer to discriminate
• failing to fairly represent bargaining unit employees.

Regulated Actors
People running job skills training programs, apprenticeship programs, and retraining and on the job training are prohibited from discriminating in admission to or participation in such training programs.

   All persons and entities covered by the statute are prohibited from
   • limiting,
   • segregating, or
   • classifying employees or applicants in any way that would deprive them or tend to deprive them of employment opportunities or adversely affect their status as an employee.

   They are also prohibited from retaliating against employees who exercise their rights.

   There are two types of retaliation:
   • Opposition clause: Prohibits employers from retaliating against someone who opposed a practice that a person believes is discriminatory
   • Participation clause: Prohibits an employer from retaliating against someone
     a. who has filed an EEO charge;
     b. who has participated in an investigation;
     c. who has participated as a witness for someone else in a Title VII or an EEO investigation;
     d. who participated in a hearing;
     e. who participated in discovery.

Areas of Focus

Sexual harassment
There are two types of sexual harassment.
• Quid pro quo: when a job action is dependant on the provision of sexual favors
• Hostile environment sexual harassment: does not involve a tangible job detriment but instead creates an environment that is unpleasant and unacceptable based upon the considerations of sex (e.g., jokes, language, unwanted touching)

**Leading cases:** *Faragher v. City of Boca Raton* and *Ellerth v. Burlington Industries*: The Supreme Court ruled that in any situation where sexual harassment by a supervisor with immediate or successively higher authority results in a tangible detrimental employment action (such as discharge or demotion or an undesirable assignment), the employer is strictly liable for that action, even if the employer and its management had no knowledge the harassment was taking place.

If, however, no tangible detrimental employment action results from the sexual harassment *Faragher* and *Ellerth* provide employers with a two-prong affirmative defense;
• has to show reasonable care to prevent and/or correct harassing behavior
• complaining employee unreasonably failed to use existing policy.

**Tangible job detriment**
• could affect pay
• demotion
• discharge
• failure to promote.

**Supervisor is generally one who has the authority to**
• hire
• fire
• discipline
• promote
• change terms and conditions of employment
• effectively recommend these be done.

In its 2004 opinion in *Pennsylvania State Police v. Sunders* the Supreme Court considered whether the *Faragher/Ellerth* affirmative defense is available to the defendant in a “constructive discharge” case. The Court held that the ordinary harassment rules apply to cases in which the plaintiff alleges a compelled resignation: the defense is not available if a tangible employment action caused such a resignation, but is available if the resignation occurred without a tangible employment action.

**Other elements to claim of sexual harassment:**
• Does Title VII prohibit sexual harassment where the harasser and the victim are the same sex?

**Leading case:** *Oncale v. Sundowner Offshore Services, Inc*: The Court answers yes, the purpose of Title VII was to protect both
men and women from discrimination and harassment in the workplace and the sex of the harasser should not be a determining factor.

Equal opportunity harasser

- If defendant can successfully argue the harassment was not because of the sex of the target this type of harassment is not covered by Title VII.

**Hostile work environment**

The basic question is whether the harassment was sufficiently severe and pervasive to create an environment that a reasonable person would find hostile and abusive.

**Leading case:** *Harris v. Forklift Systems, Inc.*: Supreme Court detailed factors;
- frequency and severity of the conduct
- whether it was physically threatening or humiliating as opposed to a mere offensive utterance
- whether it unreasonably interfered with an employee’s work performance.

Harassment also prohibited by:
- co-workers
- supervisors
- customers
- patients.

**Discrimination against the disabled**

Definition in the 1990 Americans with Disabilities Act.

If the person
- has a disability that significantly affects a major life activity
- has a record of such a disability
- is regarded as having such a disability
then it qualifies under the statute.

Not considered disabilities:
- illegal drug use
- bisexuality
- transvestism, etc.
- physical characteristics
- personality traits
- pregnancy
- predisposition to illness.

**Leading case:** *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*: The Supreme Court held that “to be substantially limited in performing manual tasks an individual must have an impairment
that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives and the impact of the impairment is required to be permanent or long term.”

**Leading case:** *Sutton v. United Air Lines Inc.*: The Court ruled that judging whether a person is disabled within the meaning of the ADA also requires taking into account available effective mitigating measures.

Employers must make a reasonable accommodation for the disability that does not cause an undue burden on the employer. Reasonable accommodations:

- making existing facilities readily accessible and usable
- job restructuring
- part time or modified work schedules
- reassignment to vacant positions
- provision of qualified readers or interpreters.

**Theories of Discrimination**

**Disparate treatment**

Intentional discrimination

- Can be proved by direct or circumstantial evidence.
- Burden of proof is on the plaintiff.

**Mixed motive**

Discrimination was one factor in the discrimination but not the only factor

- Plaintiff need only demonstrate that race, color, religion, sex, national origin, age, or disability was a motivating factor in the decision made by the employer.
- Employer bears the burden of persuasion.

**Pattern and practice**

Plaintiff alleges ongoing disparate treatment with all members of protected class.

**Adverse impact**

Plaintiff alleges facially neutral practice falls more harshly on one group than another and is not justified by business necessity.

Adverse impact is also sometimes called disparate impact. The Supreme Court in its March 2005 opinion in *Smith v. City of Jackson* authorized recovery for complaints of disparate impact under the Age Discrimination in Employment Act, or ADEA. However, the Supreme Court held that an employer can more readily defend a practice that has a disparate impact under the ADEA than under Title VII.
Procedural Issues

Role of the EEOC
Plaintiff cannot be in court unless the plaintiff has exhausted before the EEOC with respect to claims that are Title VII, ADEA, ADA, etc. Plaintiff must put down in charge before EEOC what is the practice that is alleged to be unlawful and what is the basis of discrimination being claimed. Is it age, race, gender, etc.?

Filing deadlines
- 180 or 300 days of the alleged discrimination occurring
- depends on whether the plaintiff has also filed the charge in a deferral jurisdiction.

Deferral jurisdictions
Where there is a fair employment practices agency and a fair employment practices statute. Where those kinds of statutes or ordinances exist, the limitations period is extended from 180 days to 300 days.

Leading case: Edelman v. Lynchburg College: The Supreme Court decided that the filing of a verified or sworn charge after the limitations period relates back to a timely filed unverified charge making the earlier charge timely.

Mediation
Even before the EEOC investigation is complete, the agency offers the parties assistance in mediating the dispute in most cases only if both parties agree.

The EEOC administrative process ends if the agency decides against a “reasonable cause.” If it does reach a reasonable cause determination, it then asks the parties to conciliate. If the parties do not, EEOC can bring suit or issue a “notice of right to sue.” Parties now have 90 days to file a Title VII, ADEA, or ADA lawsuit after they receive the notice.

Leading case: EEOC v. Waffle House: Court decided that where an employee cannot sue his employer claiming discrimination because he signed an agreement to arbitrate such disputes, the EEOC can still sue the employer on its own authority.

Doctrine of exhaustion
Requires that the basis for the discrimination claim has to be stated completely in the charge.
- Applies in Title VII, ADA and ADEA cases.
- Doesn’t apply under Sections 1981 and 1983.
- Exceptions if party could not have known the basis for discrimination or if there is post-charge retaliation.
- List of defendants does not have to be exhausted in the charge. They can be added if they had notice, they could have reasonably understood charges
could have brought against them or acted in ways that led to confusion about who was liable.

**Single-filing doctrine**
In cases in which class actions are sought and the representative plaintiff is seeking to add individuals into the case whose claims are timed barred, the single-filing rule says that if the individual
- who never filed a charge
- who never exhausted administrative remedies
- if that individual suffered the same kind of discrimination as the named plaintiff within the statute of limitations so that they could have filed a charge at the same time the charging party did
- then the individual can be brought into the lawsuit on a piggyback or single-filing basis

**Continuing violations doctrine**
Reaches back beyond the 180-day or 300-day limitation.

**Leading case:** *National Railroad Passenger Corp v. Morgan*:
Court held that a Title VII plaintiff raising claims of discrete discrimination or retaliatory acts must file his charge within the 180-300-day period but that a charge alleging hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period.

Time periods for exhaustion:
1. 180 days of filing under Title VII, ADEA, or ADA.
2. 300 days if there is a deferral agency.
3. Time starts to run when person is told of adverse action.
4. Grieving the action in collective bargaining situation does not toll the time period.
5. If action is not final, time does not necessarily start to run.


**Public and Private Sector Differences**
- No punitive damages available under federal law against any government agency.
- If you are dealing with the state or local government agency and the case is brought under Title VII, the Supreme Court has held that the Eleventh Amendment does not bar the case, and the courts of appeals have held that
that does not bar even a claim for compensatory damages against the state agency.

- If it’s a case under the ADA or under the ADEA, the Supreme Court has held that the Eleventh Amendment does bar the private individual from suing the state agency for monetary relief.
- They can still sue for injunctive relief and the government may still sue for monetary and injunctive relief but the individual cannot sue for monetary relief.

**Federal government**

- There is a 45-day time period for filing the initial charge of discrimination.
- At the end of the proceeding, there is an adjudicative hearing, the results of which can bind the agency but not bind the individual.
- An individual can go to court and have a de novo determination whether there was discrimination.
- If adjudicative process found that there was discrimination but it gives inadequate relief in the eye of the plaintiff, the plaintiff can go to court and obtain partial summary judgment on liability based on the administrative decision and then seek the additional relief the individual believes that he or she is entitled to.
- Supreme Court held that an individual must exhaust as to a claim for compensatory damages, it has to be specifically stated in the charge of discrimination or else that is waived, and there’s no such requirement with respect to the private sector.

**Discovery Issues**

**2000 Rules changes**

There was a significant change in the rules affecting discovery that went into effect on Dec. 1, 2000.

**Scope of discovery**

The scope of the case and the type of issue really determine the nature of the discovery.

**Burden on the employer**

The employer can have extensive records and they can reside in various departments and various places.

**Evidence of motive**

What motivated the employer’s decision.

**Issues of privacy**

Frequently there is a need to balance the right to discover potentially relevant evidence with the privacy interests of parties and witnesses.
Rule 412
Dealing with evidence of sexual misconduct bars evidence that is offered to prove the alleged victim engaged in other sexual behavior or to prove the alleged victim’s sexual predisposition.

Such evidence is admissible if its probative value substantially outweighs the danger of unfair prejudice to the plaintiff.

The plaintiff’s reputation is only admissible if she herself placed it in controversy.

There can also be information the defendant/employer is concerned about, even if it doesn’t rise to the level of trade secrets:

- benefit plans
- employee compensation
- future business plans
- personal information about other employees who aren’t plaintiffs.

These issues are dealt with through the court issuing protective orders.

Evidence necessary to grant summary judgment
Standard used to decide whether to grant it was developed by the Supreme Court in a 1973 decision, McDonnell Douglas v. Green;

- plaintiff is in a protected group
- there has been an adverse employment action
- it occurred under circumstances giving rise to an inference of discrimination
- job is still open
- these are the elements of a prima facie case
- this shifts the burden of going forward (but not the burden of proof), that is, the burden of articulating a legitimate, nondiscriminatory reason for the employment action to the defendant.

The plaintiff then has the opportunity to show the articulated reason is pretextual, that the real reason is discrimination.

Leading case: Reeves v. Sanderson Plumbing, 530 U.S. 133 (2000): The Court articulated three factors in Reeves for determining whether or not there is enough evidence for the case to go to the jury:

- Was there only a bare bones prima facie case?
- What is the probative value of the proof that the explanation was false?
- What other evidence is there to support defendant’s nondiscriminatory explanation of employment action?

The Court held that a jury is permitted to infer discrimination if it determines that the supposedly non-discriminatory reason articulated by the defendant/employer was in fact pretextual.
**Comparative evidence**
The questions that arise are
- Were the individuals similarly situated?
- Were the same standards involved?
- Was the same conduct involved?
- Were there differentiating or mitigating circumstances?

Challenging question
“Me too” evidence – an employee charges he was terminated because of age and says he knows five other employees who were terminated because of age as well. Should he be allowed to offer evidence of those other five cases?

**Statistical evidence**
- What is appropriate employee pool to compare plaintiff to?
- What is appropriate comparison to make?
- What is the relevant time period for comparison?
- What degree of statistical disparity is evidence of discrimination?

The Supreme Court has adopted a basic test that says if a disparity is more than two or three standard deviations from what would be expected it is enough to infer something did not occur by chance.

**Biased remarks**
The issue is who made the remark, was it the decision maker in the case in question, was the remark really evidence of bias or was it a more generally accepted comment, how close in time was the remark made to the decision in question?

**Relief**

**Injunctive relief - 2 types**
- Individualized relief – restores an individual to the position he or she would have been in absent the discrimination.
- can include reinstatement, hiring, promotion, other actions.

**General injunctive relief**
- Most common in class actions or government pattern and practice cases
- Back pay and lost benefits.

Where there is a large-scale case and it is not possible to determine which plaintiff would have received the promotion absent discrimination, it is possible to share the back pay on a classwide pro-rata basis.

Relief can also include changes in policies and practices. Goals and timetables requiring gender or race conscious relief with respect to hiring and promotions may be established.

**Prejudgment interest**
Customarily awarded.
**Front pay**
- Compensates for the difference between the plaintiff’s present position and the one they are waiting to open up.
- When the plaintiff has been discharged or is no longer able to work with the employer until the plaintiff finds comparable employment.

**Liquidated damages**
- Available under the Equal Pay Act, Age Discrimination in Employment Act, and FMLA.
- Damages are available under FMLA and EPA unless the employer proves it acted in good faith and had reasonable grounds for believing that its conduct was not a violation of the law.
- Liquidated damages are available under ADEA if the violation was willful.
- Under the EPA, if the violation was willful, liquidated damages are available for the three years before the filing date of the suit; absent willfulness, damages are limited to a two-year period.

**1991 Civil Rights Act included**
- right to common-law damages
- right to a jury trial

The Act imposed a cap on the amount each claimant can recover; cap is $300,000 for employers of 501 or more employees and $50,000 for employers of 15 to 100 employees.

If the defendant is a federal, state, or local public-sector employer, punitive damages are prohibited. The Act also says if plaintiff is unable to recover damages under section 1981, they can recover under Title VII.
- There cannot be double recovery.
- Cap applies to each claimant, not each claim.

**Compensatory damages**
Compensatory damages require real injury, not simply a technical violation of the law

- Damages can be sought against state and local officials in their personal capacity under 42 U.S.C. §§ 1981 and 1983 but not under Title VII or the ADA.
- There is a qualified immunity defense available under section 1981 and section 1983 cases. Section 1983 is available against municipalities where plaintiff can show intentional discrimination was the official policy, but it is not available against states.
- In private-sector cases, punitive damages are available even in the absence of particularly egregious facts, but plaintiff has to show that there should be vicarious liability for the actions of supervisors.
- The most common way to establish vicarious liability is to show the discrimination was committed by an agent acting in a managerial capacity in the scope of his employment.
There is a good-faith defense if the employer can show they were taking reasonable steps to ensure managers were complying with the law.

If employer hides evidence of discrimination or fails to respond to a discrimination complaint or responds inappropriately the good-faith defense is not available.

A good-faith effort has to involve actual implementation, not just a paper response.
American Bar Association
Section of Labor and Employment Law

in cooperation with the
Federal Judicial Center

EEO Statutory Overview

by

Wendy L. Kahn
Zwerdling, Paul, Leibig, Kahn & Wolly, PC
Washington, D.C.

Jana Howard Carey
Baltimore, Maryland

1/ The opinions expressed herein are those of the authors, and not necessarily of our law firm, our clients, or the Federal Judicial Center.
## TABLE OF CONTENTS

STATUTORY OVERVIEW..........................................................1

COVERAGE.............................................................................1

   A. Which Entities Are Prohibited From Discriminating?..............................................1
   B. Bases of Discrimination...........................................................................3
   C. In What Kinds of Decisions/Actions?.........................................................16
   D. Remedies..................................................................................................21

Comment on Back Pay and Make Whole Remedies.................................................................21

II. Equal Pay Act ("EPA")....................................................................25
   A. What Entities Are Prohibited From Discriminating?.........................................25
   B. On What Bases?.........................................................................................26
   C. In What Kinds of Decisions/Actions?.........................................................26
   D. Remedies..................................................................................................27

III. Age Discrimination in Employment Act ("ADEA").........................................................29
   A. What Entities Are Prohibited From Discriminating?.........................................29
   B. On What Bases?.........................................................................................30
   C. In What Kinds of Decisions/Actions?.........................................................30
   D. Remedies..................................................................................................33
E. Special Issues in Age Discrimination Cases ...........................................35

IV. Americans with Disabilities Act of 1990 (ADA) ...........................................40
A. What Entities Are Prohibited From Discriminating .................................40
B. Basis of Discrimination .................................................................41
C. In What Kinds of Decisions/Actions? ..............................................43
D. Remedies ...................................................................................48

V. Section 1981 ..................................................................................45
A. What Entities Are Covered? ..............................................................46
B. On What Bases? ............................................................................47
C. In What Kinds of Decisions/Actions? ..............................................48
D. Remedies ...................................................................................49

Comment on Issues Unique to State And Municipal Government Defendants .....51
A. State Employers – Effect of Eleventh Amendment ...............................49
B. Municipal Employers ....................................................................50

VI. Section 1983 ..................................................................................50
A. Which Entities Are Prohibited From Discriminating? ............................51

Comment on Special Issues Re: State and Municipal Government Defendants under §1983........52
A. State Employers – Effect of Eleventh Amendment ...............................52
B. Municipal Employers ....................................................................53
C. What Bases and What Kinds of Decisions/Actions?..............................53
D. Remedies........................................54
STATUTORY OVERVIEW

COVERAGE


A. Which Entities Are Prohibited From Discriminating?

1. Employers

   (a) Private employers which "affect" commerce and with 15 or more employees each working day in each of 20 weeks in current or preceding calendar year.\(^4\)

   (b) State and local government employers.

   (c) Federal government.

      (1) Executive branch and units of judiciary and legislature subject to competitive civil service, \textit{et al.}\(^5\).

      (2) Congressional entities.\(^6\)

\(^2\)/ 42 U.S.C. §§2000e \textit{et seq.}

\(^3\)/ As the 1991 Amendments, Pub. L. No. 102-166 \textit{et seq.}, 1991 U.S.C.C.A.N. (105 Stat.) 1071, in significant part overruled some Supreme Court cases, some cases decided prior to the applicability of the 1991 CRA amendments are no longer good law.


\(^6\)/ Protections of Title VII and certain other worker protection...
(d) Exclusions from definition of "employer."

(1) Bona fide membership clubs.\(^7\)

(2) Indian tribes.\(^8\)

(3) United States and wholly owned corporations.\(^9\)

(4) Religious organizations (may discriminate solely on the basis of religion).\(^10\)

(e) Extra-territorial application. Title VII applies to American employers (including foreign corporations controlled by American laws (e.g., Family and Medical Leave, Fair Labor Standards, Employee Polygraph Protection) were extended to employees of the House, Senate, Capitol Police, Congressional Budget Office, inter alia, by the Congressional Accountability Act ("CAA"), Pub. L. 104-1 (1995), 2 U.S.C. §1301 et seq. Civil actions in federal district courts are authorized after completion of statutorily mandated counseling and mediation under the auspices of the Office of Compliance (an independent office within the Federal government's legislative branch). 2 U.S.C. §§1404, 1408. As an alternative to a civil action, after completion of counseling and mediation, a complainant may file for an administrative hearing appealable to the Board of the Office of Compliance. Jurisdiction to review a Board decision lies in the United States Court of Appeals for the Federal Circuit. 2 U.S.C. §§1404-1407.

\(^7\) 42 U.S.C. §2000e(b)(2).

\(^8\) 42 U.S.C. §2000e(b)(1).


\(^10\) 42 U.S.C. §2000e-1(a); Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987)(as amended in 1972, exemption applies to secular, nonprofit activities of a religious organization as well as to its "religious" activities). Arguably 42 U.S.C. §2000e-2(e)(2) is superfluous as a result of these amendments.
employers) outside U.S. territorial jurisdiction, with respect to treatment of U.S. citizens, unless otherwise required by host country's law. 42 U.S.C. §2000e(f); §2000e-1(b)(c).

2. Employment agencies.\textsuperscript{11}

3. Labor organizations.\textsuperscript{12}

4. Training programs. Joint labor-management committees controlling apprenticeship or other training or retraining, including on-the-job training.\textsuperscript{13}

B. Bases of Discrimination

1. Race or color.\textsuperscript{14} Covers all races, including whites.

2. National Origin\textsuperscript{15}

\textsuperscript{11} 42 U.S.C. §2000e(c).

\textsuperscript{12} 42 U.S.C. §2000e(d) and (e) define covered labor organizations and require, \textit{inter alia}, maintenance of a hiring hall or at least 15 members.

\textsuperscript{13} 42 U.S.C. §2000e-2(d).

\textsuperscript{14} Discrimination on basis of color, e.g., includes discrimination by dark-skinned African-American against light-skinned African-American.

(a) Definition of "National Origin."

(1) The EEOC guidelines\textsuperscript{16} define national origin discrimination as including:

- The denial of equal employment opportunity because of an individual’s or his or her ancestors, country of his or her ancestors, country of origin, or because an individual has the physical, cultural or linguistic characteristics of a national origin group.

- The guideline’s definition further indicates that the Commission will examine with particular concern charges that equal employment opportunity has been denied for reasons such as:
  - marriage to or association with persons of a national origin group;
  - membership in or association with an organization identified with or seeking to promote the interests of national origin groups;
  - attendance or participation in schools, churches, temples or mosque generally used by persons of a national origin group; and
  - because an individual’s name or spouse’s name is associated with a national origin group.

\textsuperscript{16/} 29 CFR § 1606 et seq. (1980).
(2) The definition of "country of origin" and "national origin group."

The courts generally have been willing to grant national origin protection against discrimination where:

- the plaintiff clearly identified a political subdivision in existence as the basis for discrimination. Typical of such claims are Belgium, Egyptian, Indian, Irish, Japanese, Korean, New Zealander, Norwegian, Pakistani, Sri Lankan, and Vietnamese.\textsuperscript{17}

- where a distinct cultural or ethnic identity is claimed, even though no specific country or region of origin was identified. Thus, Gypsies have been protected under the national origin trait, despite the absence of any country or even region of origin.\textsuperscript{18} Similarly, Acadians or Cajuns have no common nation of origin but have likewise been protected.\textsuperscript{19} The claims of a Palestinian were also deemed entitled to protection, despite the non-existence of a State of Palestine.\textsuperscript{20} Slavic is considered

\textsuperscript{17} See generally, 3 Arthur Larson & Lex Larson, Employment Discrimination § 93.10 (1994).


a national origin, despite its meaning a region of the globe and not a unique political country.\footnote{21}

- where there was a historical national entity. Accordingly, Serbians\footnote{22} and Ukranians\footnote{23} were protected under the national origin language of Title VII, prior to the breakup of Yugoslavia and the Soviet Union.

(b) \textbf{Title VII does not ordinarily protect against discrimination on the basis of citizenship.}

(1) In Espinoza v. Farah Manufacturing Co. the Court held that Title VII national origin status was not meant to protect against citizenship discrimination unless citizenship requirement has the purpose or effect of national origin discrimination.\footnote{24} Alienage is thus considered distinct from national origin.\footnote{25}

\footnotetext{21}{See Kutska v. California State Dep’t of Education, 410 F. Supp. 48 (W.D. Pa. 1976), aff’d, 549 F.2d 795, opinion supplemented by 564 F.2d 108 (3rd Cir. 1977).}

\footnotetext{22}{See Pejic v. Hughes Helicopters, Inc., 840 F.2d 667 (9th Cir. 1988).}

\footnotetext{23}{See Pejic v. Hughes Helicopters, Inc., 840 F.2d 667 (9th Cir. 1988).}

\footnotetext{24}{414 U.S. 86 (1973).}

\footnotetext{25}{The anti-discrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA) do prohibit discrimination based in hiring and discharge based on citizenship status, subject to several limitations (see 8 U.S.C. §1324b(a)) and also expand Title VII’s prohibition against national origin discrimination.
(c) Exceptions to the Ban on National Origin Discrimination.

(1) The "Treaty" Defense.

Some foreign countries have friendship, commerce and navigation treaties with the United States that allow those countries to give preference to their own citizens for employment in executive (and sometimes other) positions. The Fifth Circuit held in Papaila v. Uniden American Corp, 51 F.3d 54 (5th Cir.), cert. denied, 516 U.S. 868 (1995) that a domestic subsidiary of a Japanese company could assert the FCN treaty rights of its Japanese parent corporation, and favor Japanese citizens for executive positions where the Japanese parent dictated the discriminatory conduct by hiring the Japanese citizens who were favored in Japan, controlling their salaries, benefits and American incorporated subsidiaries, to choose only Japanese for managerial positions.

(2) Other exceptions to the Title VII ban on national origin discrimination include the situation where national origin qualifies under Section 703(e) of Title VII as a bona fide occupational qualification for the job in question (see discussion of this exception below) and where, under Section 703 (g), employers are permitted to refuse to employ individuals who are unable to obtain a to smaller employers. (8 U.S.C. §1324b(a)(1)(A)).
security clearance because they have relatives behind the Iron Curtain.\textsuperscript{26}

(d) \textbf{Fluency in English Requirements}

- The Equal Employment Opportunity Commission has promulgated regulations setting out when an employer’s rule requiring employees to speak only in the English language is discriminatory.\textsuperscript{27} The Commission states that when the English-only rule is enforced at all times in the workplace it is a burdensome term of employment, and may create an "atmosphere of inferiority, isolation and intimidation based on national origin." This gives rise to a presumption that the rule violates Title VII and it will be closely scrutinized.

- An employer may, however, establish a rule requiring the use of English during certain periods of time if the employer sets forth a business justification for the rule.

- Finally, the Commission requires that even a valid rule cannot be enforced against employees who were not put on notice of its existence or the consequences of violating it.

- Some "English only" rules are protected by the courts as enforcing essential functions of the position. See generally, EDL 2002 Supp. at 304, notes 34-36. Where the job duties involved are closely interwoven with the use of

\textsuperscript{26}/ \textit{EEC General Counsel Opinion Letter, G.C. 1224-65 (October 18, 1965 (unreported).

\textsuperscript{27}/ See 29 C.F.R. 1606.7 (1994).
language, some courts will give wide discretion to employers to set forth reasonable language rules. For instance, proficiency in English was deemed a legitimate qualification for a position as a police officer, sufficient to justify a no-Spanish rule\textsuperscript{28} that prevented Spanish from being spoken during breaks, but was found necessary to facilitate effective communications among officers. See also Jurado v. Eleven-Fifty Corp, where the court held that a management rule requiring "English-only while on-air" did not violate Title VII, since the "mere fact that a station adopts a format designed to entice a target ethnic audience does not tend to show racial animus in employment." The rule was reasonably limited to on-air time and was within the station’s broadcasting latitude. Conversely, an English-only rule was rejected in Gutierrez v. Municipal Court, where the complaining employee was a bilingual deputy court clerk.\textsuperscript{29} The position itself required translating for the non-English speaking public, but the employer promulgated a rule prohibiting all languages other than English in all conversations conducted during work time. The court held that the prohibition on intra-employee communications in Spanish was not in any way connected to the sale or distribution of the employer’s services, was not needed to control a


\textsuperscript{29} 838 F.2d 1031 (9th Cir. 1988), reh’g denied, 861 F.2d 1187 (9th Cir. 1988), and cert. granted and judgment vacated, 490 U.S. 1016 (1989).
"Tower of Babel", and was not legitimately based on the need to control increased hostility between Hispanics and non-Spanish speaking employees or a need to allow non-Spanish speaking supervisors to effect more control over the dissemination of information to the public. In short, the rule was excessive and was not justified by a business necessity.

3. **Sex** (including sexual harassment\(^{30}\)).
   
   (a) Sex refers to "gender" not sexual activity or practices.
   
   (b) Includes discrimination based on pregnancy, childbirth or related medical conditions\(^{31}\).
   
   (c) Does not prohibit discrimination on basis of marital status.
   
   (d) Does not prohibit discrimination on basis of sexual orientation\(^{32}\).
   
   (e) Subject to "BFOQ" defense (See Sec. I, C, 7).
   
   (f) Special Issues Involved With Claims of Discrimination on the Basis of Pregnancy\(^{33}\).

\(^{30}\) See Appendix A on "Sexual Harassment Claims ".

\(^{31}\) As amended in 1978, Title VII reads that "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. §2000e(k).

\(^{32}\) However, same-gender sexual harassment claims are actionable under Title VII. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).
(1) Overview

In 1978, Congress enacted the Pregnancy Discrimination Act ("PDA") to make it clear that sex discrimination includes discrimination on the basis of pregnancy. Section 701(k) of Title VII now provides:

"The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions, and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other person not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise."

(2) Scope of the PDA.

In California Federal Savings & Loan Association v. Guerra, 479 U.S. 272 (1987), the Supreme Court held that the PDA did not preempt a state statute that required employers to provide paid leave to female employees disabled by pregnancy, childbirth or related

\[12/\] For a recent overview of the law on discrimination on the basis of pregnancy, see generally EDL 2002 Supp. at Chapter 13, part V; and for recent cases discussing issues regarding discrimination on the basis of pregnancy, see generally EELU 2005 Update.
conditions. The PDA, said the Court, is "a floor beneath which pregnancy benefits may not drop -- not a ceiling above which they may not rise." Id. at 285. The Court further reasoned that the statute in question covered only the period of actual physical disability, and did not conflict with Title VII because it did not require preferential treatment for women.

In Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1987), the Court held that the PDA protects not only female employees but also the female spouses of male employees, striking down a benefits plan that gave greater pregnancy coverage to female employees than to spouses of male employees because it gave a less inclusive benefits package to married male than married female employees.

Issues under the PDA revolve around whether a particular condition, such as abortion or infertility, is related to pregnancy or childbirth, whether a particular action of the employer was taken on the basis of a protected condition, and whether employee conduct caused by or related to pregnancy (such as refusal to treat an HIV positive patient) is protected by the PDA. Generally, the courts have held that the PDA does not require special accommodation or preference for pregnancy or related conditions, and that in fact, such treatment might discriminate against men. See

4. Religion\(^{34}\)

(a) Overview

The prohibition on discrimination on the basis of religion set forth in Title VII\(^{35}\) raises three unique issues. First, there is the question of what is a protected "religion". Second, the statute specifically requires that employers make "reasonable accommodations" for the religious beliefs of employees so long as the accommodations do not result in undue hardship to the employer's business. Finally, there are some specific exemptions from the statute allowing religious institutions to discriminate when the employee's conduct is inconsistent with the employer's religious precepts.

(b) What is protected "religion"?

- As a general proposition, the courts handle the definition of religion in Title VII in much the same way as they handle the military service exemption based on religious beliefs, and the balance between religious rights and the First Amendment. In a nutshell, the employee has to show that the belief is sincerely and deeply held, but the term "religion" is interpreted

\(^{34}\) For a recent overview of the law on discrimination on the basis of religion, see generally EDL 2002 Supp, at Chapter 8; and for recent cases discussing issues regarding discrimination on the basis of religion, see generally EELU 2005 Update.

fairly broadly to include, for example, self proclaimed Satanists, a refusal to sign forms related to drug testing. See generally, EDL 2002 Supp, pp. 121-122. The term also includes:

- Church affiliation
- Agnosticism/atheism
- Religious beliefs not held by any church or by one’s own denomination
- Religious practices & observances
- Personal dress/grooming observances

(c) The Duty To Accommodate

- Title VII’s requirement for accommodations in the religion context is less demanding in some ways that the ADA’s requirement for accommodation to an employee’s disabilities. In Trans World Airlines v. Hardison, 432 U.S. 63 (1977), the Supreme Court held that an employer is not required to bear more than a de minimus cost to accommodate an employee’s religious beliefs, and that requiring more would constitute an undue hardship within the meaning of Section 701(j) of the Act. Further, TWA was not required to carve out a special exception to its seniority systems to accommodate the religious beliefs of its employees.

In Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986), the Court further held that the offer of a reasonable accommodation satisfies the employer’s duty, even if it is not the accommodation desired by the employee, and that offering unpaid days to an employee for religious observances would ordinarily be a reasonable accommodation unless the employer offered paid leave for
all purposes other than religious needs. Moreover, employees have a responsibility to participate in the interactive process in order to determine a reasonable accommodation. See EEOC v. AutoNation USA Corp., 52 Fed. Appx. 327, 2002 WL 31650749 (9th Cir., Nov. 22, 2002) (unpublished), (employee who quit on first day of discussion with employer had not engaged in the interactive process and thus was not protected).

(d) **Proof Standard:**

- In general, employees make out a case of religious discrimination by showing that the employee has a bona fide religious belief that conflicts with an employment requirement; the employee has informed the employer of this belief (or, some cases hold, the employer is otherwise aware of this belief and the need to accommodate it), and the employee was disciplined for failure to comply with the conflicting employment requirement (or, some cases hold, the employee reasonably could have inferred that he would have been disciplined for failure to comply had he not done so). Once the employee makes out a *prima facie* case, the burden shifts to the employer to demonstrate that it reasonably accommodated the plaintiff or was unable to do so without undue hardship. See generally EDL 2002 Supp. at Chapter 8.

(e) **Permissible Religious Discrimination -- Special Exemptions**

- Section 702 of Title VII allows religious institutions to discriminate in employment decisions when the employee’s conduct is
inconsistent with the employer’s religious precepts. The Section is not restricted to employees in jobs having to do with religion, no matter how secular the position. The exemption does not apply to discrimination based on protected characteristics other than religion, such as race or sex. Compare Boyd v. Harding Academy of Memphis, Inc., 88 F.3d 410 (6th Cir.1996) (academy could terminate a pregnant unmarried teacher because having sex outside of marriage violated the Academy’s code of conduct) with Ganzy v. Allen Christian School, 995 F. Supp 340 (E.D.N.Y. 1998) (on similar facts, termination was not upheld because of question of fact as to whether termination was because of the teacher’s premarital fornication, which would have been a legally terminable offense, as opposed to her pregnancy, which would not be).

Section 703(3)(2) of Title VII permits education institutions to employ employees of a particular religion if the institution is, in whole or in substantial part, owned, supported, controlled or managed by a particular religion or religious corporation, association or society, if its curriculum is directed towards the propagation of the particular religion.

C. In What Kinds of Decisions/Actions?

1. Employers are prohibited:

   (a) From discriminating in hiring or discharge, or with respect to compensation,\textsuperscript{36} terms,

\textsuperscript{36} The Bennett Amendment provides that an employer is not prohibited from "differentiating upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is
conditions, or privileges of employment.\textsuperscript{37} including, for example, promotion, tests or other selection criteria, employee benefits, training, work assignments, etc.

(b) From limiting, segregating or classifying employees or applicants in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect one's status as an employee.\textsuperscript{38}

2. Employment agencies\textsuperscript{39} are prohibited -- on the basis of the person's race, color, religion, sex or national origin -- from failing or refusing to refer for employment, or otherwise discriminating against, or referring for employment.

3. Labor organizations\textsuperscript{40} are prohibited, because of one's race, color, religion, sex or national origin, from

\textsuperscript{39} 42 U.S.C. §2000e-2(b).
\textsuperscript{40} 42 U.S.C. §2000e-2(c).}
(a) Excluding or expelling a person from its membership or otherwise discriminating against someone;

(b) Limiting, segregating, or classifying its membership or applicants for membership; or classifying or failing or refusing to refer for employment in a way which would deprive or tend to deprive one of employment opportunities, or would limit employment opportunities or otherwise adversely affect status as an employee or applicant; or

(c) Causing or attempting to cause an employer to discriminate.

4. Training Programs.

(a) Employers, labor organizations and joint labor-management committees controlling apprenticeship or other training, retraining or on-the-job training programs may not discriminate in admission to, or employment in, any program apprenticeship or other training program. 42 U.S.C. §2000e-2(d).

5. Retaliation.41

(a) Unlawful for employer to discriminate against employee or applicant; for employment agencies and committees controlling apprenticeship or training programs to discriminate against any individual; and for labor organizations to discrimination against members or applicants for membership:

(1) Because person has opposed any practice made unlawful by this title ("opposition" clause); or

(2) Because person has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this title ("participation" clause).

6. **Printing Or Publication Of Notices Or Advertisements** indicating any preference, limitation, specification or discrimination on basis of race, color, religion, sex or national origin except when religion, sex, or national origin is a BFOQ.42

7. **Statutory Defenses.**

   (a) **"BFOQ" - Bona Fide Occupational Qualification.**

   (1) Employer, labor organization, employment agency may use gender, religion or national origin (but not race) as factor in employment decisions if the factor is a BFOQ for the job, i.e., it is "reasonably necessary to the normal operation of that particular business or enterprise."43

   (2) (a) Defendant must prove that direct relationship exists between the protected factor and an employee's ability to perform the duties of the job, so that all or substantially all members of the excluded group cannot perform the duties of the job, or it is impossible or highly impracticable to determine on an individual basis if

---


members of the excluded group can perform the duties of the job;\textsuperscript{44} and

(b) The required job qualification goes to the "essence" of the business operation.

(3) Extremely narrowly construed;\textsuperscript{45} e.g., customer preference generally not a BFOQ\textsuperscript{46}; gender-specific requirements for employment in professional sports is.

(b) Bona fide seniority or merit systems
\"...[N]ot unlawful...for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system or merit system or a system which measures earnings by quantity or quality of production or to employees who work in different locations provided that such differences are not the result of an intention to discriminate on basis of race, color, religion, sex, or national origin.\"\textsuperscript{47}

(c) Tests. \"...[N]ot unlawful...for employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of

\textsuperscript{44/} See Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) (infra note 93).


\textsuperscript{47/} 42 U.S.C. §2000e-2(h).
race, color, religion, sex or national origin."\textsuperscript{48}

D. Remedies\textsuperscript{49}

1. In all cases (i.e., "disparate impact" and "disparate treatment" cases):

(a) Preliminary and permanent injunctive relief.\textsuperscript{50}

(b) Attorneys fees and costs.\textsuperscript{51}

(c) Such affirmative action as may be appropriate which may include, but is not limited to, reinstatement or hiring of employees with or without back pay.\textsuperscript{52}

(d) Equitable relief.\textsuperscript{53}

\textbf{COMMENT ON BACK PAY AND MAKE WHOLE REMEDIES:}

Victims are entitled to a presumption in favor of back pay; one of the purposes of Title VII is to make persons "whole" for

\textsuperscript{48}/ Id.

\textsuperscript{49}/ See Seymour and Dichter, "EEO Litigation: Practice and Procedure," prepared for this program ("Seymour and Dichter") at Sec. I for a more detailed discussion of remedies.

\textsuperscript{50}/ 42 U.S.C. §2000e-5(f)(2), (g), 2000e-6(a)-(b).


injuries suffered. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). "Rightful place relief" is judicially created principle to implement "make whole" relief.

Back pay includes wage or salary, regular or anticipated wage increases, overtime pay, commission earnings and shift differentials, bonuses, fringe benefits (e.g., sick and annual leave, pension benefits), medical expenses incurred that would have been covered by employer's insurance, value of lost insurance benefits, expenses for job search. Back pay awards may include prejudgment interest. Victim has duty to mitigate back pay losses and awards will be reduced by interim earnings or amount which could have been earned by using "reasonable diligence" to seek "substantially equivalent" employment.

54/ Under Title VII, back pay may not be awarded to a date more than 2 years prior to the filing of a charge with EEOC. 42 U.S.C. §2000e-5(g).


56/ 42 U.S.C. §2000e-5(g). Courts disagree on whether unemployment, workers compensation, pension benefits, etc. should be considered interim earnings and deducted from back
"Rightful place" relief involves not only monetary relief, but may also involve, e.g.:

a. An order promoting or upgrading victim to the position or an equivalent position would have held in absence of discrimination.

b. Granting of retroactive seniority.

Front pay is compensation for future economic losses that cannot be remedied by typical "rightful place" relief such as pay, or payments from a collateral source and not deducted. Compare, e.g., Dailey v. Societe Generale, 108 F.3d 451 (2d Cir. 1997) (unemployment not deductible); Hunter v. Allis-Chalmers, Corp., 797 F. 2d 1417 (7th Cir. 1986) (finding district court did not abuse discretion in refusing to allow deduction for unemployment compensation); Daniel v. Loveridge, 32 F.3d 1472, 1478 n. 4 (10th Cir. 1994) (finding no abuse of discretion in district court's decision not to reduce award by unemployment compensation); Thurman v. Yellow Freight Sys., 90 F.3d 1160 (6th Cir. 1996) (finding workers' compensation to be collateral benefits which should not be deducted from backpay award); EEOC v. Ford Motor Co., 645 F.2d 183 (4th Cir. 1981) (holding district court ruled correctly in not deducting unemployment compensation), rev'd on other grounds, 458 U.S. 219, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982), with Grant v. Bethlehem Steel Corp., 622 F.2d 43, 47 (2d Cir. 1980) (finding district court's deduction of unemployment compensation fair and reasonable); Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975) (finding deduction of unemployment compensation within discretion of district court); Bowie v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969) (finding deduction of unemployment compensation was proper, being a valid exercise of the trial judge's discretion); Wilcox v. Stratton Lumber Inc., 921 F. Supp. 837, 843 (D.Me. 1996) (unemployment deducted in court's discretion; noted that no circuit had determined that such benefits should be deducted as a general rule).
hiring, promotion or reinstatement. While reinstatement is generally the preferred remedy, such factors as whether there exists a vacancy in which to place plaintiff, whether reinstatement would require displacement of another, the existence of feelings of animosity or hostility, whether the parties agree that reinstatement is viable may militate in favor of front pay instead of reinstatement. See generally, Seymour and Aslin, EQUAL EMPLOYMENT LAW UPDATE, Chapter 46.

2. In cases involving intentional discrimination, but not disparate impact cases.

(a) Compensatory damages.

(1) Included in compensatory damages are "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses." Excluded are "back pay, interest on back pay, or any type of relief authorized under section 706(g) [42 U.S.C. §2000e-5(g)]."

---


(b) Punitive damages, against nongovernmental employer in cases of "malice" or "reckless indifference."  

(c) The sum of compensatory and punitive damages is subject to dollar caps depending on size of employer.


Prohibits employers from paying men and women unequally for "equal work" within an establishment unless the difference is based on a factor set forth in the statute.

A. What Entities Are Prohibited From Discriminating?

1. Employers

   (a) Private employers.

   (b) State and Local Governments, although certain kinds of employees are exempted.

---


64/ 29 U.S.C. §203(d) defines "employer" as any person acting directly or indirectly in the interest of an employer in relation to employee....". Limitations on who is a covered "employer" or "employee" are contained in 29 U.S.C. §203.

65/ As part of the Fair Labor Standards Act ("FLSA"), the FLSA’s complicated structure of exemptions applies to the EPA; see, e.g., 29 U.S.C. §213(a)(3)(certain non-profits); §214, §213(a)(6)-(8)(certain agricultural workers, newspaper employees and others); §213(a)(10), (15)(certain switchboard operators; certain casual domestic service workers).
(c) Federal Government, with certain exceptions.\(^{68}\)

B. On What Bases?

Sex

C. In What Kinds of Decisions/Actions?\(^{69}\)

1. Payment of men and women unequal wages for "equal work" in the same establishment is prohibited.
   (a) "equal work" - jobs "the performance of which requires equal skill, effort and

\(^{66}\) Most EPA cases subsequent to Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) (infra note 82) have concluded that the Eleventh Amendment does not bar EPA suits against the states. Varner v. Illinois State University, 226 F.3d 927 (7\(^{th}\) Cir. 2000), cert. denied, 533 U.S. 902, 121 S.Ct. 2241, 150 L.Ed.2d 230 (No. 00-1277) (June 11, 2001); Anderson v. State University of New York, 107 F.Supp.2d 158 (N.D. NY 2000); Kovacevich v. Kent State Univ., 224 F.3d 806 (6th Cir. 2000); Hundertmark v. State of Florida, Dept. of Transp., 205 F.3d 1272 (11th Cir. 2000). The U.S. Supreme Court recently let stand a decision from U.S. Court of Appeals for the Fifth Circuit in which the Fifth Circuit agreed that the EPA does not violate the Eleventh Amendment in light of the Supreme Court’s decision in Kimel. Siler-Khodr v. Univ. of Tex. Health Sci. Ctr. San Antonio, 261 F.3d 542 (5\(^{th}\) Cir. 2001), cert. denied, 123 S.Ct. 694, 154 L.Ed.2d 631 (No. 02-253) (Dec. 16, 2002). Similarly, the Supreme Court has held that the 11\(^{th}\) Amendment does not bar suits brought against state employers under the Family Medical Leave Act of 1993. Nevada Dept. of Human Resources v. Hibbs, 123 S.Ct. 1972 (No. 01-1368) (May 27, 2003).


responsibility, and which are performed under similar working conditions" except where such payment is made pursuant

(1) a seniority system;

(2) a merit system;

(3) a system which measures earnings by quantity or quality of production; or

(4) a differential based on any other factor than sex.

2. Labor organizations are prohibited from causing or attempting to cause an employer to discriminate.  

3. Employer may not reduce the wage rate of any employees in order to comply.  

4. No person may retaliate against an employee because s/he has "filed any complaint or instituted or caused to be instituted any proceeding under or related to [the Act]... or has testified or is about to testify any such proceeding."

D. Remedies

---

The "equal work" standard does not require that the jobs be "identical" or "exactly alike", but requires more than that they be merely "comparable." Thompson v. Sawyer, 678 F.2d 257, 272-73 (D.C. Cir. 1982). The jobs need only be "substantially equal." Schultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), cert. denied, 398 U.S. 905 (1970). Job content, not job description is controlling.


1. Back pay\textsuperscript{74} plus

2. An equal amount as liquidated damages\textsuperscript{75} unless defendant proves it acted in "good faith and that he had reasonable grounds for believing that this act or omission was not a violation..."\textsuperscript{76}

3. Back pay is limited to two (2) years preceding suit, except in cases of willful violations when period is three (3) years.\textsuperscript{77}

4. Prejudgment interest.\textsuperscript{78}

5. Attorney’s fees and costs.\textsuperscript{79}

6. Injunctive relief.\textsuperscript{80}

7. Punitive damages are not available, however, at least one court has permitted an award of punitive damages under EPA’s retaliation

\textsuperscript{74}/ 29 U.S.C. §260.

\textsuperscript{75}/ 29 U.S.C. §216(b).

\textsuperscript{76}/ 29 U.S.C. §260.

\textsuperscript{77}/ 29 U.S.C. §255. In McLaughlin v. Richland Stone Co., 486 U.S. 128 (1988), the Court noted that the standard of "willfulness" necessary to trigger the three-year period under the EPA is the same as the "willfulness" standard adopted by the Court in Trans World Airlines v. Thurston, 469 U.S. 111 (1985) to support liquidated damages under the ADEA.

\textsuperscript{78}/ EEOC v. Liggett & Myers, Inc., 690 F.2d 1072, 1074 (4th Cir. 1982); McMillan v. Massachusetts Society for the Prevention of Cruelty to Animals, 140 F.3d 288 (1st Cir. 1998).

\textsuperscript{79}/ Mandatory to a prevailing party. 29 U.S.C. §216(b).

\textsuperscript{80}/ Bailey v. Southwest Gas Co., 275 F.3d 1181 (9th Cir. 2002) (finding an employee may obtain injunctive relief for violations of the FLSA’s antiretaliation provision); Soto v. Adams Elevator Equipment Co., 941 F.2d 543 (7th Cir. 1991).
provision, based on 1977 amendment to §216(b) permitting the award of "legal" as well as equitable relief.

III. Age Discrimination in Employment Act ("ADEA")

A. What Entities Are Prohibited From Discriminating?

1. Employers

A. Private employers in industry affecting commerce with 20 or more employees for each of 20 or more weeks in current or preceding calendar year.

B. State and local governments.

C. Federal government.

2. Employment agencies.

---

\(^{81}\) ADEA's purpose is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. §621(b).

\(^{82}\) 29 U.S.C. §630(b).

\(^{83}\) 29 U.S.C. §630(b)(2). While state employers are covered by the terms of the statute, enforcement is very limited as a result of Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) (Congress may not constitutionally abrogate the states' Eleventh Amendment immunity from suit in federal court under the ADEA).

\(^{84}\) 29 U.S.C. §633a governs age discrimination actions against the federal government and contains the only exemptions and defenses applicable to the federal government; different procedural requirements apply to federal employee age claims. Id. Congressional employers are covered by the Congressional Accountability Act, 2 U.S.C. §1311(a)(2).

\(^{85}\) 29 U.S.C. §623(b).
3. Labor organizations.\textsuperscript{86}

B. On What Basis?

1. Prohibits discrimination on the basis of age defined as "at least 40."\textsuperscript{87}

C. In What Kinds of Decisions/Actions?

1. Prohibits Employers from:

(a) Discriminating in recruitment, hiring, job classification, transfer, promotion, compensation, termination and any other term or condition of employment.

(b) Reducing any employee's wage rate in order to comply with the law.\textsuperscript{88}

2. Prohibits employment agencies from failing or refusing to refer or otherwise discriminating

\textsuperscript{86/} 29 U.S.C. §623(c).

\textsuperscript{87/} 29 U.S.C. §631(a)(b).

\textsuperscript{88/} In General Dynamics Land Systems, Inc. v. Cline, 124 S.Ct. 1236 (2004), the Supreme Court held that the ADEA does not prevent employers from implementing policies that treat older employees more favorably than younger workers – all of whom are within the protected class of age 40 and over. The case involved a group of plaintiffs, all of whom were at least 40 but not yet 50 years old in 1997, who alleged that their employer violated the ADEA when it negotiated a collective bargaining agreement in 1997 that offered retiree health benefits only to those workers who had turned 50 as of July 1 of that year. Although acknowledging that §623(a)(1) theoretically could be construed to include claims of age discrimination against younger workers, the court noted that the text, structure, purposes, and history of the ADEA, however “speak[s] almost unanimously to an understanding of discrimination as directed against workers who are older than the ones getting treated better.”
because of age or from classifying or referring on basis of age.

3. Prohibits labor organizations from:

(a) Excluding or expelling a person from its membership or otherwise discriminating against someone;

(b) Limiting, segregating, or classifying its membership; or classifying or failing or refusing to refer for employment in a way which would deprive or tend to deprive one of employment opportunities, or would limit employment opportunities or otherwise adversely affect status as an employee or applicant for employment; or

(c) Causing or attempting to cause an employer to discriminate.

4. Prohibits retaliation, \(^{89}\) i.e. discrimination against one who:

(a) "Has opposed any practice made unlawful by the section;" or

(b) "Has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or litigation under this chapter."

5. Prohibits employers, labor organizations and employment agencies from printing or publishing certain notices indicating any preference,

limitation, specification or discrimination based on age.  


(a) Executives and high-level policy-makers entitled to annual retirement benefit from current employer of at least $44,000.  

(b) Firefighters and law enforcement officers may be required to retire pursuant to certain state or local laws, within the limitations contained in the ADEA.  

7. Statutory Defenses

(a) Bona fide seniority systems.  

(b) Bona fide occupational qualifications.  

(c) Reasonable factors other than age.  29 U.S.C. §623(f)(1) (e.g., uniformly required educational credentials, prior experience, etc.).  

(d) Bona fide benefit plans.  29 U.S.C. §623(f)(2). Employers may not refuse to hire any person and may not require or

---

91/ 29 U.S.C. §631(c) (permits compulsory retirement at age 65).  
94/ 29 U.S.C. §623(f)(1). In order to establish that age is a BFOQ, an employer must provide that it has a factual basis for believing that all or substantially all persons over the age in question would be unable to perform essential job duties in a safe and efficient manner. Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985).
permit the involuntary retirement of any person because of age-based distinctions in an employee benefit plan. Employers may observe the terms of bona fide benefit plans (such as retirement, pension, life insurance, disability payments, health insurance, etc.) which make age-based distinctions, but only "where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker...." 95

D. Remedies

1. Penalty provisions of Fair Labor Standards Act apply. 96 These authorize:

   (a) Back wages and benefits. 97

---


97/ Although not expressly stated in the ADEA or FLSA, an employee has duty to mitigate damages -- an issue on which the employer has the burden of proof. See, e.g., Anastasio v. Schering Corp., 838 F.2d 701 (3d Cir. 1988); West v. Nabors Drilling USA, Inc., 330 F.3d 379 (5th Cir. 2003); Jackson v. City of Cookeville, 31 F.3d 1354 (6th Cir. 1994); Yancey v. Weyerhaeuser Co., 277 F.3d 1021 (8th Cir. 2002); Muñoz v. v. Oceanside Resorts, Inc., 223 F.3d 1340 (11th Cir. 2000).

   Courts differ on whether unemployment compensation should be deducted. Compare, e.g., Gaworski v. ITT Commercial Fin, Corp., 17 F.3d 1104 (8th Cir, 1994)(not deducted) with EEOC v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980)(deduction within discretion of the court).
(b) Employment reinstatement, promotion.

(c) Other equitable relief such as pay increases or front pay.

(d) "Liquidated damages" in an amount equal to the back pay award -- if wrongful conduct found to be "willful".\(^9^8\)

(e) Attorneys fees and costs.\(^9^9\)

(f) Injunctive relief.\(^1^0^0\)

2. Prejudgment interest: Circuits split on whether to award prejudgment interest when liquidated damages have been awarded.\(^1^0^1\)

3. Front pay

4. Punitive damages not available.\(^1^0^2\)

5. Compensatory damages not available.\(^1^0^3\)

\(^9^8\) 29 U.S.C. §626(b). Trans World Airlines v. Thurston, 469 U.S. 111 (1985) (action is "willful" under §626(b) if "the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA").

Note that ADEA standard differs from the FLSA and the Equal Pay Act, where a finding of "willfulness" is not required for an award of liquidated damages,

\(^9^9\) 29 U.S.C. §216(b).

\(^1^0^0\) 29 U.S.C. §217.

\(^1^0^1\) See Seymour and Dichter, Sec. I-3.

\(^1^0^2\) In Trans World Airlines, Inc. v. Thurston, Supreme Court described liquidated damages as intended to be "punitive in nature." 469 U.S. 111, 125 (1985).

6. Prerequisites regarding releases and settlements of ADEA claims.\textsuperscript{104}

E. Special Issues in Age Discrimination Cases\textsuperscript{105}

1. Proving Disparate Treatment When the Comparator Is Over 40

(a) O’Connor v. Consolidated Coin Caterers Corporation.

As indicated above, only those who are 40 and older are protected under the ADEA. This raises the issue of whether discrimination has occurred when the comparator is also over 40 and within the protected class. In O’Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996), the 56-year-old plaintiff was terminated in a reduction in force and replaced by a 40-year-old worker. The Fourth Circuit held that the plaintiff failed to establish a \textit{prima facie} claim of age discrimination because he was not replaced by someone outside of the protected age group. The Supreme Court reversed. The Court held that in order to establish a \textit{prima facie} claim, the plaintiff need not prove that the person who replaced him was outside of the protected age group.

\begin{quote}
("ADEA provides no compensation for any of the other traditional harms associated with personal injury. Monetary remedies under the ADEA are limited to back wages which are clearly of an ‘economic character’ and liquidated damages.")
\end{quote}


\textsuperscript{105/} For a recent overview of the law on discrimination on the basis of age, see generally EDL 2002 Supp, at Chapter 16; and for recent cases discussing issues regarding discrimination on the basis of age, see generally EELU 2005 Update, at Chapter 7.
In so ruling, the Court observed that the relative ages of the plaintiff and the person who replaced him is a far more reliable indicator of age discrimination than the fact that the plaintiff was replaced by someone outside of the protected class. The Court went on to state that an inference of age discrimination cannot be drawn from evidence that the plaintiff was replaced by another worker who is insignificantly younger. On the other hand, the fact that a replacement is substantially younger than the plaintiff can create an inference of age discrimination, regardless of whether the younger person is within or without the protected class.

(b) Post O'Connor cases:

Pursuant to O'Connor, the courts have varied on the issue of how much younger the replacement or comparator must be to meet the "substantially younger" test. In Showalter v. University of Pittsburgh Medical Center, 190 F.3d 231 (3rd Cir. 1999), the plaintiff who was laid off was 61, and the employees retained were 52 and 45. The Third Circuit held that both the eight year as well as the sixteen year difference in age was sufficient to meet the "substantially younger" test. In contrast, in Hartley v. Wisconsin Bell, Inc., 124 F. 3d 887, 892 (7th Cir. 1997) and Fisher v. Wayne Dalton Corp. 139 F.3d 1137, 1141 (7th Cir. 1998), the court held that at least a ten year age difference is required to meet the "substantially younger test," and "any age disparity less than ten years is 'presumptively insubstantial'". See also Girten v. McRentals, Inc., 337 F.3d 979, 981 (8th Cir. 2003) (nine-year age difference "may not be significant enough" to demonstrate age discrimination); Dunaway v. International Brotherhood of Teamsters, 310
F.3d 758 (D.C. Cir. 2002) (six-year difference in ages between plaintiff and comparator insufficient to sustain claim of age discrimination); Cianci v. Pettibone Corp., 152 F.3d 723 (7th Cir. 1998) (a five-year difference was not enough), and cf. Fairchild v. Forma Scientific, Inc., 147 F.3d 567 (7th Cir. 1998) (plaintiff was six years younger than the decision maker, and this would make it hard for her to prove discrimination.) See also EDL 2002 Supp. at p. 429, note 142.

(c) "Reverse Discrimination":

In General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 976 (2004), the U.S. Supreme Court held that the ADEA does not protect individuals age 40 and over from implementing policies that discriminate in favor of older members of the protected class. The case involved a group of plaintiffs, all of whom were at least 40 but not yet 50 years old in 1997, who alleged that their employer violated the ADEA when it negotiated a collective bargaining agreement in 1997 that offered retiree health benefits only to those workers who were age 50 or older as of July 1 of that year.
2. Availability of Disparate Impact Theory Under the ADEA

In Smith v. City of Jackson, 125 S.Ct. 1536 (2005) the Supreme Court answered a previously unresolved question, holding that the disparate impact theory of liability is available under the Age Discrimination in Employment Act. The Court noted, however, that an age claim based on a disparate impact theory is harder to establish than is a disparate impact claim under Title VII. Under the statutory framework of the ADEA, the employer has a defense if it shows that the differentiation is based on reasonable factors other than age. In addition, although the Civil Rights Act of 1991 amended Title VII to modify the holding of Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), that a plaintiff asserting a disparate impact claim must identify the specific employment practices that cause the disparate impact, the amendment does not apply to the ADEA. Therefore, Wards Cove’s requirement that the plaintiff identify the specific practices that cause the disparate impact remains applicable to the ADEA. Id. At 1545.

3. Older Worker Benefit Protection Act. ("OWBPA")

(a) Validity of Waivers and Settlement Agreements. The OWBPA was passed in 1999 to set forth specific requirements for a valid waiver of ADEA claims. Final guidelines under the Act were issued by the EEOC in 1998 and are set forth at 29 CFR 1625.22. "At a minimum, the statute requires the

---

106 Pursuant to the Civil Rights Act of 1991, under Title VII the complaining party need not demonstrate that each particular challenged employment practice causes a disparate impact if the complaining party can demonstrate to the court that the elements of respondent’s decisionmaking process are not capable of separation for analysis. In that event, the decisionmaking process may be analyzed as one employment practice. 42 U.S.C. §2000e-2(k)(1)(B)(i).
following to establish that the waiver is "knowing and voluntary":

- the release must be written so as to be understandable by the employee or by the average individual eligible to participate,
- it must refer specifically to ADEA claims,
- it must not purport to apply to claims arising after its date of execution,
- it must be supported by consideration beyond that to which the employee would otherwise be entitled
- it must advise the employee to consult with an attorney prior to executing the document
- it must give the employee at least 21 days to review the document before signing it, and 45 days if the settlement involves an incentive that is offered to a group.
- it must allow the employee seven days to revoke the agreement after signing, and
- if it is offered in connection with an exit incentive or group discharge program, the employer must provide information about the job titles and ages of those eligible for the program, and the corresponding information pertaining to employees in the same job titles who are not eligible for or selected for the program.

No Tender Back Requirement. In Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998), the Supreme Court held that strict compliance with all the OWBPA’s requirements is necessary for a valid release, and that a plaintiff whose release does not meet the OWBPA standards is not required to tender back the consideration received under the release prior to filing a lawsuit against the employer.
Numerous issues have arisen regarding the intricacies of the components of release agreements, the effect of an unlawful waiver or the offer of one, and the nature of the consideration required for an effective release. See generally, EDL 2002 Supplement at 479-483 and EELU 2005 Update.

4. The OWBPA’s "Safe Harbor"

The OWBPA also delineates a "safe harbor" to secure the intent of the ADEA to allow age based reductions in employee benefit plans when such differences are "justified by significant cost considerations". This "safe harbor" allows employers to prevent "double dipping" by offsetting pension payments with other disability or other payments to employees who leave the workplace. However, there is continued litigation over whether the "safe harbor" requirements have been met, and the types of benefits that are covered. See, e.g., EDL 2002 Supp. at pp. 475-479.

IV. Americans with Disabilities Act of 1990 ("ADA")

The ADA prohibits discrimination in employment on the basis of an actual or perceived disability or the record of having had a disability.

A. What Entities Are Prohibited From Discriminating?

1. Employers

   (a) Private employers

---


108/ 42 U.S.C. §12111(5). The Supreme Court recently determined that, in the absence of direction from Congress, courts should look to the common law control test to determine employee status under the ADA and other discrimination statutes, both for the
Exclusions: same as Title VII except no special provision for religious organizations.

(b) Covered entities in foreign countries: limitations set forth in 42 U.S.C. §12112(c).

(c) State and local government.

(d) Federal Government - Not covered by the ADA. Federal employees seek monetary or equitable relief under the Rehabilitation Act of 1973.

2. Employment agencies
3. Labor organizations
4. Joint labor-management committees

B. Basis of Discrimination

Against qualified individual with disability

1. "Disability" is "(A) a physical or mental purpose of determining who is an employer as well as determining who is an employee. See Clakamas Gastroenterology Associates P.C. v. Wells, 538 U.S. 440 (2003) (remanding for a determination as to whether shareholder-directors of a professional corporation qualify as "employees" for the purposes of determining whether professional corporation had enough employees to be considered an employer under the ADA). In Clackamas, the Court endorsed the EEOC's proposed six-factor test for ascertaining control.


impairment that substantially limits one or more of the major life activities of an individual, or (B) having a record of such impairment, or (C) being regarded as having such an impairment."\(^{111}\)

2. **Statutory Exclusion**: Homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, psychiatric substance abuse disorders resulting from current illegal use of drugs.\(^{112}\)

3. "Qualified individual with disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job."\(^{113}\)

4. "Reasonable accommodation" may include -

   (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
   B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provisions of qualified readers or interpreters, and other similar accommodations for individuals with

\(^{111}\) 42 U.S.C. §12102(2).

\(^{112}\) 42 U.S.C. §12208 and 12211. Employers can require that employees not be under the influence of alcohol or other drugs while at work, and may refuse to hire or fire persons who are currently using illegal drugs. 42 U.S.C. §12114(c)(2). But former users who have completed a supervised rehabilitation program and are not current users are protected. 42 U.S.C. §12114(b).

\(^{113}\) 42 U.S.C. §12111(8).
disabilities.\textsuperscript{114}

5. Undue hardship

... an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).\textsuperscript{115}

C. In What Kinds of Decisions/Actions?

"No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application and testing procedures, hiring, promotion, compensation, training, or any other term, condition or privilege of employment".\textsuperscript{116}

"Discriminate" is defined very comprehensively and broadly in 42 U.S.C. §12111(b) and includes, \textit{inter alia},

1. Disparate Treatment: Unlawful to limit, segregate, or classify an applicant or employee in a way that adversely affects his or her opportunities or status because of a disability.\textsuperscript{117}

2. Disparate Impact: Unlawful to use standards, criteria, or methods of administration that have the effect of discriminating on the basis of disability or that perpetuates discrimination of others subject to common administrative

\textsuperscript{114} 42 U.S.C. §12111(9).


\textsuperscript{116} 42 U.S.C. §12112(a).

\textsuperscript{117} 42 U.S.C. §12112(b)(1).
control.\textsuperscript{118}

To use selection criteria that screen out individual with disability -- or a class, unless standard, test, criteria is shown to be job-related for the position in question and is consistent with business necessity.\textsuperscript{119}

3. Participation in Contractual Relationships that Have the Effect of Discriminating: Unlawful to participate in contractual or other relationships that have the effect of subjecting applicants or employee to prohibited discrimination, e.g., relationships with employment or referral agencies, labor unions, organizations providing fringe benefits to employees, and organizations providing training and apprenticeship programs.\textsuperscript{120}

4. Discrimination Because of a Relationship to a Person with a Disability: Unlawful to exclude or otherwise deny equal jobs or benefits to a qualified individual because of that individual’s known relationship or association with a person known to have a disability.\textsuperscript{121}

5. Failure to Make Reasonable Accommodation: Unlawful to fail or refuse to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the employer shows that the accommodation would impose an undue hardship on the operation of its business.\textsuperscript{122}

6. Pre-employment Inquiries: Situations which are

\textsuperscript{118} 42 U.S.C. §12112 (b) (e).

\textsuperscript{119} 42 U.S.C. §12112 (b) (6).

\textsuperscript{120} 42 U.S.C. §12112 (b) (2).

\textsuperscript{121} 42 U.S.C. §12112 (b) (4).

\textsuperscript{122} 42 U.S.C. §12112 (b) (5).
and are not permissible are addressed in statute.\textsuperscript{123}

7. Medical Examinations and Inquiries: Situations which are and are not permissible addressed in statute.\textsuperscript{124}

D. Remedies

Same as Title VII.

V. \& VI. Sections 1981 and 1983

Now codified at 42 U.S.C. §1981 and §1983, these are two of the civil rights enforcement statutes originally enacted immediately following the Civil War in order to effectuate the guarantees of the 13\textsuperscript{th} and 14\textsuperscript{th} Amendments respectively. The laws give private individuals a cause of action in federal court to enforce the enumerated civil rights.

V. Section 1981

The Statute:\textsuperscript{125}

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

\textsuperscript{123/} 42 U.S.C. §12112(d)(2).

\textsuperscript{124/} 42 U.S.C. §12112(d)(1), (3), (4).

\textsuperscript{125/} 42 U.S.C. §1981(a) was originally enacted pursuant to Section 2 of the Thirteenth Amendment, as part of the Civil Rights Act of 1866, §1. 42 U.S.C. §1981(b) and (c) were added by the Civil Rights of 1991, Pub. L. 102-166.
(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

General Comment

Section 1981 provides a longer time period within which to file a complaint, does not require claimant to go through administrative procedures, and -- while authorizing the same equitable remedies as Title VII -- allows recovery of uncapped compensatory and punitive damages.\(^{126}\)

A. What Entities Are Covered?

1. Private individuals and entities\(^{127}\) (without regard to number of employees)

---

\(^{126}\) In Jones v. R.R. Donnelley & Sons, Co., 541 U.S. 369, 124 S.Ct. 1836 (2004), the U.S. Supreme Court held that the catchall federal four-year statute of limitations enacted as part of the Civil Rights Act of 1991 (28 U.S.C. §1658(a)), rather than the state two-year statute of limitations, was applicable to a §1981 claim arising after December 1, 1990.

2. Federal Government, but only in few cases not covered by Title VII.\textsuperscript{128}

3. State and municipal governments\textsuperscript{129}

B. On What Bases?

1. Race.

Race is broadly defined to mean "identifiable classes of persons based on ancestry or ethnic characteristics."\textsuperscript{130} Includes, e.g.,

- African-Americans
- Caucasians\textsuperscript{131}
- Hispanics, Filipinos, Jews, Arabs, Chinese, Asian-Indians\textsuperscript{132}

2. Alienage\textsuperscript{133} (i.e., citizenship status).


\textsuperscript{129/} See Comment on Issues Unique to State and Municipal Government Defendants, infra text accompanying notes 143-146.


\textsuperscript{132/} Claims of discrimination on basis of national origin are not actionable under §1981; claimants of different ethnic background must allege discrimination based on race or color.

\textsuperscript{133/} Anderson v. Conboy, 156 F.3d 167 (2d Cir. 1998), cert.
3. Section 1981 does not cover claims of discrimination on basis of sex, national origin, religion, age or disability.

C. In What Kinds of Decisions/Actions?\(^{134}\)

1. Adverse employment decisions, e.g., hiring, termination,\(^{135}\) promotion, pay issues including but not limited to "Hostile environment" racial harassment,\(^{136}\) constructive discharge.\(^{137}\)

2. Retaliation\(^{138}\)

---


\(^{135}\) Most courts hold that Section 1981 covers claims of termination of at-will employment. E.g., Lauture v. IBM Corp., 216 F.3d 258 (2d Cir. 2000); Spriggs v. Diamond Auto Glass, 165 F.3d 1015, 1018-19 (4th Cir.1999); Fadeyi v. Planned Parenthood Ass'n of Lubbock, Inc., 160 F.3d 1048, 1051-52 (5th Cir.1998); Perry v. Woodward, 199 F.3d 1126, 1133 (10th Cir.1999).


\(^{137}\) Brown v. Ameritech Corp., 128 F.3d 605, 607 (7th Cir. 1997).

\(^{138}\) Several courts have held a retaliation claim cognizable if retaliation was in response to the employee’s assertion of rights protected by § 1981. Hawkins v. 1115 Legal Serv. Care, 163 F.3d 684, 693 (2d Cir. 1989); O’Neal v. Ferguson Constr. Co., 237 F.3d 1248 (10th Cir. 2001); Spriggs v. Diamond Auto Glass, 165 F.3d 1015, 1018-19 (4th Cir.1999); Andres v. Lakeshore Rehab. Hosp., 140 F.3d 1405 (11th Cir. 1998); Evans v. Kansas City School Dist., 65 F.3d 98 (8th Cir. 1995). Courts have also found claims are cognizable if retaliation is in response to attempts to vindicate § 1981 rights of others. Johnson v. University of Cincinnati, 215 F.3d 561 (6th Cir. 2000); Skinner v. Total Petroleum, Inc., 859 F.2d 1439 (10th Cir. 1988).
D. Remedies

1. Injunctive relief - e.g., hiring, promotion, reinstatement, retroactive seniority
2. Back pay/Front pay
3. Compensatory damages
4. Punitive damages
5. Attorneys’ fees
6. Prejudgment interest

COMMENT ON ISSUES UNIQUE TO STATE AND MUNICIPAL GOVERNMENT DEFENDANTS

A. State Employers - Effect of Eleventh Amendment

- injunctive relief against state officials permissible


\footnote{Compensatory and punitive damages are not subject to the dollar limitations contained in Title VII.}

\footnote{Compensatory and punitive damages are not subject to the dollar limitations contained in Title VII.}

\footnote{42 U.S.C. §1988, Civil Rights Attorney’s Fees Awards Act.}

\footnote{See, e.g., Foulks v. Ohio Dep’t of Rehabilitation and Correction, 713 F.2d 1229, 1231 (6th Cir. 1983).}
- money damages against state barred
- suits for money damages against state officials in individual capacity permissible; qualified immunity in theory is available.\textsuperscript{144}

B. Municipal Employers

- Municipalities are not immune from §1981 actions.
- Unresolved issue is whether the pre-1991 CRA decision in Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989) requiring claimants to sue governmental actors under §1983 for violations of §1981 (under which liability against municipal corporations cannot be premised on respondeat superior but requires proof of a custom or policy within the meaning of Monell v. Dept’ of Social Services, 436 U.S. 658 (1978)) is still good law or whether the 1991 CRA Amendments, 42 U.S.C. §1981(c), created a right of action against municipalities directly under §1981 and in effect overturned Jett.\textsuperscript{145}
- Qualified immunity in theory available in individual capacity suits, but not likely to be available since qualified immunity requires "good faith".\textsuperscript{146}

VI. Section 1983\textsuperscript{147}

\textsuperscript{144/} See infra text accompanying note 146.

\textsuperscript{145/} See Dennis v. County of Fairfax, 55 F.3d 151 (4th Cir. 1995); Butts v. County of Volusia, 22 F.3d 891 (11th Cir. 2000) for the former proposition; and Oden v. Oktibbeha County, Miss., 246 F.3d 458 (5th Cir. 2001); Federation of African Am. Contractors v. Oakland, 96 F.3d 1204 (9th Cir. 1996) for the latter.

\textsuperscript{146/} See Lowe v. Monrovia, 775 F.2d 998 (9th Cir. 1985).

\textsuperscript{147/} 42 U.S.C. §1983 was originally enacted as part of the Civil
The Statute

Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State or Territory ..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

A. Which Entities Are Prohibited From Discriminating?

1. State and local governments

2. Private entities only if the private institution is so involved with the state that state action is alleged to exist.

3. Federal Government

   (a) actions of federal officials done under color of federal law not actionable.

   (b) actions of federal officials done under

Rights Act of 1871, pursuant to Section 5 of the Fourteenth Amendment, empowering Congress to enforce the provisions of the Fourteenth Amendment.


149/ See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982) referencing four factors, e.g., the "public function" test; the "state compulsion" test; the "nexus" test; a "joint action" test. Id. at 939.
COMMENT ON SPECIAL ISSUES RE: STATE AND MUNICIPAL GOVERNMENT DEFENDANTS UNDER §1983

A. State Employers -- Effect of Eleventh Amendment

- bars suit in federal court for damages against the state or against state officials in their official capacities.

- does not bar prospective relief against a state through an appropriate official even if compliance will cost some money.

- does not bar an award in proper case, of litigation costs or expenses including attorney’s fees.

- does not apply to suits against state governmental officials in their individual/personal capacity; however, suits subject to defense of
  - absolute immunity

---


151/ It is beyond the scope of this paper to do more than highlight the complicated issues applicable to State Governments and Local Governments under §1983.


- qualified or "good faith" immunity

**B. Municipal Employers**

Municipalities and individual municipal agents acting in official capacities may be sued under §1983 for damages and for injunctive relief.\(^{158}\)

- but *respondeat superior* liability barred;\(^{159}\) action alleged must be official policy of government\(^{160}\)

- Individual capacity suits permissible -- subject to absolute and qualified immunity.

**C. What Bases and What Kinds of Decisions/Actions?**

Section 1983 does not create federal rights, but is used to enforce rights established by other sources of federal law. The principal source of federal law used in employment discrimination cases is

1. The Equal Protection Clause

   Bases protected by the Equal Protection Clause include:

---

\(^{157/}\) *Hafer*, Id. at 25.


\(^{159/}\) Id. at 691-95.

\(^{160/}\) A plurality in *City of St. Louis v. Praprotnik*, 485 U.S. 112, 131 (1988) held that an "official policy" is one adopted by someone with final policy-making authority with respect to action ordered. *Praprotnik* recognized two situations where §1983 liability could be established by actions of non-policy making officials, i.e., (1) a widespread practice so permanent and well-settled as to constitute custom or usage; (2) ratification of subordinate’s decision by authorized policy-makers. Id. at 128.
- Race, including racial harassment
- Sex, including sexual harassment
- Retaliation for assisting or interacting with minorities

Discrimination must be intentional;\(^{161}\) adverse impact not enough. Courts are divided over whether Title VII provides exclusive remedy.

D. **Remedies\(^{162}\)**

**Municipalities**
- Injunctive Relief
- Back Pay
- Compensatory Damages
- No punitive damages\(^{163}\) except in individual capacity cases
- Attorneys fees - available under 42 U.S.C. 1988
- Prejudgment Interest

**State**
- Injunctive Relief


\(^{162}\) This section should be read in conjunction with "Comment on Special Issues re: State and Municipal Government Defendants Under §1983, supra. The state statute of limitations for personal injury suits apply to §1983 suits. Wilson v. Garcia, 471 U.S. 261 (1985). As to when there are more than one state personal injury statutes, see Owens v. Okure, 488 U.S. 235 (1989)."

- Money Damages available only against state actors in individual capacity


- Interest\textsuperscript{164}

\textsuperscript{164} Missouri v. Jenkins, 491 U.S. 274, 280-84 (1989) ("no-interest rule" applicable to federal government does not apply to state government).
SEXUAL AND OTHER FORMS OF HARASSMENT

Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.” Sexual harassment is a form of gender discrimination. Although most harassment cases involve sexual harassment, harassment based on race, religion, national origin, disability, and other protected characteristics also may be actionable.

Actionable harassment occurs when an employee or applicant is subjected to unwelcome conduct that is motivated by the complainant’s membership in a protected class and that either (a) results in a tangible employment action, or (b) is sufficiently severe or pervasive to create a hostile work environment for a reasonable person in the complainant’s circumstances. Whether the harassment is motivated by race, color, sex, religion, national origin, age, or disability, all cases of harassment are analyzed similarly.

I. SEXUAL HARASSMENT

A. OVERVIEW AND HISTORICAL PERSPECTIVE

1. Introduction

Sexual harassment in employment initially was narrowly defined as a demand that a subordinate, usually a woman, grant sexual favors to obtain or retain a job benefit. Now it is more broadly defined as the imposition of an unwanted condition on a person’s employment because of that person’s gender. The sexual nature of the conduct is significant only as proof that the conduct occurred because of the complainant’s gender.

The evolution of harassment law warrants a brief summary. For over 40 years, Title VII has prohibited discrimination in employment on the basis of “sex.” But Title VII does not mention, let alone define, “harassment.” Not until Judge Charles Richey’s 1976 decision in Williams v. Saxbe did a court recognize sexual harassment as a form of sex discrimination. The Supreme Court’s 1993 decision in Harris v. Forklift Systems, Inc., 510 U.S. 17, 63 FEP 225 (1993), adopted a definition of a hostile environment that encompasses race, color, religion, and national origin as well as gender. Almost every principle discussed in this chapter is applicable to harassment on any protected basis. See generally Burlington Indus. Inc. v. Ellerth, 524 U.S. 742 (1998) (Thomas, J., dissenting) (standard for employer liability should be the same regardless of whether the basis of harassment is gender or race).

1 This is a draft of a chapter to appear in B. Lindemann & P. Grossman, Employment Discrimination Law (4th Ed. 2006) (C. Geoffrey Weirich, Editor-in-Chief). Copyright @ 2005 American Bar Association, Chicago, IL. Draft prepared by Jill Rosenberg, Prof. Mary Rose-Strubbe and Julie Richard-Spencer. For reprint permission, contact BNA Books (books@BNA.com).
3 See Section II infra.
4 The Supreme Court’s 1993 decision in Harris v. Forklift Systems, Inc., 510 U.S. 17, 63 FEP 225 (1993), adopted a definition of a hostile environment that encompasses race, color, religion, and national origin as well as gender. Almost every principle discussed in this chapter is applicable to harassment on any protected basis. See generally Burlington Indus. Inc. v. Ellerth, 524 U.S. 742 (1998) (Thomas, J., dissenting) (standard for employer liability should be the same regardless of whether the basis of harassment is gender or race).
following year, the D.C. Circuit in *Barnes v. Costle*\(^6\) confirmed that sexual harassment violates Title VII, reasoning that in most cases it is simply a form of disparate treatment based on sex. Since then, courts have endeavored to define the elements of actionable harassment.

2. *Meritor Savings Bank v. Vinson*

   In 1986, in *Meritor Savings Bank v. Vinson*,\(^7\) the Supreme Court held that “hostile environment” sexual harassment was sex discrimination, actionable under Title VII, even if it does not cause a direct financial injury. In *Meritor*, Mechelle Vinson alleged that she had been pressured into having sexual relations on numerous occasions with her supervisor, Taylor.\(^8\) She said she agreed to do so out of fear of losing her job. Vinson never reported Taylor to his supervisors, assertedly because of her fear of him. Taylor denied Vinson’s accusations. The bank, citing the absence of any complaint by Vinson, claimed ignorance of any improper conduct by Taylor.

   The Supreme Court stated that “[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor discriminate[s] on the basis of sex.”\(^9\) Further, the Court rejected the defense’s argument that liability was incompatible with the trial court’s finding that Vinson’s submission to Taylor’s advances had been “voluntary.” The Supreme Court held that *voluntariness* is not determinative; the correct question was whether Vinson, by her conduct, had indicated that the sexual advances were *unwelcome*.\(^10\) The Court acknowledged that the distinction between voluntariness and welcomeness required factfinders to make fine distinctions, often based on the credibility of witnesses. Yet these distinctions and credibility assessments can be made, the Supreme Court ruled; in doing so the factfinder should consider all the circumstances.\(^11\)

   Taylor and the bank also argued that even if Vinson had been sexually harassed, she had no claim under Title VII because she had suffered no economic loss. The Supreme Court rejected this argument also, ruling that discrimination because of sex violates Title VII even if it affects only the psychological aspects of employment,\(^12\) so long as the unwelcome conduct is “severe or pervasive.”\(^13\)

   The Supreme Court agreed with the defendants on one critical issue: that an employer is not automatically liable, even for a supervisor’s misdeeds, in a hostile environment case.\(^14\)

---

\(^{6}\) 561 F.2d 983, 15 FEP 345 (D.C. Cir. 1977).
\(^{7}\) 477 U.S. 57, 40 FEP 1822 (1986).
\(^{8}\) *Id.* at 60, 40 FEP 1822.
\(^{9}\) *Id.* at 64, 40 FEP 1822 (internal quotation marks omitted).
\(^{10}\) *Id.* at 68. The fact that the sex-related conduct was “voluntary,” “in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit” under Title VII.
\(^{11}\) *Id.* at 68–69.
\(^{12}\) *Id.* at 64.
\(^{13}\) *Id.* at 67 (citation omitted).
\(^{14}\) *Id.* at 72.
Liability depends, the Court explained, on the application of traditional “agency principles.”

The Court approved the EEOC’s 1980 Guidelines, which defined “sexual harassment” as “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.” This conduct is prohibited discrimination, regardless of whether it is part of an economic quid pro quo, if the “conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”

All “harassment” in the workplace “affects ‘a term, condition, or privilege’ of employment within the meaning of Title VII.” Absent a tangible employment action, harassment is actionable only if it is “sufficiently severe or pervasive to alter the conditions of [the complainant’s] employment and create an abusive working environment.”

3. The Quid Pro Quo/Hostile Environment Dichotomy

The early cases analyzed harassment as two discrete forms of conduct. “Quid pro quo harassment” was defined as a demand that an employee provide sexual favors to gain an employment benefit or to avoid an adverse employment action. Perhaps the most vivid example of sexual harassment in employment is a supervisor’s demand that a subordinate employee grant sexual favors in exchange for job benefits – hence the name “quid pro quo.” “Hostile environment harassment,” by contrast, was defined as a workplace permeated with unwelcome intimidation, ridicule, or insult, based on the plaintiff’s membership in a protected class, that is sufficiently severe or pervasive to create an abusive work environment.

The Supreme Court used the terms “quid pro quo” and “hostile environment” in Meritor, not in the context of considering employer liability, but to illustrate two examples of sexual harassment: (1) changing tangible terms or conditions of employment in connection with a sexual demand, and (2) changing intangible terms or conditions of employment through severe or pervasive conduct.

In 1993, the Supreme Court decided Harris v. Forklift Systems, clarifying the elements of a “hostile environment” claim under Title VII. The Court held that the work environment, to be actionable, must be one that “a reasonable person” would find hostile, looking at all the circumstances, and that, in addition, the plaintiff must subjectively perceive the environment as

---

15 Id. at 70–73.
16 29 C.F.R §1604.11. This Guideline, with its narrow focus on the “sexual nature” of the unwelcome conduct, has since been expanded. See generally Oncale.
17 477 U.S. at 65, 40 FEP 1822.
18 Id. at 67, 40 FEP 1822.
19 Id., 40 FEP 1822.
20 The term “quid pro quo” is attributed to Professor Catharine MacKinnon in SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).
21 Harris, 510 U.S. at 21, 63 FEP 225.
22 477 U.S. at 72–73, 40 FEP 1822.
A psychological injury is not a necessary element of a hostile environment case. Rather, psychological harm is but one factor to consider in determining whether an environment is hostile.

Other relevant factors include the frequency of the discriminatory conduct, its severity, whether the conduct is physically threatening or humiliating or a mere “offensive utterance,” and whether the conduct unreasonably interferes with the complainant’s work performance. In both Meritor and Harris the alleged harassers were the plaintiffs’ superiors. The Court, however, did not address issues of employer notice and employer responsibility in any detail in either decision.

Most federal appellate courts had concluded that employers were “strictly” liable for quid pro quo harassment, which, by definition, involves a supervisor with power to grant or withhold tangible job benefits. Because supervisors act for the employer in granting or withholding those benefits, courts held employers liable for the supervisory actions without further proof of the employer’s knowledge or notice. Courts disagreed, however, over whether employers should ever be “strictly” liable for a hostile environment, even when a supervisor had created the hostile environment. Plaintiffs, therefore, sought wherever possible to characterize conduct as “quid pro quo” harassment, so that employer liability would follow automatically. The ensuing arguments over the definition of “quid pro quo” harassment led to widely divergent rulings among the lower courts. It was against this backdrop that the Supreme Court approached harassment law in 1998.

4. The 1998 Supreme Court Harassment “Trilogy”

In 1998, the Supreme Court decided three harassment cases under Title VII. In Oncale v. Sundowner Offshore Services the Court held that Title VII recognizes claims for “same-sex” harassment. Faragher v. City of Boca Raton and Burlington Industries v. Ellerth dealt with employer liability for supervisors’ actions.

---

24 Id. at 21-22, 63 FEP 225.
25 Id., 63 FEP 225. Title VII “comes into play before the harassing conduct leads to a nervous breakdown.” Id. at 22, 63 FEP 225.
26 Id. at 22-23, 63 FEP 225.
27 Id. at 23, 63 FEP 225.
28 See, e.g., Nichols v. Frank, 42 F.3d 503, 66 FEP 614 (9th Cir. 1994); Karibian v. Columbia Univ., 14 F.3d 773, 63 FEP 1038 (2d Cir. 1994); Kauffman v. Allied Signal Inc., 970 F.2d 178, 59 FEP 606 (6th Cir. 1992).
29 Compare Sauers v. Salt Lake County, 1 F.3d 1122, 1125, 62 FEP 1269 (10th Cir. 1993) (supervisors with significant control over employees act as alter ego of employer and their unlawful acts subject employer to liability) with Bouton v. BMW of N. Am., 29 F.3d 103, 110, 65 FEP 53 (3d Cir. 1994) (employer not liable for hostile environment created by supervisor where it promptly addressed harassment complaints).
a. Same-Sex Harassment

Prior to the Oncale decision, federal appellate courts differed as to whether Title VII always forbids sexual harassment between members of the same sex. The Supreme Court granted certiorari in Oncale v. Sundowner Offshore Services Inc., which is a Fifth Circuit case finding that same-sex harassment did not violate Title VII. In a unanimous decision written by Justice Scalia, the Court reversed the Fifth Circuit and held that “nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.”

Joseph Oncale worked as a roustabout for Sundowner Offshore Services in an eight-man crew on an oil rig platform in the Gulf of Mexico. Oncale was verbally and physically assaulted by other members of the crew, including the supervisor, “in a sexual manner,” and was threatened with rape. His complaints to supervisory personnel produced no remedial action. Oncale eventually quit, indicating that he did so because of sexual abuse.

The Court began its opinion by repeating the statement from Meritor that the language of Title VII “evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.” Consistent with its conclusion in earlier race and sex discrimination cases, the Court observed that “Title VII’s prohibition of discrimination (because of . . . sex) protects men as well as women.”

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discriminate[ion] . . . because of . . . sex” in the “terms” or “conditions” of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

The Court also emphasized that bias against the plaintiff because of the plaintiff’s gender is an indispensable part of a sex harassment case. The sexual nature of harassing conduct does not necessarily prove that the harassment is because of sex: “We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.” Instead, the
Oncale Court noted Justice Ginsburg’s concurrence in Harris v. Forklift Systems: “The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed,” although the harassing conduct need not be motivated by sexual desire.

Lastly, Justice Scalia cautioned that “male-on-male horseplay” and “intersexual flirtation” should not be mistaken for discrimination, and the “social context in which particular behavior occurs and is experienced by its target” must always be considered.

b. Faragher v. City of Boca Raton and Burlington Industries Inc. v. Ellerth

Burlington Industries Inc. v. Ellerth and Faragher v. City of Boca Raton, the other two Title VII harassment cases of the Supreme Court’s 1997-98 term, appear factually dissimilar. Ellerth came to the Court on a variety of quid pro quo theories and Faragher came to the Court on the issue of when an employer is liable for a hostile environment.

In Faragher, the district court found during a bench trial that the plaintiff—an oceanfront lifeguard for the City of Boca Raton—and her female co-workers suffered a hostile work environment at the hands of two male supervisors, which included persistent episodes of grabbing, threats of forced sex, lewd comments and gestures, and sexual propositions. The district court then found the city liable because (1) the harassment was sufficiently pervasive that the city had “knowledge, or constructive knowledge” of it; (2) under traditional agency principles, the supervisors acted as agents of the city when they committed harassment; and (3) a training captain knew about the harassment first-hand but took no steps to report it or prevent

---

40 Id. at 80, 76 FEP 221. This admonition would seem to present an insurmountable obstacle in Oncale’s case, since there apparently were no women on the oil rig on which he worked. The Court in Oncale suggested several ways that the plaintiff can show that the discrimination was “because of sex”: first, if the harasser and the harassed employee are of opposite sexes and the conduct involves explicit or implicit proposals for sexual activity, it is a fair inference that the conduct occurred “because of sex”; second, where the individuals involved are of the same sex and there is credible evidence that the harasser is homosexual, the same inference may be drawn; and third, when an employee is harassed “in such sex specific and derogatory terms ... as to make it clear that the harasser is motivated by general hostility” to the presence of persons of plaintiff’s gender in the workplace.

41 Id., 76 FEP 221. This point continues to cause problems for plaintiffs and confusion among courts in same-sex harassment cases. See, e.g., Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001) (despite Oncale’s statement to the contrary, court requires evidence that the harasser sexually desires the victim); LaDay v. Catalyst Tech. Inc., 302 F.3d 474 (5th Cir. 2002) (requiring evidence both that the harasser was homosexual and that the harassment was explicit or implicit proposal for sexual activity).

42 Id. at 81, 76 FEP 221.


45 Faragher v. City of Boca Raton, 864 F. Supp. 1552, 1556–58, 73 FEP 1455 (S.D. Fla. 1994). This finding was not challenged in the Supreme Court.
On appeal to the Eleventh Circuit, a panel and then the full court (on a 7–5 vote) reversed the liability finding,\(^47\) relying on *Meritor Savings Bank v. Vinson*,\(^48\) and the Restatement (Second) of Agency § 219.

The Supreme Court (with Justices Scalia and Thomas dissenting) reinstated the district court’s judgment, holding the city liable for the male supervisors’ misconduct. Writing for the Court, Justice Souter observed that none of the Court’s prior decisions squarely held under what circumstances an employer might be held vicariously liable under Title VII for a supervisor’s harassment of a subordinate.\(^49\)

Following a detailed review of agency law and of the legislative purposes of Title VII, the Court held that the “aided-by-agency-relation principle embodied in § 219(2)(d) of the Restatement provides an appropriate starting point for determining liability for the kind of harassment presented here.”\(^50\) It then spelled out how the principle would apply in harassment cases:

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, see Fed Rule Civ Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised 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 antiharassment 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. 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.\(^51\)

\(^{46}\) *Id.* at 1563–64.
\(^{47}\) *Faragher v. City of Boca Raton*, 111 F.3d 1530, 73 FEP 1468 (11th Cir. 1997).
\(^{48}\) 477 U.S. 57, 40 FEP 1822 (1986).
\(^{49}\) *Faragher*, 524 U.S. at 788.
\(^{50}\) *Id.* at 802.
\(^{51}\) *Id.* at 807–08.
Applying this standard, the Supreme Court held that the district court correctly “found that the degree of hostility in the work environment rose to the actionable level and was attributable to [the supervisors]. It is undisputed that these supervisors ‘were granted virtually unchecked authority’ over their subordinates, ‘directly control[ing] and supervis[ing] all aspects of [Faragher’s] day-to-day activities.’” It is also clear that Faragher and her colleagues were ‘completely isolated from the City’s higher management.’” 52

The Court also declined the city’s suggestion to remand the case for further proceedings under the new standard. “[W]e hold as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisors’ harassing conduct. . . . [T]hose responsible for city operations could not reasonably have thought that precautions against hostile environments in any one of many departments in far-flung locations could be effective without communicating some formal policy against harassment, with a sensible complaint procedure.” 53

Finally, in view of the Court’s agency holding, it declined to rule on the alternative suggestion of the plaintiff that the City could be held liable because “it knew of the harassment vicariously through the knowledge of its supervisors.” 54

In Burlington Industries Inc. v. Ellerth, the question presented for certiorari was framed in quid pro quo terms:

Whether a claim of quid pro quo sexual harassment may be stated under Title VII ... where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances? 55

Ellerth, decided the same day as Faragher, involved a boss’s unfulfilled threats to deny the plaintiff a promotion and “make [her] life very hard” unless she acceded to his demands for sex. The district court granted summary judgment for the employer, holding that although the actions may have been severe or pervasive, the employer lacked actual or constructive knowledge of the harassment because the plaintiff failed to complain. The full Seventh Circuit combined the Ellerth appeal with a second, unrelated case for argument and issued a single decision that failed to state a majority view on liability. 56

Again split 7–2, the Supreme Court reversed the summary judgment rendered against Ellerth. Focusing on the agency question, as in Faragher, the majority in Ellerth observed that the courts of appeal had, in the wake of Meritor, divided harassment cases into two branches: quid pro quo and hostile work environment. Yet the Supreme Court, despite having itself used these same terms in Meritor, stressed the limited significance of such classifications in assessing liability.

52 Id. at 808 (quoting Barkett, J., dissenting impart and concurring in part).
53 Id. at 808–09.
54 Id. at 810.
55 524 U.S. at 753 (quoting the Petition for Certiorari).
56 Jansen v. Packaging Corp. of Am., 123 F.3d 490, 494, 74 FEP 1138 (7th Cir. 1997) (en banc) (per curiam).
In *Meritor*, the terms served a specific and limited purpose. There we considered whether the conduct in question constituted discrimination in the terms or conditions of employment in violation of Title VII. We assumed, and with adequate reason, that if an employer demanded sexual favors from an employee in return for a job benefit, discrimination with respect to terms or conditions of employment was explicit. Less obvious was whether an employer’s sexually demeaning behavior altered terms or conditions of employment in violation of Title VII. We distinguished between *quid pro quo* claims and hostile environment claims, see 477 U.S., at 65, 106 S. Ct., at 2404–2405, and said both were cognizable under Title VII, though the latter requires harassment that is severe or pervasive. *Ibid.* The principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive. The distinction was not discussed for its bearing upon an employer’s liability for an employee’s discrimination. On this question *Meritor* held, with no further specifics, that agency principles controlled.57

The Court found that “[b]ecause Ellerth’s claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct.”58 Because the district court had already found that there was a genuine issue of material fact about whether the conduct was severe or pervasive, this left the question of whether the employer could be held liable.59

As the Court restated the question, “[w]e must decide, then, whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate’s terms or conditions of employment, based on sex, but does not fulfill the threat.”60 The Court held, citing Restatement (Second) of Agency § 219(2) (d), that employers may be liable for supervisors who use their authority to aid in their harassment. “[W]e can identify a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of the harassment: when a supervisor takes a tangible employment action against the subordinate.”61 “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.”62 In such cases, vicarious liability for the employer is automatic.63 Where no tangible employment action is taken, the Court held, as in *Faragher*, that liability is vicarious, but subject to the two-prong affirmative defense (efforts to prevent and correct harassment, and the

58 *Id.* at 754.
59 *Id.*
60 *Id.*
61 *Id.* at 760.
62 *Id.* at 761.
63 *Id.* at 762–63.
plaintiff’s unreasonable failure to take advantage of such efforts). 64

Thus, since Ellerth and Faragher employers are vicariously liable for harassment by supervisors. Where a harassing supervisor actually imposes a tangible employment action, the employer’s vicarious liability is automatic; no affirmative defense is available to the employer. For all practical purposes, therefore, the “tangible employment action” discussed in Ellerth has replaced the concept of “quid pro quo” in determining an employer’s liability.

Where no tangible employment action has been imposed by the harassing supervisor, the employer has conditional vicarious liability, but then may present an affirmative defense. The mere existence of an employer policy prohibiting harassment is not sufficient to save the employer from vicarious liability for harassment by a supervisor. Rather, it is necessary at a minimum to disseminate the policy to affected employees, to ensure that the policy allows for complaints to persons other than the harassing supervisor, to ensure that complaints are investigated promptly, and to take appropriate remedial action, which may well include workforce training, where justified.

Where the employer has a policy to resolve complaints of harassment, employees have a duty to use the procedure. Some of the evidence relevant to an employer’s lack of reasonable care, e.g., a practice of retaliating against complainants, also may be relevant to the plaintiff’s reasonable failure to use the employer’s complaint procedures.

When the harasser is another employee who is not a supervisor with authority over the complainant and who cannot effect a tangible employment action concerning the complainant, the standard for employer liability remains negligence: whether the employer knew or should have known about the harassment and failed to take prompt remedial action. To recover for hostile environment discrimination, an employee must show that: (1) she was subject to unwelcome harassment; (2) the harassment was based on (was “because of”) the protected characteristic; (3) the harassment was so severe or pervasive that it altered the conditions of the employee’s environment and created a hostile or abusive working environment; and (4) there is a basis for employer liability. Given the liability formula set out in Ellerth, whether there was a “tangible employment action” taken against the complainant, is a threshold issue. If there was not, the complainant must establish severe or pervasive unwelcome conduct in order to prevail. 65

In the hostile work environment variant, the conduct does not need to amount to “economic” or “tangible” discrimination. 66 It just needs to be so “severe or pervasive” as to “alter the conditions of [the victim’s] employment and create an abusive working environment.” 67 To be actionable under Title VII, a sexually objectionable environment must be both objectively and subjectively offensive—one that a reasonable person would find hostile or

64 Id. at 765.
65 Ellerth, 524 U.S. at 763–64 (unfulfilled threat by supervisor must be analyzed as “hostile environment” rather than as “quid pro quo” claim).
abusive and one that the victim in fact perceived to be so.\textsuperscript{68}

Courts determine whether an environment is sufficiently hostile or abusive by looking at all the circumstances, including the “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”\textsuperscript{69} This inquiry must consider the “social context” in which the particular behavior occurs and is experienced by its target.\textsuperscript{70} A hostile work environment can be established with one particularly egregious incident or by aggregating numerous events.\textsuperscript{71}

\textbf{5. National Railroad Passenger Corp. v. Morgan—Timeliness of Charge Filing}

In 2002, in \textit{National Railroad Passenger Corp. v. Morgan},\textsuperscript{72} the Supreme Court determined “whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside” the requirement of Section 2000e-5(e)(1) that a Title VII plaintiff file a charge with the EEOC either 180 or 300 days “after the alleged unlawful employment practice occurred.”\textsuperscript{73} The Court concluded that the answer to the question depends on whether the alleged discrimination consists of discrete discriminatory acts or of a hostile environment.

Abner Morgan, a black male, filed a charge of discrimination against Amtrak, his employer, with the EEOC and the California Department of Fair Employment on February 27, 1995. Morgan alleged that throughout his employment he was “harassed and disciplined more harshly than other employees on account of his race.”\textsuperscript{74} Some of the actions about which Morgan complained occurred within 300 days of his charge, but many had occurred prior to that time period. After Morgan filed suit, Amtrak moved for summary judgment as to all incidents that occurred more than 300 days before the filing of Morgan’s EEOC charge. The district court granted Amtrak’s motion. The Ninth Circuit reversed, relying on its formulation of the continuing violation doctrine, “which allows courts to consider conduct that would ordinarily be barred as long as the untimely incidents represent an ongoing unlawful employment practice.”\textsuperscript{75}

The Supreme Court stated that the critical statutory provision is the section 2000-5(e)(1) requirement that “a charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred.” The “critical questions, then, are: What constitutes an ‘unlawful employment practice’ and when has that practice ‘occurred’? Our task is to answer these questions for both discrete discriminatory acts and hostile work

\footnotesize

\textsuperscript{68} \textit{Id.} at 787 (citing \textit{Harris}, 510 U.S. at 21–22).
\textsuperscript{69} \textit{Id.} at 787–88 (quoting \textit{Harris}, 510 U.S. at 23).
\textsuperscript{70} \textit{Oncale v. Sundowner Offshore Servs.}, 523 U.S. 75, 82, 76 FEP 221 (1998).
\textsuperscript{71} \textit{See} \textit{Smith v. Sheahan}, 189 F.3d 529 (7th Cir. 1999); \textit{Durham Life Ins. Co. v. Evans}, 166 F.3d 139,148, 78 FEP 1434 (3d Cir. 1999).
\textsuperscript{72} 536 U.S. 101 (2002)
\textsuperscript{73} \textit{Id.} at 104-05.
\textsuperscript{74} 536 U.S. at 105.
\textsuperscript{75} \textit{Id.} at 107.
environment claims. The answer varies with the practice."\textsuperscript{76}

The Court held that “a discrete retaliatory or discriminatory act ‘occurred’ on the day that it ‘happened.’ A party, therefore, must file a charge within either 180 or 300 days of the date of the act or lose the ability to recover for it.”\textsuperscript{77} The Court rejected Morgan’s argument that the statutory reference to an “unlawful employment practice” converts related discrete acts into a single unlawful practice for the purpose of timely filing. Further, the Court reiterated that “discrete acts that fall within the statutory time period do not make timely acts that fall outside the time period,”\textsuperscript{78} although such acts may constitute relevant background evidence.

The Court stated, however, that “hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct.”\textsuperscript{79} Harassment “occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own,” because hostile environment claims are often based on the cumulative effect of individual acts.\textsuperscript{80}

The Court, therefore, concluded that “a hostile environment claim is comprised of a series of separate acts that collectively constitute one ‘unlawful employment practice’.”\textsuperscript{81} Thus, “provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.”\textsuperscript{82}

B. The Elements of a Sexual Harassment Case – Element One: The Conduct is “Because of Sex”

Analytically, then, actionable sexual harassment requires that the complained of conduct must be because of the plaintiff’s gender, must be severe or pervasive, and must be unwelcome.

Harassment that is neither sexual nor gender-based cannot constitute sexual harassment.\textsuperscript{83}

\textsuperscript{76} Id. at 110.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 112.
\textsuperscript{79} Id. at 115.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 117.
\textsuperscript{82} Id. See Hildebrandt v. Illinois Dept. of Natural Resources, 347 F.3d 1014 (7th Cir. 2003) (applying Morgan holding to consider actions occurring outside the 300 day charge filing limitations period in determining whether plaintiff stated a claim for hostile environment); Watson v. Blue Circle, Inc., 324 F.3d 1252 (11th Cir. 2003).
\textsuperscript{83} Alfano v. Costello, 294 F.3d 365, 374, 89 FEP 193 (2002) (“it is ‘axiomatic’ that in order to establish a sex-based hostile work environment under Title VII, a plaintiff must demonstrate that the conduct occurred because of her sex”); Hurley v. Atlantic City Police Dep’t, 174 F.3d 95, 116–17, 79 FEP 808 (3d Cir. 1999) (it is not enough that environment was generally harsh and unpleasant; in order to find hostile work environment sexual harassment, plaintiff must be harassed because she is a woman), cert. denied, 528 U.S. 1074, 82 FEP 1472 (2000); Stahl v. Sun Microsystems, Inc., 19 F.3d 533, 538, 64 FEP 468 (10th Cir. 1994) (“If the nature of an employee’s environment, however
Put differently, to establish a hostile environment claim, the complainant must show that “but for the fact of her sex, she would not have been the object of harassment.” In the quid pro quo context, proof of the causal connection actually involves two distinct elements: (1) the tangible job detriment would not have occurred “but for” the complainant’s reaction to the supervisor’s request for sexual favors, and (2) that request would not have occurred “but for” the complainant’s gender. Some courts have held that vulgar words and conduct directed toward both genders are not sex based, especially where men and women alike have engaged in them or where the conduct complained of is equally offensive to men and women.

Further, hostility resulting from a personality conflict or some other cause is not actionable sexual harassment. Although most cases assume that gender-based epithets are unpleasant, is not due to her gender, she has not been a victim of sex discrimination.”

---

84 Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 63 FEP 225 (1993); see also Smith v. First Union Nat’l Bank, 202 F.3d 234, 242, 81 FEP 1391 (4th Cir. 2000) (sex discrimination established if acts would not have occurred but for sex of recipient); Mendoza v. Borden, Inc., 195 F.3d 1238, 1244, 81 FEP 470 (11th Cir. 1999) (en banc) (same), cert. denied, 529 U.S. 1068, 83 FEP 1088 (2000).

85 See Oncale v. Sundowner Offshore Services, 523 U.S. 75, 80, 76 FEP 221 (1998) (in most male-female sexual harassment situations where explicit or implicit proposals of sexual activity are involved, the inference that the harassing conduct occurred “because of” the complainant’s gender is “reasonable”).

86 See Holman v. Indiana, 211 F.3d 399, 82 FEP 1287 (7th Cir.) (an equal opportunity harasser escapes liability under Title VII), cert. denied, 531 U.S. 880, 83 FEP 1600 (2000); Walker v. Sullair Corp., 736 F. Supp. 94, 99, 52 FEP 1313 (W.D.N.C. 1990) (finding harassment not based on sex where evidence showed that supervisor publicly berated both male and female employees), aff’d in part & rev’d in part, 946 F.2d 888 (4th Cir. 1991).

87 See Reed v. Shepard, 939 F.2d 484, 491, 56 FEP 997 (7th Cir. 1991) (affirming dismissal of sexual harassment claim where plaintiff’s behavior manifested “enthusiastic receptiveness” to sexually suggestive jokes and activities); Weinheimer v. Rockwell Int’l Corp., 754 F. Supp. 1559, 1564, 54 FEP 828 (M.D. Fla. 1990) (plaintiff’s willing and frequent involvement in sexual innuendos prevalent in her workplace negated any hostile work environment), aff’d, 949 F.2d 1162, 57 FEP 1224 (11th Cir. 1991).

88 See Dattoli v. Principi, 332 F.3d 505, 506, 91 FEP 1665 (8th Cir. 2003) (fact that alleged harasser had difficulty interacting with male and female coworkers indicated that his conduct towards the female plaintiff was not sex-based); Scusa v. Nestlé U.S.A. Co., 181 F.3d 958, 965, 80 FEP 239 (8th Cir. 1999) (fact that offensive conduct was directed at both men and women important in determining whether sex-based discrimination occurred); Pasqua v. Metropolitan Life Ins. Co., 101 F.3d 514, 517, 72 FEP 1158 (7th Cir. 1996) (harassment inflicted on both males and females in same setting is not actionable harassment based on sex); Pospicil v. Buying Office, Inc., 71 F. Supp. 2d 1346, 1357 (N.D. Ga. 1999) (sexual harassment does not exist where supervisor used vulgar and suggestive language in front of both male and female employees). But see Ocheltree v. Scollon Prod., Inc., 335 F.3d 325, 332-33, 92 FEP 433 (4th Cir. 2003) (en banc) (the fact that a few men were also offended by the daily stream of sex-based and sexist antics in the workplace did not mean that the conduct did not occur because of the plaintiff’s gender).

89 See Pipkins v. City of Temple Terrace, 267 F.3d 1197, 1200-01, 86 FEP 1413 (2001) (conduct occurring because of disappointment over a failed consensual relationship does not equate to
motivated by the plaintiff’s sex, some courts have recently indicated a willingness to examine
the speaker’s purpose in employing such terms rather than assuming that the motivation is
gender-based animus.  Even where the motivation behind the harassment is gender neutral,
however, a sexual harassment claim may lie if the method by which the harassment is carried out
is motivated by the victim’s sex or exposes members of one sex to disadvantageous terms and
conditions of employment when compared with members of the opposite sex.

1. Common Types of Sexual Harassment

   a. Sexual Advances

In cases where a male supervisor demands that a subordinate employee provide sexual favors to
obtain or retain a tangible job benefit, the sexual nature of the conduct is plain, and courts usually
have little trouble in concluding that the supervisor did not treat employees of the other sex in a

---

E.g., Hocevar v. Purdue Frederick Co., 223 F.3d 721, 737, 83 FEP 1196 (8th Cir. 2000) (“mere
use of the word ‘bitch,’ without other evidence of sex discrimination, is not particularly probative
of a general misogynist attitude”); Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164,
1167–68, 70 FEP 341 (7th Cir. 1996) (use of word “bitch” not necessarily motivated by gender;
several possible motives explained speaker’s reference to plaintiff as “sick bitch”).

Winsor v. Hinckley Dodge, Inc., 79 F.3d 996, 1000, 70 FEP 611 (10th Cir. 1996) (“[E]ven if the
motivation behind plaintiff’s mistreatment was gender neutral . . . the manner in which her co-
workers expressed their anger and jealousy was not. Rather, plaintiff’s co-workers often chose
sexually harassing behavior [calling her a ‘fucking bitch’ and directing sexually crude depictions of
a woman at plaintiff] to express their dislike of plaintiff, which would not have occurred if she were
not a woman.”).

Oncale, 523 U.S. at 80, 76 FEP 221; Ocheltree, 335 F.3d at 332-33, 92 FEP 433 (even though
men were also offended by daily stream of sexual and sexist antics, a jury could reasonably find that
the female plaintiff was an individual target of harassment) Gillming v. Simmons Indus., 91 F.3d
1168, 1171–72, 71 FEP 1016 (8th Cir. 1996) (affirming judgment in favor of employer, court stated
that the acts supporting a hostile environment claim “need not be explicitly sexual in nature” if “
‘members of one sex are exposed to disadvantageous terms or conditions of employment to which
members of the other sex are not exposed’ ”) (citations omitted).
similar fashion,\textsuperscript{93} and therefore in concluding that the conduct occurred “because of sex.”\textsuperscript{94} Additionally, direct sexual advances from persons with high authority in the company may be sufficiently severe to be actionable, even if the advances are not numerous.\textsuperscript{95}

\hspace{1cm} b. Gender-Based Animosity

Although harassment must be because of gender, it need not be sexual in nature to be actionable.\textsuperscript{96} Title VII proscribes gender-based harassment even when it is not motivated by sexual desire.\textsuperscript{97} Thus, “courts should avoid disaggregating a hostile work environment claim, dividing conduct into instances of sexually oriented conduct and instances of unequal treatment, then discounting the latter category of conduct, thereby robbing instances of gender-based harassment of their cumulative effect.”\textsuperscript{98} Many nonsexual activities can satisfy the “conduct” element: epithets, slurs, or negative stereotyping; threatening, intimidating, or hostile acts; and written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of gender.\textsuperscript{99} Thus, sexual harassment includes any unwelcome conduct inflicted due to the victim’s

\textsuperscript{93} But cf. Holman, 211 F.3d at 403–05, 82 FEP 1287, where dismissal was affirmed where male and female plaintiff both claimed that the same supervisor had been sexually harassing both by soliciting sex from each on separate occasions. The Seventh Circuit concluded that a complaint against an “equal opportunity harasser” failed to state a claim of sex discrimination.

\textsuperscript{94} Lipphardt v. Durango Steakhouse, 267 F.3d 1183, 1189, 86 FEP 1409 (11th Cir. 2001) (“[w]hen a person ‘sexually harasses’ another, i.e., makes comments or advances of an erotic or sexual nature, we infer that the harasser is making advances towards the victim because the victim is a member of the gender the harasser prefers”).

\textsuperscript{95} See Quantock v. Shared Marketing Serv., 312 F.3d 899, 90 FEP 883 (7th Cir. 2002).

\textsuperscript{96} Oncale, 523 U.S. at 80, 76 FEP 221 (noting that harassment not necessarily based on sexual connotation but rather on “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed”) (citation omitted); Williams v. General Motors Corp., 187 F.3d 553, 80 FEP 753 (6th Cir. 1999) (offending conduct need not be sexual in nature to constitute unlawful sexual harassment); Hurley, 174 F.3d at 117, 79 FEP 808 (harassing conduct need not be sexual in nature to demonstrate sexual harassment).

\textsuperscript{97} Berry v. Delta Airlines, Inc., 260 F.3d 803, 810–11, 86 FEP 1367 (7th Cir. 2001).

\textsuperscript{98} Berry, 260 F.3d at 810-11, 86 FEP 1367 (internal quotations marks and citations omitted).

\textsuperscript{99} Alfano, 294 F.3d at 375, 89 FEP 193 (“[t]here is little question that incidents that are facially sex-neutral may sometimes be used to establish a course of sex-based discrimination”); Williams, 187 F.3d at 565–66, 80 FEP 753 (stating that “[b]ecause it appears this court has never explicitly held that non-sexual conduct can constitute harassment ‘based on sex,’ we now take this opportunity to join our sister circuits and make clear that the conduct underlying a sexual harassment claim need not be overtly sexual in nature”); O’Shea v. Yellow Tech. Servs., Inc., 185 F.3d 1093, 1097, 80 FEP 1191 (10th Cir. 1999) (activity that is not specifically gender-based may nevertheless, in context of other incidents, constitute actionable harassment); Carter v. Chrysler Corp., 173 F.3d 693, 701–02, 79 FEP 1253 (8th Cir. 1999) (slurs need not be explicitly sexual to create genuine issue of material fact about severe or pervasive harassment); see also Howley v. Town of Stratford, 217 F.3d 141, 83 FEP 293 (2d Cir. 2000) (the “fomenting of gender-based skepticism” towards the female firefighter plaintiff could have impaired the plaintiff’s ability to lead under life-threatening circumstances, and thus constituted harassment because of sex).
gender that creates a hostile work environment.\(^{100}\)

c. Sexually Charged Workplace

A hostile environment might exist where the cultural norms of the workplace are sexually charged. A sexually charged workplace may exist where management condones sexually offensive language or visual displays that are not targeted at specific female workers and, indeed, may have existed for years prior to the complainant’s arrival in the workplace.\(^{101}\) In a sexually charged workplace it may be difficult to distinguish welcomeness of the conduct from the complainant’s effort to adjust to the prevailing workplace culture.\(^{102}\)

2. Same-Sex Harassment

In *Oncale v. Sundowner Offshore Services*,\(^{103}\) the Supreme Court resolved a previously unanswered question, holding that same-sex harassment is actionable under Title VII if it occurs

\(^{100}\) “When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment, Title VII is violated” so long as the conduct was “because of” sex, that is, gender. *Oncale*, 523 U.S. at 78, 76 FEP 221 (internal quotation marks omitted); *see also* Durham Life Ins. Co. v. Evans, 166 F.3d 139, 148, 78 FEP 1434 (3d Cir. 1999) (no error in district court’s aggregating numerous events of harassment triggered by sexual desire, sexual hostility, nonsexual but gender-based, and other facially neutral harassment, because Title VII is applicable to all of this conduct); *Hurley*, 174 F.3d at 116–17, 79 FEP 808 (it is not enough that environment was generally harsh and unpleasant; in order to find hostile work environment sexual harassment, plaintiff must be harassed because she is a woman); *Stahl*, 19 F.3d at 538, 64 FEP 468 (“If the nature of an employee’s environment, however unpleasant, is not due to her gender, she has not been a victim of sex discrimination.”); *Smith*, 202 F.3d at 242, 81 FEP 1391 (sex discrimination established if acts would not have occurred but for sex of recipient ); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1244, 81 FEP 470 (11th Cir. 1999) (en banc) (same), *cert. denied*, 529 U.S. 1068, 83 FEP 1088 (2000); *Holman*, 211 F.3d 399, 82 FEP 1287 (an equal opportunity harasser escapes liability under Title VII); *Walker*, 736 F. Supp. at 99, 52 FEP 1313 (finding harassment not based on sex where evidence showed that supervisor publicly berated both male and female employees); *Hocevar*, 223 F.3d at 736-37, 83 FEP 1196 (summary judgment affirmed for employer on sex harassment claim where, *inter alia*, the female plaintiff also used words like “bitch” in the workplace); *Scusa*, 181 F.3d at 965, 80 FEP 239 (fact that offensive conduct was directed at both men and women important in determining whether sex-based discrimination occurred); *Pasqua*, 101 F.3d at 517, 72 FEP 1158 (harassment inflicted on both males and females in same setting is not actionable harassment based on sex).

\(^{101}\) *See* Ocheltree, 335 F.3d at 331-32, 92 FEP 433 (en banc) (rejecting employer’s argument that crude workplace conduct did not occur because of complainant’s sex simply because the conduct was neither specifically directed at the complainant nor offensive only to women).

\(^{102}\) *See* Dyke v. McCleave, 79 F. Supp. 2d 98, 108 (N.D.N.Y. 2000) (in light of evidence that both the complainant and her harasser used offensive language in the workplace, the issue of welcomeness was for jury to decide).

\(^{103}\) 523 U.S. 75, 76 FEP 221 (1998).
“because of sex.” A hostile environment sexual harassment claim thus may lie regardless of whether the harasser and victim were the same or opposite gender. Although Oncale involved a hostile environment claim, the Court’s analysis appears equally applicable to claims involving a tangible employment action. The critical issue is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.

In Oncale, the Court suggested three non-exclusive “evidentiary route[s]” to proving that same-sex harassment occurred because of the victim’s gender.104 (1) the alleged harasser is gay or lesbian, and thus presumably motivated by sexual desire;105 (2) the victim is harassed in sufficiently sex-specific and derogatory terms as to make it clear that the alleged harasser is motivated by general hostility to the presence of his or her own sex in the workplace; or (3) comparative evidence about how the alleged harasser treated members of the opposite sex in the workplace.

Harassment based on gender stereotyping also constitutes discrimination based on sex.106 Attempts to distinguish same-sex harassment based on gender stereotyping—which is actionable under Title VII—from harassment based on sexual orientation—which is not actionable under Title VII—have led to divergent results in the courts.107 Although courts differ regarding the significance

---

104 Oncale, 523 U.S. at 80-81, 78 FEP 221.
105 La Day v. Catalyst Tech., Inc., 302 F.2d 474, 480, 89 FEP 1038 (5th Cir. 2002) (there are two types of credible evidence that a same-sex harasser is homosexual: evidence of an intent to have sexual contact with the victim and proof that the harasser made same-sex sexual advances to others).
106 Price Waterhouse v. Hopkins, 490 U.S. 228, 250-51, 49 FEP 954 (1989); Nichols v. Azteca Restaurant Enter., Inc., 256 F.3d 864, 874-75, 86 FEP 336 (9th Cir. 2001) (“[a]t its essence, the systematic abuse directed at [the plaintiff] reflected a belief that [he] did not act as a man should act. . . . [w]e conclude that this verbal abuse was closely linked to gender”), overruling DeSantis v. Pacific Tel. & Telegraph Co., 608 F.2d 327, 19 FEP 1493 (9th Cir. 1979); Centola v. Potter, 183 F. Supp. 2d 403, 410, 87 FEP 1780 (D. Mass. 2002) (“[s]exual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. . . . [t]he gender stereotype at work here is that ‘real’ men should date women, and not other men”).
107 Compare, e.g., Nichols, 256 F.3d at 870, 86 FEP 336 (evidence that the plaintiff’s co-workers and supervisors, inter alia, referred to him as “she” and “her” and told him he walked and carried his serving tray “like a woman” was sufficient to show that the harassment occurred because of the plaintiff’s gender); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1217-18, 88 FEP 1586 (D. Or. 2002) (supervisor’s negative comments regarding the plaintiff’s lesbian relationship indicated harassment because she failed to conform to stereotypes of how a woman should act); Centola, 183 F. Supp. 2d at 410, 87 FEP 1780 (comments and photographs that mocked the plaintiff’s masculinity and portrayed him as effeminate, including receiving pictures of Richard Simmons in pink hot pants, were sufficient to show that the harassment was based on gender) with Hamm v. Weyauwega Milk Products, Inc., 332 F.3d 1058, 92 FEP 89 (7th Cir. 2003) (no link between taunts from co-workers regarding work-related disputes and perceptions about the plaintiff’s sexual orientation—including references to the plaintiff as “girl scout,” “faggot,” and “bisexual”—and gender, particularly in light of history of horseplay at the worksite); Bibby v.
to be accorded to a plaintiff’s belief that he was harassed because of his sexual orientation (as opposed to his gender), the plaintiff’s sexual orientation is not a defense to claims of same-sex harassment. A plurality opinion of the Ninth Circuit Court of Appeals, Rene v. MGM Grand Hotel, Inc., reversed summary judgment for an employer who claimed that any harassment of the plaintiff by his co-workers was due to his sexual orientation and not his gender. Five of the justices in Rene would hold that the sexual orientation of a Title VII plaintiff (even in a same-sex harassment case) is irrelevant, and that the “because of sex” requirement is met where severe or pervasive unwelcome sexual conduct is shown.

3. The Equal Opportunity or Bi-Sexual Harasser

The logic of the requirement that the conduct occurred “because of sex” would appear to permit the defendant to assert in defense that the harasser was “even-handed” or “bi-sexual.” Theoretically, an employer could defeat the “because of sex” element by showing that the harasser treated members of both genders equally as his or her sexual prey. In these cases, the sexual harassment might not be “because of sex,” the employer would argue, because men and women are

Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 264, 86 FEP 553 (3d Cir. 2001) (homophobic taunts were insufficient to establish that the harassment occurred on the basis of anything other than sexual orientation); Martin v. New York State Dep’t of Corrective Servs., 224 F. Supp. 2d 434, 441, 90 FEP 267 (N.D.N.Y. 2002) (crude homophobic slurs and mock sexual invitations were harassment based on sexual orientation rather than gender).

Compare, e.g., Hamm, 332 F.3d at 1065, 92 FEP 89 (finding it significant that “[plaintiff] himself characterizes the harassment of his peers in terms of work-related disputes and perceptions of his sexual orientation and does not link their comments to his sex”) with Centola, 183 F. Supp. 2d at 411, 87 FEP 1780 (giving no weight to the plaintiff’s belief that he was harassed in part based on his sexual orientation: “[t]he question to be answered here is – what motivated [the plaintiff’s] co-workers and supervisors to take these actions against [him]? . . . [the plaintiff] cannot ‘admit’ to a motivation that only existed in the minds of his harassers”).

See Hamm, 332 F.3d at 1065, 92 FEP 89 (“we do not focus on the sexuality of the plaintiff in determining whether a Title VII violation has occurred”); La Day, 302 F.3d at 480 n.5, 89 FEP 1038 (“if the proper analysis is used, the sexual orientation of the allegedly harassed employee (the plaintiff) plays no part”); Bibby, 260 F.3d at 265, 86 FEP 553 (“once it has been shown that the harassment was motivated by the victim’s sex, it is no defense that the harassment may have also been partially motivated by anti-gay or anti-lesbian animus”).

108 Compare, e.g., Hamm, 332 F.3d at 1065, 92 FEP 89 (finding it significant that “[plaintiff] himself characterizes the harassment of his peers in terms of work-related disputes and perceptions of his sexual orientation and does not link their comments to his sex”) with Centola, 183 F. Supp. 2d at 411, 87 FEP 1780 (giving no weight to the plaintiff’s belief that he was harassed in part based on his sexual orientation: “[t]he question to be answered here is – what motivated [the plaintiff’s] co-workers and supervisors to take these actions against [him]? . . . [the plaintiff] cannot ‘admit’ to a motivation that only existed in the minds of his harassers”).

109 See Hamm, 332 F.3d at 1065, 92 FEP 89 (“we do not focus on the sexuality of the plaintiff in determining whether a Title VII violation has occurred”); La Day, 302 F.3d at 480 n.5, 89 FEP 1038 (“if the proper analysis is used, the sexual orientation of the allegedly harassed employee (the plaintiff) plays no part”); Bibby, 260 F.3d at 265, 86 FEP 553 (“once it has been shown that the harassment was motivated by the victim’s sex, it is no defense that the harassment may have also been partially motivated by anti-gay or anti-lesbian animus”).

110 305 F.3d 1061, 89 FEP 1569 (9th Cir. 2002), cert. denied, 538 U.S. 922 (2003).

111 Rene, 305 F.3d at 1064, 89 FEP 1569. But see Linville v. Sears, Roebuck and Co., 335 F.3d 822, 824, 92 FEP 132 (8th Cir. 2003) (per curiam) (without evidence of the alleged harasser’s motivation, striking the male plaintiff repeatedly in the scrotum was not harassment because of sex); Davis v. Coastal Int’l Sec., Inc., 275 F.3d 1119, 1123-24, 87 FEP 1263 (D.C. Cir. 2002) (incidences where male co-workers grabbed their crotches and made kissing noises at the male plaintiff did not satisfy the ‘because of sex’ requirement).
accorded like treatment.\textsuperscript{112}

Prior to Oncale, the Ninth Circuit held that a harasser cannot “cure” his conduct toward women by treating males in the workplace in an equally offensive and degrading manner.\textsuperscript{113} However, since Oncale, several courts have concluded that harassment inflicted on males and females equally is not actionable.\textsuperscript{114}

That is not to say that a plaintiff can never maintain a sexual harassment claim in situations where the harasser abuses both males and females. Plaintiff may satisfy the “because of sex” element by proof that the offensive conduct was disproportionately directed at plaintiff or members of his or her gender, or motivated by general hostility toward his or her gender.\textsuperscript{115}

4. Harassment Directed at Other Employees In the Protected Group [Third Party Claims]

\textsuperscript{112} See, e.g., Holman v. Indiana, 211 F.3d 399, 82 FEP 1287 (7th Cir.), \textit{cert. denied}, 531 U.S. 880, 83 FEP 1600 (2000) (affirming dismissal of sexual harassment claims of husband and wife employees who alleged that their joint supervisor solicited sex from both of them; an “equal opportunity harasser” does not discriminate because of gender).

\textsuperscript{113} Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464, 65 FEP 58 (9th Cir. 1994).

\textsuperscript{114} E.g., Holman, 211 F.3d at 407, 82 FEP 1287; Dattoli v. Principi, 332 F.3d 505, 506, 91 FEP 1665 (8th Cir. 2003) (affirming summary judgment against plaintiff; evidence showed that harasser “had problems with \emph{everyone}, men and women alike”); Lack v. Wal-Mart Stores, 240 F.3d 255, 85 FEP 151 (4th Cir. 2001) (reversing jury verdict for plaintiff; supervisor made vulgar and obscene comments to everyone in the workplace, and male plaintiff failed to show that the behavior was directed more to men than women); Hocevar v. Purdue Frederick Co., 223 F.3d 721, 83 FEP 1196 (8th Cir. 2000) (affirming summary judgment against plaintiff; harasser’s offensive language was used in the presence of both men and women and used to describe both men and women); Caines v. Village of Forest Park, 2003 WL 21518558 (N.D.Ill. July 2, 2003) (dismissing sexual harassment complaint where plaintiff alleged multiple instances of harassment directed at members of both genders; the alleged conduct placed defendant in the “equal opportunity” harasser category).

\textsuperscript{115} E.g., Ocheltree v. Scollon Productions, Inc., 335 F.3d 325, 92 FEP 433 (4th Cir. 2003) (en banc) (affirming jury verdict for sole female employee in production shop subjected to sexually explicit daily bantering by co-workers; although the vulgar talk was experienced by all shop employees regardless of gender, reasonable jury could find that the bantering was specifically targeted at plaintiff to embarrass her and also showed general hostility toward women in the workplace); EEOC v. R&R Ventures, 244 F.3d 334, 338-339, 85 FEP 553 (4th Cir. 2001) (reversing summary judgment against plaintiff; although defendant argued that the supervisor was an “equal opportunity harasser who abused men and women alike,” the evidence showed that he reserved his sexually pointed comments and derision for the young women he supervised); Spriggs v. Diamond Auto Glass, 242 F.3d 179, 85 FEP 342 (4th Cir. 2001) (unambiguous gender-related epithets may imply that generalized vulgar behavior was motivated by hostility toward women); Beard v. Southern Flying J, Inc. 266 F.3d 792, 798, 87 FEP 1836 (8th Cir. 2001) (affirming jury verdict of sexual harassment; although harasser inappropriately touched both males and females, women were his “primary target”).
The law clearly protects direct targets of sexual harassment. It is less clear whether the law also protects a person who is injured by gender-based conduct in the workplace that is directed as someone else or that is not directed at anyone in particular. The phrase “third-party claims” is used in this section to describe claims asserted by plaintiffs who are not themselves the direct targets of sexual harassment, but who either observe the harassment or are otherwise in a workplace where harassment (or a consensual relationship) is occurring. Although sexual relationships are sometimes present in such cases, often the claims brought are not sexual harassment claims, but claims of other forms of sex discrimination. A frequent threshold issue in these third-party cases is whether the plaintiff has standing to sue under Title VII because the plaintiff himself or herself was not the employee who was harassed.\footnote{116} This section addresses several kinds of third-party claims, although such claims are fairly rare and seldom successful.

\section*{a. Third-Party Sexual Harassment Claims Based On Coerced or Consensual Relationship Between Supervisor and Subordinate}

A third-party plaintiff may not have been subjected to requests for sexual favors, but it may appear to the plaintiff that in his or her workplace granting sexual favors is the only way to progress. Such claims might be thought of as “implicit quid pro quo”; although the plaintiff is never directly told that sexual activity with supervisors is a prerequisite to advancement, the prevalence of such occurrences in the plaintiff’s workplace makes such submission an implied condition for advancement. The viability and nature of such a third-party claim will depend on several factors: whether the relationship between the supervisor and subordinate was consensual or coerced; whether the plaintiff can show that there were many relationships (consensual or coerced) or only an isolated instance in the workplace; and the genders of the plaintiff and the targets of the supervisor’s wanted or unwanted sexual advances.

\subsection{i. Coercive Relationships Between Supervisors and Subordinates.}

A third-party plaintiff has the strongest case where the plaintiff can establish repeated coercive relationships between a supervisor and that supervisor’s subordinates, with those who submit to sexual advances receiving preferential treatment and those refusing advances being treated poorly.\footnote{117}

According to the EEOC, a plaintiff of either gender may find this atmosphere demeaning enough to constitute a hostile work environment.\footnote{118}

\footnote{116} \textit{E.g.,} Leibovitz v. New York City Transit Auth., 252 F.3d 179, 85 FEP 1543 (2d Cir. 2001) (plaintiff suing employer for alleged sexual harassment of her female co-workers by supervisors did have Article III standing to bring Title VII claim).

\footnote{117} \textit{See} O’Patka v. Menasha Corp., 878 F. Supp. 1202, 1207, 70 FEP 11 (E.D. Wis. 1995) (holding by implication that allegation “that women or men had to grant sexual favors to management for professional advancement” would state claim of hostile work environment sexual harassment); Bonner v. Guccione, 68 FEP 47, 49 (S.D.N.Y. 1995) (holding that plaintiff stated quid pro quo claim based on allegations that employer followed policy of promoting only those employees who provided sexual favors).

\footnote{118} \textit{See Sexual Favoritism Guidance,} 8 FEP MAN. at 405:6819-20 (males or females may assert
The EEOC’s Guidelines on Discrimination Because of Sex and its Policy Guidance on Sexual Favoritism suggest that where an employer grants job benefits in exchange for consenting to unwelcome requests for sexual favors, the unsuccessful candidates who are of the same sex as the successful candidate will have a cause of action, even when they themselves were not subjected to such requests. For example, in Piech v. Arthur Andersen & Co., the court held that the plaintiff stated a cause of action for quid pro quo sexual harassment where she presented evidence that it was “generally necessary for women to grant sexual favors to decision-makers for professional advancement.” According to the EEOC, such a scenario also establishes a claim for sex discrimination that is not sexual harassment, because sexual favors are a condition imposed only on one sex and the opposite sex does not have to submit to unwanted requests for sexual favors to get ahead.

Individuals of the opposite gender as those subordinates in repeated coercive sexual relationships may also claim that they were discriminated against on the basis of sex; they were not “eligible” for promotion in their workplace because those with decision-making authority only promoted those in whom they had sexual interest. Cases of this type are rare.

The plaintiff in Burgess v. Gateway Communications, Inc. contended that although two female subordinates received preferential treatment in exchange for sexual favors from their respective male supervisors, his gender rendered him ineligible for such treatment. The court held that such favoritism is not actionable.

### ii. Consensual Relationships Between Subordinates and Supervisors.

hostile work environment claim based on widespread sexual favoritism “regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors”).

119 29 C.F.R. § 1604.11(g).
120 8 FEP MAN. at 405:6818.
121 841 F. Supp. 825, 829, 64 FEP 439 (N.D. Ill. 1994).
122 See Sexual Favoritism Guidance, 8 FEP MAN. at 405:6818 (noting that in such case, third-party plaintiff is subjected to condition that would not have been imposed on someone of opposite sex).
123 Only Nicolo v. Citibank directly recognizes the cause of action; even there plaintiff’s claim ultimately failed because he alleged only one instance of sexual favoritism. 554 N.Y.S. 2d 795, 56 FEP 563 (N.Y. Sup. Ct. 1990) (noting that court may give more expansive interpretation to state’s equivalent of Title VII).
125 Burgess, at 893-94, 78 FEP 1060; see also Schobert v. Illinois Dep’t of Transportation, 304 F.3d 725, 733, 89 FEP 1420 (7th Cir. 2002) (preferential treatment given to the sole female in a department because of her alleged grant of quid pro quo sexual favors did not constitute sexual harassment of a male co-worker; “unless [plaintiff] offered evidence that he too directly endured the same kind of harassment, which he has not, he does not have a claim of sex discrimination”); O’Patka v. Menasha Corp., 878 F. Supp. 1202, 1207, 70 FEP 11 (E.D. Wis. 1995) (by implication; holding that plaintiff asserting sex discrimination did not “indicate that [plaintiff’s supervisor] treated other men unfairly or other women preferentially [as was the supervisor’s paramour], or that any other managers were biased toward females”).
Under the EEOC’s construct, a third-party claim may also be asserted when a supervisor’s relationship with another employee is consensual, as long as there is evidence that the supervisor’s conduct was not isolated. The EEOC notes that widespread instances of consensual sexual relationships are a form of quid pro quo harassment for third parties of the same gender as the subordinates. According to the EEOC, such widespread, consensual sexual favoritism also creates a hostile work environment because it sends a message that “engaging in sexual conduct” or “sexual solicitations” is required for one gender to advance in the workplace. As with widespread coercive relationships in the workplace, the EEOC’s position is that plaintiffs of either gender may find this atmosphere demeaning enough to constitute a hostile work environment. Despite the EEOC’s position, there are no cases to speak of on this point.

Where a supervisor engages in a consensual sexual relationship with a single subordinate, other disfavored employees do not have a claim. Most courts regard an “isolated instance” of consensual sexual favoritism as no more actionable than nepotism; the practice is not sex discrimination because in each case members of both sexes are equally disadvantaged for a reason other than gender.

---

126 Cf. O’Patka, 878 F. Supp. at 1207-08, 70 FEP 11 (holding that male employee failed to state claim under Title VII where he alleged having been treated less favorably than female who entered into consensual sexual relationship with their supervisor and where plaintiff did not contend that employer was guilty of widespread favoritism for those who accept sexual advances).

127 Sexual Favoritism Guidance, 8 FEP MAN. at 405:6820 (message is communicated to same gender subordinates that “engaging in sexual conduct . . . is prerequisite to their fair treatment”). But see id. at 405:6818-19 (“Many times, a third-party female will not be able to establish that sex was generally made a condition for the benefit in question.”).

128 Sexual Favoritism Guidance, 8 FEP MAN. at 405:6819-20; see, e.g., Broderick v. Ruder, 685 F. Supp. 1269, 1277, 46 FEP 1272 (D.D.C. 1988) (plaintiff stated cause of action for hostile work environment where she presented evidence of widespread favoritism toward those subordinates in sexual relationships with supervisors; isolated direct incidents of harassment against plaintiff were least of workplace conduct considered by court).

129 Sexual Favoritism Guidance, 8 FEP MAN. at 405:6819-20 (males or females may assert hostile work environment claim based on widespread sexual favoritism “regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors”).

130 Sexual Favoritism Guidance at 405:6817-18 (Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships).

131 See, e.g., Ackel v. National Communications, Inc., 339 F.3d 376, 382, 92 FEP 744 (5th Cir. 2003) (“when an employer discriminates in favor of a paramour, such an action is not sex-based discrimination, as the favoritism, while unfair, disadvantages both sexes alike for reasons other than gender”) (quoting Green v. Administrators of Tulane Educational Fund, 284 F.3d 642, 656 n. 6, 89 FEP 587 (5th Cir. 2002)); Schobert v. Illinois Dep’t of Transportation, 304 F.3d 725, 733, 89 FEP 1420 (7th Cir. 2002) (“Title VII does not, however, prevent employers from favoring employees because of personal relationships. Whether the employer grants employment perks to an employee because she is a protégé, an old friend, a close relative or a love interest, that special treatment is permissible as long as it is not based on an impermissible classification.”); Womack v. Runyon, 147
b. Third-Party Hostile Work Environment Harassment

A plaintiff, though not the direct target of the conduct, may claim that observing others being sexually harassed creates a hostile work environment for the plaintiff. Courts have taken into consideration whether the harassment observed by the third-party plaintiff was targeted at someone of the plaintiff’s gender.\textsuperscript{132} According to the EEOC, however, both men and women who object to an “atmosphere demeaning to women” may potentially establish a violation; “co-workers of any . . . sex can claim that this conduct, which communicates a bias against protected class members, creates a hostile environment for them.”\textsuperscript{133} Note that the claim is not derivative; the particular plaintiff must allege conduct sufficiently severe or pervasive to alter the conditions of the plaintiff’s own employment and create a hostile working environment for himself or herself.\textsuperscript{134} Notably, some courts have held that even harassment that is not observed by the plaintiff may be admitted as background evidence of a generally discriminatory work environment.\textsuperscript{135}

---

\textsuperscript{132} See, e.g., Little v. National Broadcasting Co., 210 F. Supp 2d 330 (S.D.N.Y. 2002) (racial or sexual epithets not directed to plaintiff, but directed to other members of plaintiff’s protected group, may show the existence of a hostile working environment for plaintiff); Leibovitz v. New York City Transit Auth., 4 F. Supp. 2d 144, 151, 76 FEP 1406 (E.D.N.Y. 1998) (noting “particularly offensive” nature of observing hostile work environment conduct directed at members of own class), rev’d, 252 F.3d 179, 85 FEP 1543 (2d Cir. 2001). Compare Stewart v. Houston Lighting & Power Co., 998 F. Supp. 746, 755 (S.D. Tex. 1998) (no hostile work environment claim where plaintiff only alleged incidents related to other women; plaintiff did not establish “that she personally was subject to unwelcome sexual harassment”) with Leibovitz, 4 F. Supp. 2d at 152, 76 FEP 1406; Bazile v. Ford Motor Co., 960 F. Supp. 1332, 1336 (N.D. Ill. 1997) (supervisor’s general statements, not directed to plaintiff, suggesting that female employee should provide sexual favors in exchange for bathroom breaks raised issue of material fact as to whether sexual demands were being made on plaintiff).  

\textsuperscript{133} See Perry v. Ethan Allen, Inc., 115 F.3d 143, 151, 74 FEP 1292 (2d Cir. 1997) (“Evidence of the harassment of women other than [plaintiff], if part of a pervasive or continuing pattern of conduct, was surely relevant to show the existence of a hostile environment” at the plaintiff’s worksite); Hirase-Doi v. U.S. West Communications, Inc., 61 F.3d 777, 782-84, 69 FEP 1745 (10th Cir. 1995) (“evidence of a general work atmosphere, including evidence of harassment of other women, may be considered in evaluating a claim”); contra Cowan v. Prudential Ins. Co. of Am., 141 F.3d 751, 757,
Male plaintiffs have asserted that observing conduct amounting to a hostile work environment against their female co-workers resulted in a hostile work environment for the male plaintiffs. In one case against a sheriff’s department, the court indicated that harassment against women also creates a hostile environment for “those male officers who harbor a respect and concern for all their fellow officers, irrespective of their sex, and who find offensive to their conscience, and thus intolerable, an environment in which all officers, irrespective of their sex, cannot share equally in the opportunities of employment.” Some cases suggest, however, that such a cause of action by men will be difficult to sustain.

C. Element Two: The Behavior is “Severe or Pervasive.”

1. Hostile Environment Sexual Harassment

Title VII of the 1964 Civil Rights Act forbids actions taken on the basis of sex that “discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment.” Title VII’s prohibition against discrimination “because of sex” forms the basis for both gender discrimination and sexual harassment claims. Courts apply the phrase “hostile environment” to lawsuits assessing behavior that has constructively changed the complainant’s working conditions. In 1986, the Supreme Court in *Meritor Savings Bank v. Vinson* unanimously held that sexually harassing conduct, if sufficiently severe or pervasive, can so alter an employee’s working conditions as to violate Title VII—even absent actual or threatened economic injury.

2. The Evolution of “Severe or Pervasive”

In 1993, the Supreme Court addressed the requirements of a hostile environment sexual

---

77 FEP 1370 (7th Cir. 1998) (plaintiff could not rely on incidents of sexual harassment experienced by co-workers to support her hostile work environment claim unless plaintiff could show that she was exposed to same circumstances or offended by what her co-worker found offensive).


137 *E.g.*, Childress v. City of Richmond, 134 F.3d 1205, 75 FEP 1167 (4th Cir. 1998) (equally divided en banc affirmation of dismissal of white male police officers’ Title VII hostile environment claim based on harassment of female and black members of force on grounds that plaintiffs lacked standing).


138 In contrast, courts generally use the term “quid pro quo” to describe lawsuits involving tangible discriminatory employment actions.

139 477 U.S. 57, 67–68, 40 FEP 1822 (1986). *See also* Ellison v. Brady, 924 F.2d 872, 877, 54 FEP 1346 (9th Cir. 1991) (although the EEOC Guidelines spoke of an intimidating, hostile, or offensive environment or unreasonable interference with work, whereas *Vinson* spoke of altering conditions of employment and creating an abusive environment, the EEOC and Supreme Court standards are “not . . . inconsistent”); Wendy Pollack, *Sexual Harassment: Women’s Experience vs. Legal Definitions*, 13 HARV. WOMEN’S L.J. 35, 60–61 (1990) (criticizing *Vinson* as adopting too narrow a standard of liability; a better standard is that expressed in the EEOC Guidelines).
harassment suit brought under Title VII in *Harris v. Forklift Systems.* 141 *Harris* refined the definition of “hostile work environment” in three important ways: (1) it determined that conduct need not seriously affect an employee’s psychological well-being to be actionable sexual harassment; (2) it clarified that the standard for determining the severity or pervasiveness of particular conduct has both an objective and a subjective component; and (3) it provided examples of factors that should be considered in determining whether an environment is unlawfully hostile. 142

Several later Supreme Court decisions established that Title VII’s prohibition against employment discrimination does not establish a general civility code for the workplace. The Court stated, in *Burlington Industries, Inc. v. Ellerth,* that absent a tangible employment action, only harassing conduct that is “severe or pervasive” enough to “constructive[ly] alter[ ] . . . the terms or conditions of employment” is actionable.143 In *Oncale v. Sundowner Offshore Services,* the Court reiterated that “[t]he severity or pervasiveness of harassment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII’s purview.”144 Title VII is not meant to regulate “same-sex horseplay or intersexual flirtation” – both examples of “genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.”145 Further, “simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.”146 Rather, the “severe or pervasive” requirement was meant to “filter out complaints attacking the ‘ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing,’” limiting actionable claims to encompass only “extreme” conduct.147

But what precisely is a hostile or abusive environment? The Supreme Court decisions of *Harris,* *Faragher,* *Ellerth,* and *Oncale* offer guidance. Harassing conduct must actually alter the conditions of the complainant’s employment to be actionable under Title VII.148 While psychological harm is relevant, neither psychological harm nor any tangible effect on the complainant need be proven to establish a hostile environment.149 It is sufficient if the

---

142 510 U.S. 17, 63 FEP 225.
145 523 U.S. at 81, 76 FEP 221.
146 *Faragher,* 524 U.S. at 788, 77 FEP 14 (citations omitted).
147 *Id.*
148 *Harris,* 510 U.S. at 21, 63 FEP 225.
149 *Harris,* 510 U.S. at 20-22, 63 FEP 225 quoting the trial court, the Supreme Court specifically repudiated the Sixth Circuit’s requirement that the harassing conduct must “seriously affect [an employee’s] psychological well-being” or lead the plaintiff to “suffer injury”); *see also* Fitzgerald v. Henderson, 251 F.3d 345, 358, 85 FEP 1637 (2d Cir. 2001) (although a “victim’s psychological well-being need not be damaged in order to find a hostile work environment” – but such evidence is relevant to establish that plaintiff did indeed find the environment to be hostile and abusive), *cert. denied,* 536 U.S. 922, 88 FEP 1887 (2002).
environment would reasonably be perceived as, and the complainant did perceive it to be, hostile or abusive. A hostile environment claimant need not necessarily prove that the harassment actually interfered with the complainant’s work performance. On the other hand, such proof is exceedingly useful to the complainant.

3. Assessing “Severe or Pervasive”

As the Supreme Court’s decisions in Vinson, Harris, Ellerth, Oncale, and Faragher made clear, not all offensive conduct is actionable as harassment. Although a plaintiff need not prove tangible detriment to his or her job performance or psychological well-being, actionable conduct must be “sufficiently severe or pervasive to alter the conditions of the victim’s employment” by creating an abusive or unlawfully hostile working environment. This general guideline makes the level of harassment that an employee is expected to endure in the workplace one of the issues most frequently litigated in hostile environment cases. However, although courts can readily identify extreme behavior as actionable under Title VII and eliminate sporadic or marginally offensive conduct as not, drawing a precise and consistent conclusion is not a simple task.

According to the EEOC, conduct creates a hostile environment if that conduct is (1) severe enough to alter the complainant’s workplace experience, even though the conduct occurred only once or rarely, or (2) pervasive enough to become a defining condition of the workplace. Severity and pervasiveness, though distinct elements, must be considered in tandem; the more severe the incidents become, the less pervasive they need be to create a hostile environment.

150 Harris, 510 U.S. at 22, 63 FEP 225.
151 510 U.S. at 22, 63 FEP 225.
152 477 U.S. 57, 40 FEP 1822.
153 510 U.S. 17, 63 FEP 225.
154 524 U.S. 742, 77 FEP 14.
155 523 U.S. 75, 76 FEP 221.
156 524 U.S. 775, 77 FEP 14.
157 Harris, 510 U.S. at 21, 63 FEP 225.
158 See Gentry v. Export Packaging Co., 238 F.3d 842, 850, 84 FEP 1518 (7th Cir. 2001) (“It is challenging to precisely define what constitutes a hostile work environment . . . Perhaps no single description can fully take into account the divide between a hostile work environment and one which is not”).
159 [EEOC Policy Guidance on Sexual Harassment (Mar. 19, 1990), reprinted in 8 FEP MAN. (BNA) 405:6689.
161 E.g., La Day v. Catalyst Tech., Inc., 302 F.3d 474, 483, 89 FEP 1038 (5th Cir. 2002) (“a plaintiff need only show that the harasser’s conduct was ‘severe or pervasive’ . . . [h]e does not have to prove both”); Hickman v. Laskodi, 45 Fed. Appx. 451 (unpublished opinion), 2002 U.S. App. LEXIS 18183, at ** 10 (6th Cir. Aug. 30, 2002) (single incident where correctional facility supervisor threatened female subordinate with bodily harm sufficient to survive summary judgment); see Quantock v. Shared Mktg. Servs., 312 F.3d 899, 904 n.2, 90 FEP 883 (7th Cir. 2002) (single
The EEOC and some courts have said that a physical incident may constitute unlawful harassment, on the basis of its severity, even if it occurs only once. In particular, the EEOC has said that the unwelcome, intentional touching of “intimate body areas” is sufficiently offensive, in and of itself, to alter the conditions of the working environment.

In determining whether an environment is sufficiently hostile or abusive, courts must look at all aspects of a particular situation, as “the real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.” Such an inquiry requires an evaluation of the “‘frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it encounter, in which company president thrice-propositioned employee for sex, held to be severe enough to create a hostile work environment; “abusive conduct ‘need not be both severe and pervasive to be actionable; one or the other will do’”); Little v. Windermere Relocation, Inc., 301 F.3d 958, 967, 87 FEP 1452 (9th Cir. 2001) (“A single ‘incident’ of harassment . . . can support a claim of hostile work environment because the ‘frequency of the discriminatory conduct’ is only one factor in the analysis”); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 872, 86 FEP 336 (9th Cir. 2001) (“The required level of severity or seriousness ‘varies inversely with the pervasiveness or frequency of the conduct’”) (quoting Ellison v. Brady, 924 F.2d 872, 878, 54 FEP 1346 (9th Cir. 1991)).

162 E.g., Ferris v. Delta Air Lines, Inc., 277 F.3d 128, 136, 87 FEP 899 (2d Cir. 2001) (hostile environment undoubtedly created after single incident of rape by co-worker), cert. denied, 537 U.S. 824, 89 FEP 1888 (2002); Little, 301 F. 3d at 967, 87 FEP 1452 (plaintiff—raped three times in one evening by a business associate—able to show that the conditions of her work environment were “irrevocably” altered; “rape is unquestionably among the most severe forms of sexual harassment.”); Schele v. Porter Mem’l Hosp., 198 F. Supp. 2d 979, 991 (N.D. Ind. 2001) (rape by co-worker satisfied “severe and/or pervasive” standard).

163 EEOC Policy Guidance on Sexual Harassment (Mar. 19, 1990), reprinted in 8 FEP MAN. (BNA) 405:6689; see also La Day, 302 F.3d 474, 481, 89 FEP 1038 (evidence that supervisor had fondled plaintiff’s anus in the workplace was sufficient to support summary judgment finding of a hostile work environment); Worth v. Tyer, 276 F.3d 249, 268, 87 FEP 994 (7th Cir. 2001) (company president touched paralegal’s breast; “direct contact with an intimate body part constitutes one of the most severe forms of sexual harassment”); but see Brooks v. City of San Mateo, 229 F.3d 917, 927, 86 FEP 1221 (9th Cir. 2000) (one incident of breast-touching is not sufficiently severe or pervasive to constitute actionable sexual harassment).

164 Oncale, 523 U.S. at 81-82, 76 FEP 1248; see also Faragher, 524 U.S. at 787, 77 FEP 14 (1998) (quoting Harris, 510 U.S. at 23, 63 FEP 225) (courts are “to determine whether an environment is sufficiently hostile or abusive by ‘looking at all the circumstances’”); Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 270, 85 FEP 730 (2001) (“Workplace conduct is not measured in isolation;” an examination of all surrounding circumstances is required); Leibovitz v. New York City Transit Auth., 252 F.3d 179, 188, 85 FEP 1543 (2d Cir. 2001) (“Courts look at all circumstances to ascertain whether an environment is sufficiently hostile or abusive to support a claim”); O’Rourke v. City of Providence, 235 F.3d 713, 728, 85 FEP 1135 (1st Cir. 2001) (in hostile environment cases, elements “must be determined by the fact-finder ‘in light of the record as a whole and the totality of the circumstances’”) (citations omitted).
unreasonably interferes with an employee’s work performance.” The circuits are split as to whether this “totality of the circumstances” contemplates an assessment of non-workplace conduct.

In general, though, a court must evaluate both severity and pervasiveness. The severity assessment includes “careful consideration of the social context in which particular behavior occurs and is experienced by its target.” Some courts have held “social context” to include an alleged harasser’s personal circumstances. Although a hostile environment claim may be grounded in the actions of co-workers or even non-employees, some courts have held that conduct is more severe when a supervisor engages in it. A hostile environment claim that

165 Faragher, 524 U.S. at 787-88, 77 FEP 14 (quoting Harris, 510 U.S. at 23, 63 FEP 225).
166 See Gowesky v. Singing River Hosp. Sys., 321 F.3d 503, 510-11 (5th Cir. 2003) (harassment claim must be supported by evidence that a person’s working environment was altered; court “not inclined to extend this judicially created harassment action to behavior that occurred when [plaintiff] was not actually working”), cert. Denied, 2003 U.S. LEXIS 5550 (Oct. 6, 2003); Crowley v. L.L. Bean, Inc., 303 F.3d 387, 409, 89 FEP 1656 (1st Cir. 2002) (co-worker’s breaking and entering of plaintiff’s home assessed in determining whether a hostile work environment was created in the workplace).
167 Cruz v. Coach Stores, Inc., 202 F.3d 560, 570, 81 FEP 1762 (2d Cir. 2000) (a “plaintiff must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were ‘sufficiently continuous and concerted’ to have altered the conditions of her working environment”) (emphasis added) (citations omitted).
168 Oncale, 523 U.S. at 81, 76 FEP 221.
169 Willets v. Interstate Hotels, LLC, 204 F. Supp. 2d 1334, 1337 (M.D. Fla. 2002) (although co-worker hugged plaintiff in a sexualized matter, rubbed plaintiff’s head and shoulders, kissed plaintiff, and grabbed plaintiff in the genital region, behavior did not amount to creation of a hostile work environment, as plaintiff was a deaf-mute “forced to rely on touch as a consequence of his disability”).
170 See Alexander v. Alcatel NA Cable Sys., Inc., 50 Fed. Appx. 594 (unpublished opinion), 2002 U.S. App. LEXIS 21498, at ***3-17 (4th Cir. Oct. 15, 2002) (plaintiff subjected to harassing telephone calls from, and an extreme physical assault by, a co-worker, as well as other anonymous offensive telephone calls and sexually explicit postings in the workplace; case remanded after district court improperly awarded summary judgment to employer on other grounds); Hertzberg v. SRAM Corp., 261 F.3d 651, 654-5, 88 FEP 165 (7th Cir. 2001) (co-worker made several demeaning comments to plaintiff; jury verdict finding sexual harassment upheld), cert. denied, 534 U.S. 1130 (2002); Madison v. IBP, Inc., 257 F.3d 780, 787-90, 86 FEP 77 (8th Cir. 2001) (jury verdict upheld; plaintiff’s co-workers regularly grabbed and fondled her breasts and buttocks, one co-worker simulated an act of sodomy on her, and several of her co-workers subjected her to vulgar and derogatory comments on a frequent basis), vacated by/remanded by 536 U.S. 919, 88 FEP 1887 (2002).
171 E.g., EEOC v. Reeves & Assoc., 68 Fed. Appx. 830 (unpublished opinion), 2003 U.S. App. LEXIS 12682, at **4 (9th Cir. June 20, 2003) (summary judgment inappropriate because harasser’s conduct—including sexual jokes, comments, leering and offensive touching—created an abusive working environment when combined with “his position within the firm as the partner with final decision-making authority in all matters concerning the firm”); Homesley v. Freightliner Corp., 61
does not involve unusually “severe” conduct normally will require a showing of multiple instances. This is particularly likely to be the case with respect to verbal utterances: “A mere utterance of an . . . epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII.”\textsuperscript{172} Most,\textsuperscript{173} but not all,\textsuperscript{174} courts have rejected claims based solely on verbal utterances. \textit{Clark County School District v. Breeden}\textsuperscript{175} is illustrative. Respondent Breeden was reviewing job applicant files with her male supervisor and a co-worker, also male.\textsuperscript{176} Breeden’s supervisor read aloud a comment that one of the applicants had made to a colleague at a previous place of employment: “I hear making love to you is like making love to the Grand Canyon.”\textsuperscript{177} After Breeden’s supervisor stated that he did not know what that comment meant, the male co-worker offered to explain it to him later and both men chuckled.\textsuperscript{178} Breeden complained about this incident to several

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{172} Harris, 510 U.S. at 21, 63 FEP 225.
  \item \textsuperscript{173} \textit{E.g.}, Patt v. Family Health Sys., Inc., 280 F.3d 749, 754, 88 FEP 52 (7th Cir. 2002) (eight gender-related comments, such as “the only valuable thing to a woman is that she has breasts and a vagina were “too isolated and sporadic to constitute severe or pervasive harassment”); Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1327, 65 FEP 341 (8th Cir. 1994) (plaintiff alleged a hostile work environment, in part, on the basis of rowdy sexual humor; judgment for defendants); Kay v. Independence Blue Cross, 2003 U.S. Dist. LEXIS 8521, at *22-23 (E.D. Pa. May 16, 2003) (sporadic, non-physical conduct did not constitute severe or pervasive harassment so as to establish a hostile work environment); \textit{cf.} Hudson v. Norfolk Southern Railway Co., 209 F. Supp. 2d 1301, 1330 (N.D. Ga. 2001) (“The prevailing view . . . appears to be that mere insults by non-supervisors are insufficient to support a claim of hostile work environment absent some aggravating factor, such as physically intimidating conduct accompanying the slurs”).
  \item \textsuperscript{174} \textit{See} Ocheltree v. Scollon Prods., Inc. 335 F.3d 325, 329, 92 FEP 433 (4th Cir. 2003) (en banc) (plaintiff’s “male coworkers subjected her to a daily stream of discussion and conduct that was sex based or sexist”), \textit{cert. denied} 2004 U.S. LEXIS 1038 and 1039 (Feb 23, 2004); Gorski v. New Hampshire Dep’t of Corr., 290 F.3d 466, 469, 88 FEP 1716 (1st Cir. 2002) (jury verdict upheld; derogatory comments regarding plaintiff’s pregnancy amounted to a sexually hostile working environment).
  \item \textsuperscript{175} 532 U.S. 268, 85 FEP 730 (2001).
  \item \textsuperscript{176} 532 U.S. at 269, 85 FEP 730.
  \item \textsuperscript{177} 532 U.S. at 269, 85 FEP 730.
  \item \textsuperscript{178} 532 U.S. at 269, 85 FEP 730.
\end{itemize}
\end{footnotesize}
individuals; she later filed a retaliation claim against the school district in response to what she believed to be an adverse employment action as a result of her complaints.\footnote{532 U.S. at 269, 85 FEP 730.} Citing *Faragher*, *Ellerth*, and *Oncale*, the Supreme Court found no actionable harassment, stating that the brief dialogue between the two men and the subsequent chuckling “are at worst an ‘isolated incident’ that cannot remotely be considered ‘extremely serious,’ as our cases require.”\footnote{532 U.S. at 271, 85 FEP 730 (quoting Faragher, 524 U.S. at 788, 77 FEP 14).} Courts have reached the same conclusion even when assessing situations in which more than one comment was made to the complainant.\footnote{Baskerville v. Culligan Int’l Co., 50 F.3d 428, 430, 67 FEP 564 (7th Cir. 1995) (no actionable harassment despite supervisor’s nine suggestive remarks, his use of a “pretty girl” moniker for plaintiff, and the fact that he grunted when plaintiff wore a leather skirt; while Title VII was designed “to protect working women from the kind of male attentions that can make the workplace hellish for women,” it was “not designed to purge the workplace of vulgarity.”).} Pervasiveness is more likely to be found if the harassment is perpetrated by more than one individual,\footnote{See, e.g., Hare v. H & R Indus., Inc., 67 Fed. Appx. 114 (unpublished opinion), 2003 U.S. App. LEXIS 10304, at **2 (3d Cir. May 22, 2003) (workplace “permeated with discrimination, ridicule, and insult” where several of plaintiff’s supervisors and co-workers engaged in both physical and verbal harassment); Haugerud v. Amery Sch. Dist., 259 F.3d 678, 693-95, 87 FEP 1326 (7th Cir. 2001) (gender harassment perpetrated by superintendent, principal, supervisor, and co-workers; incidents pervasive enough to constitute hostile work environment); Waltman v. International Paper Co., 875 F.2d 468, 471, 50 FEP 179 (5th Cir. 1989) (complainant raised a triable issue of hostile environment with evidence that several different employees touched her in a sexual manner and directed sexual comments toward her). Notably, a female truck driver successfully established a hostile environment claim where her male co-workers exposed their genitals to her, threatened her with violence, removed the pin that connected her trailer to her tractor, made verbal sexual advances and threats of harm if she reported them, touched her breasts, attempted to drag her into the sleeper compartment of a truck cab, placed a live snake on the floor of her cab, and formed the “37 Club”—a group of 37 male drivers who bet on which man would be first to have sexual intercourse with the complainant. Llewellyn v. Celanese Corp., 693 F. Supp. 369, 371–74, 380, 47 FEP 993 (W.D.N.C. 1988).} and the effect of the incidents can be cumulative.\footnote{E.g., Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 18-20, 89 FEP 1361 (1st Cir. 2002) (jury verdict upheld; regular humiliating sexual remarks and innuendos and unwelcome touching created hostile work environment); Burns v. McGregor Elec. Indus., 989 F.2d 959, 961, 61 FEP 592 (8th Cir. 1993) (courts must scrutinize “the totality of circumstances of the entire hostile work environment without dividing the ‘work environment into a series of discrete incidents and then measur[ing] the harm occurring in each episode’”); Dinkins v. Charoen Pokphand USA, Inc., 133 F. Supp. 2d 1254, 1263 (M.D. Ala. 2001) (multiple plaintiffs “subjected to a continual, sustained barrage of unwelcome comments and touchings, including requests for sex and unwelcome grabbing of their hips, buttocks, breasts, and genitalia . . . a reasonable juror could agree that they labored in a hostile, abusive, and oppressive work environment.”).}

Hostile conduct directed toward other members of the complainant’s protected group may help
demonstrate the existence of a hostile environment. However, the plaintiff must show that this conduct actually altered conditions of the particular plaintiff’s employment. Most viable cases are based on first-hand knowledge.

Where the plaintiff lacks first-hand knowledge of harassment, courts have not taken a consistent approach. All courts agree that suit must be grounded in incidents of which the plaintiff was contemporaneously aware. Several courts have said that reliable second-hand knowledge in some circumstances can be sufficient, at least if it is acquired contemporaneously.

---

184 E.g., Madison, 257 F.3d at 793-4, 86 FEP 77 (proper for trial court to admit evidence of harassment and discrimination directed at other employees); Leibovitz v. New York City Transit Auth., 252 F.3d 179, 190, 85 FEP 1543 (2d Cir. 2001) (an employee’s claim of hostile environment harassment can be supported by evidence of co-workers’ harassment; “because the crucial inquiry focuses on the nature of the workplace environment as a whole, a plaintiff who herself experiences discriminatory harassment need not be the target of other instances of hostility in order for those incidents to support her claim’’); Waltman v. International Paper Co., 875 F.2d 468, 480, 50 FEP 179 (5th Cir. 1989) (trial court must consider sexual graffiti, even if it was not directed at the complainant); Hall v. Gus Constr. Co., 842 F.2d 1010, 1015, 46 FEP 573 (8th Cir. 1988) (sexual harassment directed at employees other than plaintiff was relevant to the questions of severity and pervasiveness); but see Patt v. Family Health Sys., Inc., 280 F.3d 749, 754, 88 FEP 52 (7th Cir. 2002) (“second-hand’ harassment is obviously not as great as harassment directed toward [plaintiff] herself.”).

185 E.g., Leibovitz, 252 F.3d at 190, 85 FEP 1543 (plaintiff’s sexual harassment claim eventually failed because she was unable to show that the harassment of her co-workers altered the conditions of her working environment by making it hostile); see Waltman, 875 F.2d at 477, 50 FEP 179 (plaintiff’s observation of sexual graffiti on the walls, in the elevator, and in the bathroom of her workplace, although not all directed at her, was relevant in determining whether a hostile environment was sufficiently severe and pervasive enough to alter the conditions of her employment).

186 E.g., Brooks v. City of San Mateo, 229 F.3d 917, 924, 86 FEP 1221 (9th Cir. 2000) (“Harassment directed towards others of which an employee is unaware can, naturally, have no bearing on whether she reasonably considered her working environment abusive’’); Hirase-Doi v. U.S. West Communications, Inc., 61 F.3d 777, 782, 69 FEP 1745 (10th Cir. 1995) (the harassment of other workers is properly considered only if the plaintiff was aware [of it] during the time that she was allegedly subject to a hostile work environment’’); Edwards v. Wallace Cmty. Coll., 49 F.3d 1517, 1522, 67 FEP 949 (11th Cir. 1995) (the district court did not err in granting summary judgment for the employer concerning an employee’s hostile environment claim; the employee relied upon incidents made known to her after her termination; other alleged incidents had “hearsay problems,” and it was unclear when they occurred and when and how the employee came to know of them); see Jones v. Flagship Int’l, 793 F.2d 714, 721 n.7, 41 FEP 358 (5th Cir. 1986) (evidence of sexual harassment directed at other employees was not relevant unless such incidents actually affected the plaintiff’s psychological well-being).

187 E.g., Ficek v. Griffith Labs., Inc., 67 FEP 1396, 1400 (N.D. Ill. 1995) (the court did not require the plaintiff to hear every comment or observe the harassing graffiti first-hand in order to find a hostile work environment); Blakey v. Continental Airlines, Inc., 1995 WL 464477, at *5 (D.N.J.
4. The Standard for Evaluating Whether the Conduct is “Severe or Pervasive”

Whether a work environment is unlawfully harassing in many cases depends on the perspective from which one evaluates the evidence, and the standard used to do it. Should the trier of fact consider the evidence from the victim’s subjective perspective or a neutral bystander’s objective perspective?

The Supreme Court has established that “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.”\(^{188}\) Hence, a workplace is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment when “the environment would reasonably be perceived, and is perceived, [by the plaintiff], as hostile or abusive.”\(^{189}\) Plaintiffs must surmount both hurdles of this two-tiered test, each of which is potentially disqualifying.

Under the first prong of the test, the plaintiff loses if the conduct at issue – viewed objectively – fails to meet the “severe or pervasive” test. *Duncan v. General Motors Corporation*\(^ {190}\) demonstrates this point. In *Duncan*, the plaintiff declined her supervisor’s request for a romantic relationship shortly after commencing employment.\(^ {191}\) Thereafter, Duncan was subjected to what she perceived to be “hostile” behavior; among other things, her supervisor employed a pornographic screen-saver, showed her a penis-shaped pacifier on two occasions, unnecessarily touched her hand when she handed him the telephone, posted a “Man Hater’s Club of America” poster in the workplace depicting plaintiff as president and CEO, and asked plaintiff to type up the tenets of the “He-Men Women Hater’s Club.”\(^ {192}\) Although plaintiff was able to show that she found her supervisor’s behavior to be upsetting, her failure to satisfy the objective component of the hostile environment standard meant that her harassment claim

---

\(^{188}\) *Faragher*, 524 U.S. at 787, 77 FEP 17 (citing *Harris*, 510 U.S. at 21-22, 63 FEP 225).

\(^{189}\) *Harris*, 510 U.S. at 22, 63 FEP 225; accord *Saxton v. AT&T*, 10 F.3d 526, 533, 63 FEP 625 (7th Cir. 1993) (courts must consider both the effect that discriminatory conduct actually had on the particular complainant and the impact it likely would have had on a reasonable employee in that position).


\(^{191}\) 300 F.3d at 931, 89 FEP 1105.

\(^{192}\) 300 F.3d at 931-32, 89 FEP 1105.
failed as a matter of law. 193

Under the second hurdle, the plaintiff loses if he or she personally did not find the environment to be hostile or abusive. Thus, for example, an employer would prevail—notwithstanding an objectively harassing job environment—if the particular plaintiff, by his or her words, conduct, and actions, demonstrated that he or she did not then find the conduct to be hostile or abusive. 194

This inquiry in some respects is similar to, but ultimately it is distinct from, the “welcomeness” issue. 195 Conduct that a particular plaintiff subjectively regards as unwelcome, but trivial, is not actionable by that plaintiff even if, viewed objectively, it is severe or pervasive. 196

Historically, the EEOC 197 and certain courts 198 have held that the objective standard (in the typical case of antifemale harassment) ought to be based on the viewpoint of the reasonable

193 300 F.3d at 934, 89 FEP 1105.
194 E.g., Wolf v. Northwest Indiana Symphony Soc’y, 250 F.3d 1136, 1144, 85 FEP 1392 (7th Cir. 2001) (plaintiff’s lack of reaction to supervisor’s behavior “belie[d] any claim that he subjectively believed [she] harassed him”) cert. denied, 534 U.S. 1028, 91 FEP 1472 (2001); Braden v. Cargill, Inc., 176 F. Supp. 2d 1103, 1113 (D. Kan. 2001) (where plaintiff conceded that she believed alleged harasser’s actions to be “jokes or horseplay,” she was unable to satisfy subjective prong of analysis); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 876, 61 FEP 1252 (D. Minn. 1993) (an “employee’s subjective response . . . is an essential part of proving a claim”); Christoforou v. Ryder Truck Rental, 668 F. Supp. 294, 301, 51 FEP 98 (S.D.N.Y. 1987) (the plaintiff admitted that the alleged harassment did not interfere with her work); cf. White v. Federal Express Corp., 939 F.2d 157, 160–61, 56 FEP 657 (4th Cir. 1991) (affirming summary judgment against African-American complainant, where the record showed no evidence that the alleged racially hostile environment had any actual effect on the complainant).
195 The issue of “welcomeness” is discussed in further detail in Section D of this chapter.
196 Harris, 510 U.S. at 21-22, 63 FEP 225 (“[I]f the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation”); cf. Highlander v. KFC Nat’l Mgmt. Co., 805 F.2d 644, 646, 42 FEP 654 (6th Cir. 1986) (a terminated female employee’s hostile environment sexual harassment claim failed, in part, because the plaintiff admitted she understood her manager’s remark—that if she were interested in becoming co-manager, “there is a motel across the street”—was made in jest; plaintiff admittedly did not want to make “a big stink about it”); but cf. Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1454–55, 65 FEP 523 (7th Cir. 1994) (evidence that the complainant tolerated objectively offensive sexual comments and gestures did not undermine proof that she subjectively perceived the environment to be hostile and abusive).
197 EEOC Policy Guidance on Sexual Harassment (Mar. 19, 1990), reprinted in 8 FEP MAN. (BNA) 405:6690 (“consider the victim’s perspective”).
198 E.g., Burns v. McGregor Elec. Indus., 989 F.2d 959, 962, 61 FEP 592 (8th Cir. 1993) (accepting the reasonable woman formulation); Andrews v. City of Philadelphia, 895 F.2d 1469, 1485–86, 54 FEP 184 (3d Cir. 1990) (obscene language and pornography could be highly offensive to a woman as creating a professional barrier of sexual differentiation and abuse, although men may find actions “harmless and innocent”); Yates v. Avco Corp., 819 F.2d 630, 637 n.2, 43 FEP 1595 (6th Cir. 1987) (“men and women are vulnerable in different ways and offended by different behavior”).
woman. In the leading case, *Ellison v. Brady*,\(^\text{199}\) the Ninth Circuit panel majority said that it would “adopt the perspective of a reasonable woman primarily because . . . a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.”\(^\text{200}\) The “reasonable woman” perspective remains the standard in the Ninth Circuit.\(^\text{201}\)

The more common practice, however, is to evaluate behavior from the perspective of the “reasonable person.” In 1993 (*Harris v. Forklift Systems*) and in 1998 (*Oncale v. Sundowner Offshore Services*), the Supreme Court appeared to favor this broader “reasonable person” standard. The *Harris* Court used language that some perceived as rejecting the “reasonable woman” standard: “Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.”\(^\text{202}\) When the Supreme Court later considered this same issue in *Oncale*, it appeared to endorse almost a compromise test, by noting that “the objective severity of the harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all of the circumstances.’”\(^\text{203}\)

Given the debate over which standard to apply, it is hard to imagine that the justices in *Oncale* would have used the “reasonable person in the plaintiff’s position” standard without intending to signal their views. Nevertheless, the issue of what standard to apply undoubtedly remains open in some courts. Whatever the proper perspective, it is clear that courts can and do find some hostile environment claims to be insufficiently substantial to warrant trial.\(^\text{204}\)

\(^{199}\) 924 F.2d 872, 54 FEP 1346 (9th Cir. 1991).

\(^{200}\) 924 F.2d at 879, 54 FEP 1346. In so doing, the court explained: “We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser’s conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.” 924 F.2d at 879, 54 FEP 1346.

\(^{201}\) Kowalow v. Correctional Servs. Corp., 35 Fed. Appx. 344 (unpublished opinion), 2002 U.S. App. LEXIS 6512, at **10 (9th Cir. Apr. 8, 2002) (citing Ellison, 924 F.2d at 879, 54 FEP 1346) (“A female plaintiff states a prima facie case of hostile work environment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.”); Brooks v. City of San Mateo, 229 F.3d 917, 924, 86 FEP 1221 (9th Cir. 2000) (“No reasonable woman in Brooks’ position would believe that Selvaggio’s misconduct had permanently altered the terms or conditions of her employment”).

\(^{202}\) 510 U.S. at 21, 53 FEP 225 (emphasis added).

\(^{203}\) 523 U.S. at 81, 76 FEP 221.

\(^{204}\) Conto v. Concord Hosp., Inc., 265 F.3d 79, 82, 88 FEP 1731 (1st Cir. 2001) (plaintiff “witnessed male coworkers uttering sexually-charged profanities and making obscene bodily gestures to nurses . . . but never to her”; combined with repeated questions regarding her personal life, her coworkers’ behavior was insufficient to establish a hostile work environment claim); Fitzgerald v. Henderson,
supervisor’s hostility toward plaintiff and excessive criticism of plaintiff’s work after plaintiff rebuffed nearly a year of unwanted sexual attention created a triable issue of fact sufficient to survive summary judgment); Dayes v. Pace University, 2 Fed. Appx. 204 (unpublished opinion), 2001 U.S. App. LEXIS 1693, at **3-4 (2d Cir. Feb. 5, 2001) (although “boorish,” it was not actionable harassment for supervisor to invite plaintiff to drinks after work, offer to pay for her lunch, offer to drive her home from work, suggest that they go to Florida together, suggest that plaintiff “dress up,” make comments about plaintiff’s skirt and legs, stare at plaintiff, or sit close to plaintiff—court characterized behavior as “relatively mild” and considered the fact that it occurred over the course of an entire year); Ramos v. Marriott Int’l, Inc., 134 F. Supp. 2d 328, 348 (S.D.N.Y. 2001) (comments made to plaintiff by her co-workers did not threaten physical force or cause her work to suffer); Weston v. Commonwealth of Pennsylvania, 251 F.3d 420, 423-424, 85 FEP 1477 (3d Cir. 2001) (two incidents of physical touching—a back massage and caressing of the buttocks—not enough to state a claim for hostile environment sexual harassment), remanded on other grnds., 2001 U.S. Dist. LEXIS 19185, 87 FEP 1149 (Nov. 20, 2001); Paris v. Christiana Care Visiting Nurse Ass’n, 197 F. Supp. 2d 111, 117, 88 FEP 1149 (D. Del. 2002) (not a single one of the tepid, “slightly off color” comments was directed at plaintiff or referred to her directly); Murray v. City of Winston-Salem, 203 F. Supp. 2d 493, 499 (M.D.N.C. 2002) (four incidents in three years—including two involving innocuous touching—did not amount to a hostile work environment); Webster v. Bass Enters. Prod. Co., 192 F. Supp. 2d 684, 692 (N.D. Texas 2002) (supervisor’s gender-related criticisms of plaintiff were “relatively few in number . . . were made sparingly over a ten-year period, were not physically threatening, and were not shown to undermine [plaintiff’s] performance.”); cf. Hatley v. Hilton Hotels Corp., 308 F.3d 473, 475, 89 FEP 1861 (5th Cir. 2002) (jury verdict upheld; “repeated inappropriate touching, vulgar comments, propositioning, and physical aggression” by plaintiffs’ supervisor and a director constituted a hostile work environment); Mast v. Imco Recycling of Ohio, Inc., 58 Fed. Appx. 116 (unpublished opinion), 2003 U.S. App. LEXIS 1940, at **12-13 (6th Cir. Feb. 3, 2003) (single comment that plaintiff was “too pretty” to work at place of employment, combined with single physical incident, not sufficient to survive summary judgment); Walker v. National Revenue Corp., 43 Fed. Appx. 800 (unpublished opinion), 2002 U.S. App. LEXIS 15696, at **8-10 (6th Cir. Aug. 1, 2002) (no hostile work environment despite abusive treatment by female supervisor toward gay male subordinate who rebuffed her advances; supervisor, nicknamed “Military Mary,” “screamed at and threatened all of her subordinates on a regular basis” (failing to show her actions were motivated by plaintiff’s gender) and that her sexual propositions ceased after plaintiff rebuffed them (failing to show conduct was “severe or pervasive”)); Farra v. GMC, 163 F. Supp. 2d 894, 908-9 (S.D. Ohio 2001) (plaintiff failed to establish hostile work environment; supervisor’s ten crotch-grabbing gestures, six staring incidents, statement about women performing oral sex on him, and one threatening charge toward plaintiff in a motorized cart occurred over a 20-month period and did not result in any physical contact); Pollard v. City of Northwood, 161 F. Supp. 2d 782, 791 (N.D. Ohio 2001) (no hostile work environment established by supervisor’s use of “honey” moniker for plaintiff and supervisor’s discussion of his sexual activity and preferences in plaintiff’s presence); Hilt-Dyson v. City of Chicago, 282 F.3d 456, 464, 88 FEP 402 (7th Cir. 2002) (two brief back-rubbing incidents, followed by an allegedly demeaning comment during uniform inspection, not enough to create a hostile work environment), cert. denied, 537 U.S. 820, 89 FEP 1888 (2002); Russell v. Bd. of Trustees, 243 F.3d 336, 343, 85 FEP 458 (7th Cir. 2001) (“evidence of offensive behavior and boorish comments and signs . . . not enough to sustain a claim of discrimination on a hostile environment theory”); Wolf v.
other hand, where a triable question exists, summary judgment is denied.205

Northwest Indiana Symphony Soc’y, 250 F.3d 1136, 1144, 85 FEP 1392 (7th Cir. 2001) (supervisor told plaintiff she was lonely, but never explicitly requested a sexual relationship; “only someone ‘mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity’ would find [supervisor’s] sexual overtures, if they can even be identified as such, substantially distressing”) (citations omitted); Meriwether v. Caraustar Packaging Co., 326 F.3d 990, 993, 91 FEP 978 (8th Cir. 2003) (lone buttock-grabbing incident, followed by mild joking around about that incident, not severe or pervasive enough to alter the conditions of plaintiff’s employment); Alagna v. Smithville R-II Sch. Dist., 324 F.3d 975, 979, 91 FEP 878 (8th Cir. 2003) (summary judgment affirmed where plaintiff subjected to non-physical, non-sexually charged behavior such as frequent phone calls seeking life guidance; alleged harasser viewed as a troubled, insecure, and depressed individual “in need of constant reassurance of his worth as a human being” – not a sexual predator); Erenberg v. Methodist Hosp., 240 F. Supp. 2d 1022, 1030 (D. Minn. 2003) (co-workers referred to plaintiff as “Malibu Barbie” and hugged and touched each other—but not plaintiff—at work); Smith v. Eaton Corp., 195 F. Supp. 2d 1079, 1096, 88 FEP 142 (N.D. Ia. 2002) (male co-worker frequently told plaintiff that she had a “nice butt,” constituting nothing more than “sophomoric comments about a part [sic] his friend and co-worker’s anatomy”); Brooks v. City of San Mateo, 229 F.3d 917, 927, 86 FEP 1221 (9th Cir. 2000) (not actionable harassment for co-worker to force his hand underneath plaintiff’s sweater and bra to fondle her breast); Alfonso v. GTE Directories Corp., 137 F. Supp. 2d 1212, 1222, 85 FEP 1055 (D. Or. 2001) (supervisor’s rude and impolite behavior failed to “pollute[ ] plaintiff’s” work environment with hostility or abusiveness as conceived by either Harris or Faragher, or by the Ninth Circuit”); cf. Swenson v. Potter, 271 F.3d 1184, 1195-96, 87 FEP 621 (9th Cir. 2001) (plaintiff’s sixteen encounters with her co-worker, including the times he told plaintiff that he thought she was beautiful and sexy, that he dreamt about her at night, that he watched her “ass moving,” and that he wanted to kiss her – the last time grabbing her hand ostensibly in order to do so – did not amount to a hostile work environment); Thompson v. KN Energy, Inc., 177 F. Supp. 2d 1238, 1256, 89 FEP 1194 (D. Kan. 2001) (allegation that “women are subjected to derogatory comment [sic], all of which also created a hostile work environment” was not enough to sustain a sexual harassment claim); Johnson v. Rice, 237 F. Supp. 2d 1330, 1336-37, 90 FEP 177 (M.D. Fla. 2002) (co-worker asked plaintiff whether she smoked during sex and made several sexual jokes and comments in the workplace); Parahao v. Bankers Club, Inc., 225 F. Supp. 2d 1353, 1359, 90 FEP 28 (S.D. Fla. 2002) (record of plaintiff’s “willing participation in many personal activities with [her supervisor], including sexual activity, throughout her employment . . . so that no reasonable jury could find that [her supervisor’s] in-office performance was ‘unwelcome’”); Colon v. Envtl. Techs., Inc., 184 F. Supp. 2d 1210, 1219-21, 87 FEP 702 (M.D. Fla. 2001) (no hostile work environment where plaintiff could not show that co-worker’s crotch-grabbing was motivated by gender-based animus; rather, co-worker’s actions were retaliatory in nature due to plaintiff’s previous reporting of his offensive comments to management); Hudson v. Norfolk Southern Railway Co., 209 F. Supp. 2d 1301, 1325-32 (N.D. Ga. 2001) (plaintiff heard supervisor proclaim his hatred for women, state that plaintiff was at the top of his list, and gave plaintiff the silent treatment).

205 E.g., Suders v. Easton, 325 F.3d 432, 442, 91 FEP 897 (3d Cir. 2003) (plaintiff’s supervisor repeatedly discussed bestiality and oral sex with her—conversations that were “accompanied by leering and suggestive posturing”—and her co-worker frequently grabbed his crotch and talked about genital piercing), cert. granted, 2003 U.S. LEXIS 8576 (Dec. 1, 2003); Harrison v. Eddy
Potash, Inc., 248 F.3d 1014, 1023-4, 85 FEP 990 (10th Cir. 2001) (supervisor’s actions uncontrovertibly created a hostile work environment where he regularly tried to kiss and fondle plaintiff, regularly propositioned plaintiff, and forced plaintiff to masturbate him on several occasions), cert. denied, 534 U.S. 1019, 87 FEP 576 (2001); Parrish v. Sollecito, 249 F. Supp. 2d 342, 349, 91 FEP 199 (S.D.N.Y. 2003) (supervisor “touched and rubbed plaintiff’s leg under her skirt, well above the knee and approaching her groin”; such contact is not “isolated” and a genuine factual dispute exists); Linder v. City of New York, 263 F. Supp. 2d 585, 592-93 (E.D.N.Y. 2003) (single encounter—in which co-worker grabbed plaintiff by the hair and throat, proclaimed that he “wanted” her, touched her breast, vagina, and anus through her clothes, and pulled her shirt off—enough to withstand summary judgment); Hoschak v. Defiance County Eng’rs, 218 F. Supp. 2d 917, 925-27 (N.D. Ohio 2002) (defendants summary judgment motion denied; plaintiff offered non-exhaustive evidence of offensive sexual comments and gestures occurring over a six-month period); Chavera v. Victoria Indep. Sch. Dist., 221 F. Supp. 2d 741, 743-45, 753 (S.D. Tex. 2002) (persistent humiliating comments, regular touching of plaintiff’s and other employees’ breasts, and a physical assault wherein supervisor tackled her, forced her legs open, and attempted to unzip her pants satisfied summary judgment standard); Barton v. UPS, Inc., 175 F. Supp. 2d 904, 907, 87 FEP 238 (W.D. Ky. 2001) (no summary judgment for employer where co-workers repeatedly sent plaintiff pornographic material and adult toys, simulated oral sex on women, and spat on plaintiff); Petty v. DHL Airways, Inc., 176 F. Supp. 2d 773, 781-83, 87 FEP 1713 (S.D. Ohio 2001) (two alleged contacts involving plaintiff and the harasser’s genitalia, combined with frequent comments regarding tattoo placement, plaintiff’s smell, and plaintiff’s friend’s sexual orientation, created a genuine issue of material fact); Glover v. Oppleman, 178 F. Supp. 2d 622, 638-39 (W.D. Va. 2001) (supervisor’s regular sexual jokes, touching of plaintiff, use of derogatory monikers, and consistent inappropriate comments regarding plaintiff’s bust size and the benefits of Viagra created a material issue of fact); Mingo v. Roadway Express, Inc., 135 F. Supp. 2d 884, 899-900 (N.D. Ill. 2001) (loading dock supervisor subjected to multiple unwelcome invitations and propositions for sex from her co-workers and subordinates; this evidence, although slim, was enough to create a triable issue of fact regarding plaintiff’s subjective interpretation of the behavior in the workplace); Anderson v. Deluxe Homes of Pa, Inc., 131 F. Supp. 2d 637, 645 (M.D. Pa., 2001) (constant whistling and shrieking, referring to plaintiff as “Barbie,” and at least three incidents involving physical contact—over a two month period—satisfied “severe or pervasive” requirement); Pascal v. Storage Tech. Corp., 152 F. Supp. 2d 191, 207-8, 88 FEP 1613 (D. Conn. 2001) (plaintiff’s claims of “constant use of offensive and sexually explicit language . . . sexually explicit discussions about other female employees in her presence, [a] photograph targeting her in a sexualized manner, and a plague containing a sexual joke, all in the context of a predominantly male environment and following her complaints about such conduct” enough to create a hostile work environment); Rahn v. Junction City Foundry, Inc., 152 F. Supp. 2d 1249, 1257-59 (D. Kan. 2001) (over a period of 8 to 9 months, plaintiff’s co-worker asked if he could buy her underwear and whether she shaved her pubic hair, offered her money to perform certain activities naked, simulated sex on a couch on the workroom floor, and told mutual co-workers that plaintiff was tied up in his basement); Erdmann v. Tranquility Inc., 155 F. Supp. 2d 1152, 1159-63, 85 FEP 52 (N.D. Cal. 2001) (employer’s motion for summary judgment denied; supervisor told plaintiff, a gay man, that he was going to hell and that he should declare his commitment to monogamy to put his co-workers at ease); cf. Beard v. Southern Flying J, Inc., 266 F.3d 792, 798, 87 FEP 1836 (8th Cir. 2001) (over the course of three weeks, supervisor’s conduct—repeatedly brushing his body against her breasts and touching her breasts with cooking
D. Element Three: The Behavior is “Unwelcome.”

The Supreme Court in *Meritor* stated that the “gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’” The “unwelcome” requirement is litigated most frequently in sexual harassment cases; in race, national origin, and religion cases, the conduct is usually assumed to be inherently unwelcome. Early cases focused more explicitly on the “unwelcome” requirement than do many recent decisions, perhaps marking some sea-change in the attitude of judges (akin to that in many rape cases until the introduction of rape shield statutes) that the female victim may have been “asking for it.”

Remember that the Supreme Court in *Harris v. Forklift Systems, Inc.*, confirmed that a workplace permeated with “discriminatory intimidation, ridicule, and insult” is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment if the environment would reasonably be perceived, and is perceived by the plaintiff, as hostile or abusive.

This section of this chapter will focus both on the requirement that the victim must subjectively perceive the environment to be hostile and on the requirement that the conduct be “unwelcome.” Since *Harris*, many courts have addressed the requirement that the conduct be “unwelcome” together with the requirement that the victim subjectively perceive the environment to be hostile or abusive.

Although “unwelcomeness” is not completely congruent with a subjective perception that the environment is hostile or abusive, the two are closely linked. Racist or sexual conduct may be “unwelcome” to the victim, however, without rising to the level of the “severe” or “pervasive” hostility required for a Title VII claim. For example, in *Newman v. Federal*
Express Corp., the Sixth Circuit appeared to assume, without discussion, that an “anonymous, racially-charged hate letter” received through the company mail and a voice mail message “containing the sounds of gunshots” were “unwelcome” to the African-American plaintiff. The court affirmed the district court’s grant of summary judgment on the hostile environment claim, however, because it concluded, based upon plaintiff’s deposition testimony, that plaintiff had not shown “that the anonymous communications were subjectively hostile.”

Unwelcomeness is usually examined by looking at the complainant’s participation in or response to the conduct. Although the complainant has the burden of proving that a sexual advance was unwelcome, she or he need not necessarily show resistance. In order to establish liability, however, the complainant will usually have to show that she complained of the conduct or that the employer knew of the offensive conduct. Thus, even though the complainant’s objection or resistance may not be dispositive, the absence of some conduct or comment indicating that the alleged harasser’s conduct was unwelcome is highly relevant.

A complainant’s prior consent is relevant to, but does not conclusively disprove, a claim of harassment based on later conduct. Unquestionably, however, prior consent complicates complainant’s proof. Courts have considered various factors in evaluating whether conduct is unwelcome or whether the plaintiff was a willing participant. These include the plaintiff’s wearing of provocative dress, apparent friendliness with the harasser, failure to report harassment, and participation in sexual horseplay.

210 266 F.3d 401, 86 FEP 1375 (6th Cir. 2001).
211 Id. at 405-06. Plaintiff testified that he did not consider the letter a “big deal,” that he was not surprised, shocked, or disturbed by it, and that he would lose no sleep over it. He described the voice mail message as “silly.”
212 See, e.g., Curry v. District of Columbia, 195 F.3d 654, 663 (D.C. Cir. 1999) (jury did not have to be specifically instructed on fact that employee previously had consensual affair with alleged harasser), cert. denied, 530 U.S. 1215 (2000). See also Lipphardt v. Durango Steakhouse of Brandon, Inc., 267 F.3d 1183, 86 FEP 1409 (11th Cir. 2001), where the appellate court reversed the trial court’s grant of judgment as a matter of law for employer on a retaliatory discharge claim. The appeals court stated that the former personal relationship between the plaintiff and the alleged harasser was a factor to be considered by the jury in determining whether any alleged harassment was based on plaintiff’s gender rather than on her status as the alleged harasser’s former lover. The court concluded that the jury could reasonably have concluded that plaintiff had a good-faith reasonable belief that she was the victim of sexual harassment, and that belief is sufficient for a retaliation claim. The Eleventh Circuit went even further, however, and stated that “while a prior intimate relationship is an important factor to consider, it is not determinative of a sexual harassment claim.” Id. at 1188.
213 See, e.g., Llampallas v. Mini-Circuits Lab, Inc., 163 F.3d 1236 (11th Cir. 1998) (13-year love affair ended, and harassment followed; employee characterized problem as “personal,” which was not enough to put employer on notice of harassment).
214 See, e.g., Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164, 1167, 70 FEP 341 (7th Cir. 1996) (plaintiff’s use of bad language does not automatically demonstrate plaintiff’s insensitivity to, or lack of harm from, co-workers’ language); Carr v. Allison Gas
The employee’s response is obviously crucial in determining whether the alleged harasser’s conduct was “unwelcome.” That response is also crucial because, even if the alleged harasser was a supervisor with authority over the complainant, the employee must have acted reasonably to end the harassment.\textsuperscript{215}

Courts generally have not permitted defendants to explore a complainant’s sexual history away from the workplace with persons other than the alleged harasser to prove that the sexual conduct was actually welcomed.\textsuperscript{216}

Conduct that initially was welcome may become unwelcome. A complainant waives no right by initially accepting the behavior; he or she has the right later to insist that it stop. However, in this situation proving unwelcomeness becomes difficult.\textsuperscript{217}

An employee is expected to use reasonable self-help. First and foremost, the employee is expected to complain about any unwelcome behavior.\textsuperscript{218} Aspects of the workplace that are distasteful to some, but that easily can be avoided by sensitive employees, may not constitute sexual harassment.\textsuperscript{219} It does not follow, however, that a plaintiff is powerless to base a hostile environment claim on conduct or a workplace atmosphere that other employees accept, and

\begin{tiny}
Turbin, 32 F.3d 1007, 1010, 65 FEP 688 (7th Cir. 1994) (complainant’s use of term “fuck head” did not invite her co-workers to write “cunt” on her toolbox; to target her with offensive words, conduct, and practical jokes; to mutilate her clothes; to deface her property; or to expose themselves; because vulgarity differs from hostile harassment, former does not necessarily invite latter); Balletti v. Sun-Sentinel Co., 909 F. Supp. 1539, 1548, 73 FEP 1341 (S.D. Fla. 1995) (female employee who used vulgar language including open discussion of her use of vibrator not victim of hostile work environment); EEOC v. Grinnell Corp., 63 FEP 387, 389 (D. Kan. 1993) (“sexual bantering” by complainant does not preclude proof that she did not welcome the employer’s sexual advances and obscene gestures).

\textsuperscript{215} See generally Ellerth and Faragher.

\textsuperscript{216} See Section III. B. for discussion of Federal Rule of Evidence 412.

\textsuperscript{217} See, e.g., Lipphardt v. Durango Steakhouse of Brandon, Inc., 267 F.3d 1183, 86 FEP 1409 (11th Cir. 2001), where the appellate court reversed the trial court’s grant of judgment as a matter of law for employer on a retaliatory discharge claim. The appeals court stated that the former personal relationship between the plaintiff and the alleged harasser was a factor to be considered by the jury in determining whether any alleged harassment was based on plaintiff’s gender rather than on her status as the alleged harasser’s former lover. The court concluded that the jury could reasonably have concluded that plaintiff had a good-faith reasonable belief that she was the victim of sexual harassment, and that belief is sufficient for a retaliation claim. The Eleventh Circuit went even further, however, and stated that “while a prior intimate relationship is an important factor to consider, it is not determinative of a sexual harassment claim.” \textit{Id.} at 1188.

\textsuperscript{218} See generally Ellerth and Faragher.

\textsuperscript{219} E.g., James v. Louisiana Legislative Fiscal Office, 822 F. Supp. 349, 351, 62 FEP 251 (M.D. La. 1993) (office computer system contained offensive software program featuring animated go-go dancers; this did not constitute sexual harassment because it appeared only when computer user voluntarily chose it from menu).
\end{tiny}
perhaps even enjoy. Thus, a workplace rife with sexual insults and epithets offensive to women may be unwelcome to one or more women, and therefore may be unlawful if severe or pervasive; majority rule does not apply.  

Employers often try to prove welcomeness by pointing to the complainant’s participation in the conduct at issue, or conduct similar to it, or to complainant’s failure to report incidents of harassment to superiors. Even where a complainant contributes to the sexually charged atmosphere of the workplace, however, conduct still may be found unwelcome where the complainant expressed opposition to the conduct, or complained of conduct qualitatively different from complainant’s own.

---


221 See, e.g., Beach v. Yellow Freight System, 312 F.3d 391, 90 FEP 603 (8th Cir. 2002) (where the court equated “subjectively offensive” conduct with “unwelcome” conduct, and held that evidence that plaintiff had used “sexually explicit” language at his trucking terminal did not undermine the district court’s conclusion that the plaintiff had found persistent sexually explicit graffiti about himself, such as “give Al Beach a buck and he’ll fuck you in the butt,” to be subjectively offensive, where Beach repeatedly complained to management about the graffiti, took pictures to show management, tried to remove it himself, and suffered psychological problems as a result of the graffiti. See also Reed v. Shepherd, 939 F.2d 484 (7th Cir. 1991) (ruling that complainant welcomed sexual hijinx from her co-workers and relished reciprocating in kind).

222 Compare Martin v. Nannie & Newborns, Inc., 3 F.3d 1410, 1419 n.12, 62 FEP 1275 (10th Cir. 1993) (reversing summary judgment for the employer; the trial court erred in discrediting the claim of unwelcomeness on the ground that the complainant generally ignored the remarks in question; the remarks still may have been offensive, especially because the complainant complained to the offending workers’ supervisor), aff’d mem., 54 F.3d 788 (10th Cir. 1995) with Dockter v. Rudolf Wolff Futures, 913 F.2d 456, 459–60, 53 FEP 1642 (7th Cir. 1990) (affirming a defense judgment where the plaintiff, an administrative assistant, did not complain to management during the two weeks she was subject to unwelcome advances by her supervisor, which included the fondling of her breast and an attempted kiss).

223 See, e.g., Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 883, 61 FEP 1252 (D. Minn. 1993) (the women removed the explicit pictures, erased or obliterated the graffiti, and complained about verbal comments).

224 See, e.g., Carr v. Allison Gas Turbine, 32 F.3d 1007, 1010, 65 FEP 688 (7th Cir. 1994) (reversing the district court and entering judgment on liability for plaintiff; the complainant’s use of the term “fuck head” did not invite her co-workers to write “cunt” on her toolbox, to target her with offensive words, conduct, and practical jokes, to mutilate her clothes, to deface her property, or to expose themselves; because vulgarity differs from hostile harassment, the former does not necessarily invite the latter); Swentek v. USAir, Inc., 830 F.2d 552, 557, 44 FEP 1808 (4th Cir. 1987) (explaining that court should focus on whether the complainant welcomed (1) the particular conduct in question, (2) from the alleged harasser; complainant’s use of foul language or sexual innuendo in a consensual setting does not waive “her legal protections against unwelcome harassment.”); Jenson, 824 F. Supp.
E. Element Four: The Basis for Employer Liability

Once the plaintiff has established a prima facie case of sexual harassment, the next question is who is responsible for the sexual harassment. For the purposes of determining whether the employer is vicariously liable, the terms “quid pro quo” and “hostile work environment” no longer are controlling. Instead, liability depends upon who committed the harassment, whether the harassment resulted in a tangible employment action, and the employer’s response to the harassment.

If the harasser is a supervisor, then the employer must convince the court that no “tangible employment action” occurred in order to avoid vicarious liability. Only in the absence of a tangible employment action can the employer present an affirmative defense. Thus, oft-litigated issues since Ellerth/Faragher include:

- who is a supervisor?
- what is a tangible employment action?
- what constitutes “reasonable” action by employee and employer in the context of the affirmative defense?

1. Harasser Is High Level Manager

An employer is automatically liable if the proven harassment was the result of high-level managerial conduct. This rule applies, however, only with respect to an individual who is “indisputably within that class of an employer organization’s officials who may be treated as the organization’s proxy.” In that case, the employer bears responsibility despite the form the harassment takes.

This doctrine encompasses two categories of officials. The first are individuals who are the officers of the corporate or other entity, such as directors, owners, partners, or corporate officers. The second group comprises those other individuals of such “high rank” or “high position” that their actions may fairly be deemed the actions of the employer. Faragher and Ellerth identify this as a group for whose actions the corporate or other entity will be legally accountable, but provide no further guidance to identify them.

2. Harasser Is “Supervisor”

at 883 (although some women in the plaintiff class used foul language and sexual innuendo, they did not welcome sexual graffiti, photographs, cartoons, coarse language reflecting an antifemale attitude, or physical acts reflecting a sexual motive).


See generally Ellerth and Faragher.


See id. at 780.

Id.
If the harasser is a “supervisor with immediate (or successively higher) authority over the employee,” the employer is presumptively liable. This presumption is rebuttable, but only if there has been no tangible employment action.

The starting point in analyzing an employer’s vicarious liability for a hostile environment is the determination whether the person who allegedly created that environment was plaintiff’s “supervisor.” Generally, the courts address the issue by examining the actual authority of the purported supervisor over the victim. In determining how much authority is enough to qualify an individual as a supervisor, most courts look at the type of authority wielded by the harasser, not the nomenclature of the job.

But since Faragher and Ellerth were decided, there has been a divergence of approach among appellate courts. Some courts have taken a fairly broad view of which employees should be regarded as supervisors, and have defined “supervisor” to include persons who exercise control over the plaintiff’s daily activities or duties, even if the person did not have the power to make hiring, firing, or promotion decisions. In other words, a supervisor is someone charged with the day-to-day oversight of the work environment. Thus, the Second Circuit concluded that the “mechanic in charge” at a building with a seven-person elevator mechanic crew was plaintiff’s supervisor because he had the right to assign and schedule work, direct the work force, and enforce safety practices. The court reasoned that although the “mechanic in charge” had no power to hire or fire, he was the company’s representative on site, had authority to direct plaintiff’s daily work activities, and the authority given him by Otis “enabled him, or materially augmented his ability” to impose a hostile work environment on plaintiff. In contrast, in Joens v. John Morrell & Co., the Eighth Circuit joined the Fourth and Seventh Circuits in adopting a narrower rule that, to be a “supervisor,” the alleged harasser “must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties.”

---

230 Ellerth, 524 U.S. at 765.
231 See Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1032, 78 FEP 1329 (7th Cir. 1998) (“An employer’s liability for hostile environment sexual harassment depends upon whether the harasser is the victim’s supervisor or merely a co-employee.”); Glickstein v. Neshaminy Sch. Dist., 80 FEP 67, 75 (E.D. Pa. 1999) (Faragher and Ellerth require that court first ask whether supervisor or employee committed sexual harassment).
232 See generally Faragher and Ellerth; Parkins, 163 F.3d at 1033 (touchstone for determining supervisory status is extent of authority possessed by purported supervisor). See also Gawley v. Indiana Univ., 276 F.3d 301 (7th Cir. 2001).
233 See id.; Wright-Simmons v. City of Okla. City, 155 F.3d 1264, 1271, 78 FEP 105 (10th Cir. 1998) (test is extent to which harasser exercised “control over” victim).
235 See id. at 125.
236 354 F.3d 938 (8th Cir. 2004).
237 Id. at 940. See also Hall v. Bodine Elec., 276 F.3d 345, 355 (7th Cir. 2002); Mikels v. City of Durham, 183 F.3d 323, 333-34 (4th Cir. 1999).
Similarly, the Seventh Circuit, in Parkins v. Civil Constructors of Illinois, Inc., explained that supervisory authority “consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes [of] imputing liability to the employer.” The court noted that the harassers were members of labor unions, accounted for their work hours on a time card and were paid hourly wages, did not substitute on construction projects as a superintendent, and, although they sometimes functioned as foremen, they often worked as laborers. Accordingly, they were deemed to be merely co-workers of the victim.

The EEOC, in its enforcement guidance on the issue, proposes that “an individual qualifies as an employee’s ‘supervisor’ if:

a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or

b. the individual has authority to direct the employee’s daily work activities.”

3. What is a tangible employment action?

If the harassment by the supervisor results in a “tangible employment action,” then the presumption that the employer is vicariously liable is conclusive. The employer is not entitled to assert an affirmative defense. Moreover, it is liable for the entire course of conduct, not just the conduct resulting in the tangible action.

---

238 163 F.3d 1027, 78 FEP 1329 (7th Cir. 1998).
239 Id. at 1033.
240 Id.
241 EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, FEP MAN. (BNA) 915.002, at 5 (June 18, 1999). The Guidance further provides:

In some circumstances, an employer may be subject to vicarious liability for harassment by a supervisor who does not have actual authority over the employee. Such a result is appropriate if the employee reasonably believed that the harasser had such power. The employee might have such a belief because, for example, the chains of command are unclear. Alternatively, the employee might reasonably believe that a harasser with broad delegated powers has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee’s chain of command.

If the harasser had no actual supervisory power over the employee, and the employee did not reasonably believe that the harasser had such actual authority, then the standard of liability for co-worker harassment applies.

Id. at 5–6.
242 Faragher, 524 U.S. at 777; Ellerth, 524 U.S. at 759.
243 Id. See also Ellerth, where the Court held that an employer is strictly liable to a victimized employee for an actionable hostile work environment created by a supervisor when the harassment results in a “tangible employment action.” Ellerth, 524 U.S. at 765.
What, then, is a “tangible employment action”? The Court described a “tangible employment action” as “a significant change in employment status, often but not always resulting in economic injury,” and by reference to a non-exclusive list of actions, including “hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” The Court in Ellerth also mentioned “a less distinguished title” and “other indices that might be unique to a particular situation” as possible indicia of tangible employment actions. In other words, a tangible employment action is the type of action a supervisor normally is empowered to take and its effect on the victim must be tangible.

By contrast, where only fairly trivial work changes have resulted, no tangible employment action has been found. Courts also have declined to allow voluntary acts of the employee to serve as the basis for a tangible employment action. Thus, a voluntary transfer, even if at lesser pay, is not a tangible employment action.

In Durham Life Insurance Co. v. Evans, the Third Circuit considered whether something less than, or at least different from, this enunciated list could constitute a tangible employment action. The employer deprived a female insurance salesperson of her secretary and office, assigned her less lucrative accounts, and apparently hid files from her. In analyzing whether the loss of an office and secretary could be considered tangible employment actions, the court explained:

Although direct economic harm is an important indicator of a tangible adverse

---

244 Ellerth, 524 U.S. at 765.
245 Ellerth, 524 U.S. at 761 (citation omitted).
246 See Durkin v. City of Chicago, 341 F.3d 606 (7th Cir. 2003) (denial of job-related training can constitute a tangible employment action, although record does not establish denial of training in this case); Watts v. Kroger Co., 170 F.3d 505, 510, 81 FEP 6 (5th Cir. 1999) (requiring employee to check with supervisor before taking breaks and mop floors as member of grocery store produce department); Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263, 268, 78 FEP 561 (5th Cir. 1998) (decision to drop extracurricular activities and reassignment to different grade level, where decision was later revoked); Phillips v. Taco Bell Corp., 156 F.3d 884, 889 n.6, 78 FEP 84 (8th Cir. 1998) (assigning fast food employee to work some evening hours); Reinhold v. Virginia, 151 F.3d 172, 175, 77 FEP 1017 (4th Cir. 1998) (assigning additional work, denying opportunity to attend professional conference, requiring employee to monitor and discipline co-worker, and undesirable work assignments); but see EEOC Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, FEP MAN. (BNA) 915.002 (disagreeing with Fourth Circuit’s decision in Reinhold).
247 See Duran v. Flagstar Corp., 17 F. Supp. 2d 1195, 1202, 77 FEP 1436 (D. Colo. 1998) (plaintiff’s transfer at her own request does not constitute undesirable reassignment or otherwise qualify as tangible employment action); Sconce v. Tandy Corp., 9 F. Supp. 2d 773, 776, 83 FEP 869 (W.D. Ky. 1998) (plaintiff’s self-imposed job detriment—voluntary transfer to lower paying position at another store—could not support claim of tangible employment detriment).
248 166 F.3d 139, 78 FEP 1434 (3d Cir. 1999).
249 Id. at 153.
employment action, it is not the sine qua non. If an employer’s act substantially decreases an employee’s earning potential and causes significant disruption in his or her working conditions, a tangible adverse employment action may be found.\footnote{Id.; see also Sharp v. City of Houston, 164 F.3d 923, 933, 78 FEP 1779 (5th Cir. 1999) (transfer is a tangible employment action, despite fact that no loss of pay occurred, where new position was “objectively worse—such as being less prestigious or less interesting or providing less room for advancement”); cf. Stutler v. Illinois Dep’t of Corrections, 263 F.3d 698, 86 FEP 1019 (7th Cir. 2001) (affirming summary judgment for employer because lateral transfer to another department without any loss in benefits is not an adverse employment action).}

The Evans court also rejected the employer’s argument that there was no tangible employment action because, at the time the plaintiff alleged that she was first subjected to discriminatory treatment in the form of sexist remarks, she had not yet experienced a tangible adverse action. The employer claimed that, had she reported the conduct at that time, it would have investigated and taken prompt remedial action.\footnote{Evans, 166 F.3d at 154.} The Third Circuit rejected this argument because “it seems untoward to give an employer whose supervisors first signal their bias and then act on it more protection than an employer whose supervisors begin with tangible employment action.”\footnote{Id.}

Some courts have found tangible employment actions even in the absence of economic harm. In\footnote{96 F.3d 912, 71 FEP 1577 (7th Cir. 1996).} Bryson v. Chicago State University,\footnote{Id. at 917; see also Green v. Administrators of Tulane Educ. Fund, 284 F.3d 642, 654–55 (5th Cir. 2002) (despite absence of proof of economic consequences, court finds that “Green’s demotion, together with the substantial diminishment of her job responsibilities, was sufficient to constitute a tangible employment action”); Molnar v. Booth, 229 F.3d 593, 83 FEP 1756 (7th Cir. 2000) (negative evaluation that remained in intern teacher’s file for six months and confiscation of teacher’s art supplies by supervisor were tangible employment actions).} for example, decided before Ellerth, the Seventh Circuit held that the threatened adverse employment action need only be a tangible detriment, not an economic one. The court concluded that there was a genuine issue of material fact as to whether a tenured university professor had shown a loss of tangible employment benefits arising out of loss of her title and her banishment from university committee work. The court rejected the employer’s argument that there had been no adverse action because there had been no economic detriment, and further reasoned, “committee assignments and titles may play a part in preparing for an administrative academic career. The [district court] erred in assuming that nothing adverse had happened to Bryson because she had not yet applied for a deanship. Depriving someone of the building blocks for such a promotion . . . is just as serious as depriving her of the job itself.”\footnote{Faragher v. City of Boca Raton, 524 U.S. 775, 807, 77 FEP 14 (1998).}

Similarly, in Faragher, the Supreme Court concluded that a tangible employment action can result even if the action taken is successful or favorable because the victim succumbed to the threats.\footnote{Id.}
Several recent decisions have concluded that a “tangible employment action” is distinct from the “materially adverse employment action” which is a necessary element of a prima facie case under Title VII. These courts understand “tangible employment action” as a more restricted category, because it results in strict liability.

Conversely, in *Lee-Crespo v. Schering Plough Del Caribe, Inc.*, the court affirmed a grant of summary judgment to the employer, but assumed that thwarting of an employee’s application to transfer could, in some circumstances, constitute a tangible employment action if plaintiff establishes a causal link between the denied transfer and the alleged harasser: “that is, the harassing supervisor must be the one who orders the tangible employment action or, at the very least, must be otherwise substantially responsible for the action.” In *Lee-Crespo*, the court concluded there was no proof that the allegedly harassing supervisor “ordered or adversely influenced the denial of the transfer....” The court also noted that a reassignment could constitute a tangible employment action; again, a causal link is necessary.

In *Reed v. MBNA Marketing Systems, Inc.*, the court vacated and remanded, on other grounds, the trial court’s grant of summary judgment for employer. The court held that, because the Supreme Court stated in *Ellerth* that “unfulfilled threats” are not tangible employment actions, a supervisor’s conduct in physically assaulting a 17 year old employee who had come to his house to babysit for his young son, and then instructing the employee not to tell anyone about the assault or they would both be fired (she did not report the assault for a year and was not fired), was not a tangible employment action. The court reasoned that because the supervisor’s conduct was “exceedingly unofficial and involved no direct exercise of company authority,” it was “exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed.”

In *Green v. Administrators of the Tulane Ed. Fund*, the court held that plaintiff’s demotion from office manager to Administrative Assistant, together with the “substantial diminishment of her job responsibilities,” was a tangible employment action even though it inflicted no economic harm. Finally, in *Holly D. v. California Institute of Technology*, the court held that “a ‘tangible employment action’ occurs when the supervisor threatens the employee with discharge and, in order to avoid the threatened action, the employee complies with the supervisor’s demands.”

4. Constructive Discharge as a “Tangible Employment Action”

A constructive discharge occurs when a reasonable person in the employee’s position would view her working conditions as intolerable and would feel that she had no other choice

---

256 354 F.3d 34, 44 (1st Cir. 2003).
257 *Id.* at 44.
258 333 F.3d 27 (1st Cir. 2003).
259 *Id.* at 33. *See also Quantock v. Shared Marketing Serv., Inc.*, 312 F.3d 899 (7th Cir. 2002) (concluding that job transfer resulting in temporary change in plaintiff’s job responsibilities did not constitute tangible employment action).
260 284 F.3d 642, 654-55 (5th Cir. 2002).
261 339 F.3d 1158, 1167 (9th Cir. 2003).
but to quit. Until 2004, courts were divided over whether a constructive discharge constitutes a tangible employment action.

But in Pennsylvania State Police v. Suders the Supreme Court held a “constructive discharge” claim was viable under Title VII. An employee can quit and sue for damages as if she had been discharged, if harassment has created working conditions that are objectively intolerable. The Court further held that an employer can assert the Ellerth/Faragher affirmative defense in a case of constructive discharge when the employee has resigned because of co-worker conduct or unofficial supervisory conduct. The employer, however, is vicariously liable and cannot assert the affirmative defense when the employee has resigned because of the employer’s official acts.

Plaintiff Nancy Drew Suders alleged that her supervisors, officers of the Pennsylvania State Police, harassed her so severely that she was forced to resign. The Court addressed the burden of proof in a sexual harassment/constructive discharge claim under Title VII, building on its prior harassment jurisprudence. First, to establish a hostile environment, the plaintiff must show “harassing behavior ‘sufficiently severe or pervasive to alter the conditions of [their]employment.”

Beyond that, we hold, to establish “constructive discharge,” the plaintiff must make a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. An employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus. This affirmative defense will not be available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially

---

262 Tran v. Trustees of the State Colleges in Colo., 355 F.3d 1263, 1270 (10th Cir. 2004).
263 See Reed v. MBNA Marketing Systems, Inc., 333 F.3d 27 (1st Cir. 2003) (refusing to adopt a blanket rule one way or the other); Jackson v. Arkansas Dept. of Education, 272 F.3d 1020 (8th Cir. 2001) (stating, with little discussion, that if plaintiff was in fact constructively discharged, the constructive discharge would constitute a tangible employment action, thus preventing employer from utilizing the Ellerth affirmative defense); Caridad v. Metro-North Commuter R.R., 191 F.3d 283 (2nd Cir. 1999) (holding that constructive discharge does not constitute a tangible employment action because co-workers, as well as supervisors, can cause the constructive discharge of an employee, and an employee’s constructive discharge may not be ratified or approved by the employer); Robinson v. Sappington, 351 F.3d 317 (7th Cir. 2003) (distinguishing between a constructive discharge caused by co-employees and a constructive discharge caused by supervisors; where official actions of the supervisor make the employment intolerable, a constructive discharge may be considered a tangible employment action).
265 Id. at 2347.
changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions. In so ruling today, we follow the path marked by our 1998 decisions in Burlington Industries, Inc. v. Ellerth, and Faragher v. Boca Raton.\textsuperscript{266}

This Court granted certiorari to resolve the disagreement among the Circuits on the question whether a constructive discharge brought about by supervisor harassment ranks as a tangible employment action and therefore precludes assertion of the affirmative defense articulated in Ellerth and Faragher.

*******

We conclude that an employer does not have recourse to the Ellerth/Faragher affirmative defense when a supervisor’s official act precipitates the constructive discharge; absent such a “tangible employment action,” however, the defense is available to the employer whose supervisors are charged with harassment.\textsuperscript{267}

*******

Under the constructive discharge doctrine, an employee’s reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 838-839 (3d ed.1996) (hereinafter Lindemann & Grossman). The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee’s position would have felt compelled to resign? See C. Weirich et al., 2002 Cumulative Supplement to Lindemann & Grossman 651-652, and n. 1.

*******

We agree with the lower courts and the EEOC that Title VII encompasses employer liability for a constructive discharge.

This case concerns an employer’s liability for one subset of Title VII constructive discharge claims: constructive discharge resulting from sexual harassment, or “hostile work environment,” attributable to a supervisor. Our starting point is the framework Ellerth and Faragher established to govern employer liability for sexual harassment by supervisors. Those decisions delineate two categories of hostile work environment claims: (1) harassment that “culminates in a tangible employment action,” for which employers are strictly liable, and (2) harassment that takes place in the absence of a tangible employment action, to which employers may assert an affirmative defense. With the background set out above in mind, we turn to the key issues here at stake: Into which Ellerth/Faragher

\textsuperscript{266} Id.
\textsuperscript{267} Id. at 2350-51 (internal citations omitted).
category do hostile-environment constructive discharge claims fall--and what
proof burdens do the parties bear in such cases.

Setting out a framework for employer liability in those decisions, this Court noted
that Title VII’s definition of “employer” includes the employer’s “agent[s],” 42
U.S.C. § 2000e(b). We viewed that definition as a direction to “interpret Title VII
based on agency principles.” The Restatement (Second) of Agency, ... the Court
noted, states . . . that an employer is liable for the acts of its agent when the agent
“was aided in accomplishing the tort by the existence of the agency relation.”

We then identified “a class of cases where, beyond question, more than the mere
existence of the employment relation aids in commission of the harassment: when
a supervisor takes a tangible employment action against the subordinate.” A
tangible employment action, the Court explained, “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.” Unlike injuries that could equally be inflicted by a
coworker, we stated, tangible employment actions “fall within the special
province of the supervisor,” who “has been empowered by the company as ... [an]
agent to make economic decisions affecting other employees under his or her
control.” The tangible employment action, the Court elaborated, is, in essential
character, “an official act of the enterprise, a company act.”

Accordingly, we held that when no tangible employment action is taken, the
employer may defeat vicarious liability for supervisor harassment by establishing,
as an affirmative defense, both that “the employer exercised reasonable care to
prevent and correct promptly any sexually harassing behavior,” and that “the
plaintiff employee unreasonably failed to take advantage of any preventive or
corrective opportunities provided by the employer or to avoid harm otherwise.”

The constructive discharge here at issue stems from, and can be regarded as an
aggravated case of, sexual harassment or hostile work environment.

A plaintiff who advances such a compound claim must show working conditions so
intolerable that a reasonable person would have felt compelled to resign.
ratcheted up to the breaking point. Like the harassment considered in our pathmarking decisions, harassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts. Unlike an actual termination, which is always effected through an official act of the company, a constructive discharge need not be. A constructive discharge involves both an employee’s decision to leave and precipitating conduct: The former involves no official action; the latter, like a harassment claim without any constructive discharge assertion, may or may not involve official action.

******

But when an official act does not underlie the constructive discharge, the Ellerth and Faragher analysis, we here hold, calls for extension of the affirmative defense to the employer.268

The Court then cited two recent appellate court decisions “that indicate how the ‘official act’ (or ‘tangible employment action’) criterion should play out when constructive discharge is alleged.”

Both decisions advance the untangled approach we approve in this opinion. In Reed v. MBNA Marketing Systems, Inc., 333 F.3d 27 (C.A.1 2003), the plaintiff claimed a constructive discharge based on her supervisor’s repeated sexual comments and an incident in which he sexually assaulted her. The First Circuit held that the alleged wrongdoing did not preclude the employer from asserting the Ellerth/ Faragher affirmative defense. As the court explained in Reed, the supervisor’s behavior involved no official actions. Unlike, “e.g., an extremely dangerous job assignment to retaliate for spurned advances,” 333 F.3d, at 33, the supervisor’s conduct in Reed “was exceedingly unofficial and involved no direct exercise of company authority”; indeed, it was “exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed,” ibid. In contrast, in Robinson v. Sappington, 351 F.3d 317 (C.A.7 2003), after the plaintiff complained that she was sexually harassed by the judge for whom she worked, the presiding judge decided to transfer her to another judge, but told her that “her first six months [in the new post] probably would be ‘hell,’ “ and that it was in her “‘best interest to resign.’ “ Id., at 324. The Seventh Circuit held that the employer was precluded from asserting the affirmative defense to the plaintiff’s constructive discharge claim. The Robinson plaintiff’s decision to resign, the court explained, “resulted, at least in part, from [the presiding judge’s] official actio[n] in transferring” her to a judge who resisted placing her on his staff. Id., at 337. The courts in Reed and Robinson properly recognized that Ellerth and Faragher, which divided the universe of supervisor-harassment claims according to the presence or absence of an official act, mark the path constructive discharge claims based on harassing conduct must follow.

268 Id. at 2351 – 56 (most internal citations omitted).
Following Ellerth and Faragher, the plaintiff who alleges no tangible employment action has the duty to mitigate harm, but the defendant bears the burden to allege and prove that the plaintiff failed in that regard. The plaintiff might elect to allege facts relevant to mitigation in her pleading or to present those facts in her case in chief, but she would do so in anticipation of the employer’s affirmative defense, not as a legal requirement.269

Thus, the Court in Suders established that an harassment plaintiff can establish a constructive discharge – and thus obtain all the damages that would be available in the event of a formal termination of employment – when an abusive working environment is “ratcheted up” beyond merely unlawful harassment and has become so intolerable that the employee’s resignation qualified as a fitting response. In such a case, the Ellerth/Faragher affirmative defense is available to the employer in the absence of an official company act as the “last straw”, but is not available when a supervisor’s official act precipitates the constructive discharge.

5. Employment Action Is Not Tangible

If no tangible employment action is involved, the employer can avoid liability by establishing an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.270 As the Supreme Court said:

The defense comprises two necessary elements: (a) that the employer exercised 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.271

a. What is “reasonable” in the context of the Ellerth/Faragher affirmative defense?

269 Id. at 2356–7 (most internal citations omitted).
270 Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763–64 (1998); Faragher, 524 U.S. at 807. In adopting the affirmative defense, the Court relied upon its own holding in Meritor Savings Bank v. Vinson, 477 U.S. 57, 72, 40 FEP 1822 (1986), that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment. Ellerth, 524 U.S. at 763–64; Faragher, 524 U.S. at 790–92 (noting that definition of “employer” in Title VII includes any “agent” of employer, and that such language places some limits on the acts of employees for which employers are responsible). The Court also invoked the policy considerations behind Title VII, which is “designed to encourage the creation of antiharassment policies and effective grievance mechanisms” and “to promote conciliation rather than litigation.” Ellerth, 524 U.S. at 763–64; accord Faragher, 524 U.S. at 807.
271 Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.
Proof that the employer had promulgated an antiharassment policy with a complaint procedure, and proof that an employee unreasonably failed to use the employer-provided complaint procedure are significant to the defense.

Since the Ellerth and Faragher decisions, lower courts have concluded that, to be effective, an employer’s policy must provide for complaints to someone other than the harassing supervisor, that the employer’s response to the complaint is highly relevant, and that an employee’s vague, undifferentiated fear of retaliation does not excuse a failure to complain.

i. Reasonable care to prevent sexual harassment.

The first prong of the affirmative defense is whether the employer exercised reasonable care to prevent sexual harassment and to correct promptly any harassing behavior. This generally requires that the employer have and disseminate some formal policy against harassment, with a reasonable complaint procedure. This mechanism for reporting and resolving complaints must be available to employees without undue risk or expense. Moreover, to be an effective shield against liability, the employer’s complaint procedure must provide for bypassing the offending supervisor in instances where the supervisor himself (or herself) is the alleged harasser.

In the aftermath of Ellerth and Faragher, the courts generally have analyzed the first prong by critiquing the employer’s sexual harassment policy, if any, and, in those cases where the employee lodged a complaint, by evaluating the employer’s response.

---

272 Faragher, 524 U.S. at 807–08; Ellerth, 524 U.S. at 773–74.
273 Faragher, 524 U.S. at 807.
274 Id. at 807–08. In Faragher, the Court ruled that although the defendant city would normally have had the opportunity to raise the affirmative defense, the facts in the record established that the city could not possibly prove its elements. The plaintiff, employed as a lifeguard by the city, had been sexually harassed by her supervisors. The city had an antiharassment policy in place, yet it never disseminated the policy to the lifeguards nor made any effort to keep track of their conduct. Moreover, the city’s complaint procedure contained in the policy had no assurance that supervisors could be bypassed.
275 See, e.g., Jackson v. Arkansas Dept. Of Ed., 272 F.3d 1020 (8th Cir. 2001); Moisant v. Air Midwest, Inc., 291 F.3d 1028 (8th Cir. 2002); Scrivner v. Socorro Indep. Sch. Dist., 169 F.3d 969, 79 FEP 429 (5th Cir. 1999); Phillips, 156 F.3d at 889. See Montero v. Agco Corp., 192 F.3d 856, 80 FEP 1658 (9th Cir. 1999) (first prong of the affirmative defense established where employer had an antiharassment policy, employee received the policy, and employer responded to and investigated plaintiff’s complaint within eleven days of receiving the complaint); Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 294–95, 80 FEP 180 (D.D.C. 1999) (employer satisfied the first element of the affirmative defense where it had an antiharassment policy, a complaint procedure, and investigated employee complaints and where plaintiff knew of the employer’s sexual harassment policy but failed to report harassment); Shaw v. AutoZone, Inc., 180 F.3d 806, 80 FEP 1185 (7th Cir. 1999) (plaintiff failed to complain about sexual harassment, even though she received employer’s antiharassment policy; employer conducted antiharassment training; therefore, employer established first prong of affirmative defense), cert. denied, 528
Where the employer failed to distribute or otherwise make employees aware of the policy,\textsuperscript{276} or designated someone closely aligned with the harasser as the sole point person for complaints of harassment,\textsuperscript{277} however, courts have found that there is a material question of fact regarding the sufficiency of the employer’s efforts to prevent sexual harassment and denied summary judgment. At least one circuit, the Eighth, has held that a fact issue existed as to whether the employer satisfied the first prong even though the employer established that it had a written sexual harassment policy, which was posted at all its stores and reviewed and signed by all employees, including the plaintiff, who subsequently filed a complaint of harassment.\textsuperscript{278}

Some courts have said that to meet the reasonable care prong, an employer’s antiharassment program must also be “effective.”\textsuperscript{279} For example, the Tenth Circuit, in Wilson
v. Tulsa Junior College,\textsuperscript{280} explained that merely adopting and distributing a sexual harassment policy may be insufficient if the policy is itself deficient.\textsuperscript{281} The court noted that the employer’s policy instructed employees to report harassment at an office that was not accessible during evenings or weekend hours, when employees and students were on campus, which is when the plaintiff was subjected to the harassment. Additionally, the court faulted the policy’s requirement that supervisors report “formal complaints,” as opposed to informal complaints, without defining each.\textsuperscript{282} Finally, the court found the policy insufficient because it did not indicate the responsibilities of a supervisor who learned of harassment through informal means.

The courts are divided on whether employers are required to conduct training in order for a policy to be “effective.” Some courts have faulted antiharassment programs because they did not include or had inadequate training.\textsuperscript{283} Other courts have faulted employers who impose limitations on the supervisors or personnel officials to whom a complaint can be made, or praised plans because they did not.\textsuperscript{284}

\textbf{ii. Reasonable care to correct sexual harassment.}

Where an employee lodged a complaint of harassment, the courts will analyze as part of the first prong of the affirmative defense the corrective action the employer took against the harasser.\textsuperscript{285} The promptness of the response is part of this analysis.

\textsuperscript{280} 164 F.3d 534, 78 FEP 1189 (10th Cir. 1998).
\textsuperscript{281} Id. at 541–42.
\textsuperscript{282} Id.
\textsuperscript{283} Baty v. Willamette Indus., Inc., 172 F.3d 1232, 79 FEP 1451 (10th Cir. 1999); Hollis v. City of Buffalo, 28 F. Supp. 2d 812, 821, 78 FEP 1677 (W.D.N.Y. 1998); Miller v. D.F. Zee’s, Inc., 31 F. Supp. 2d 792, 803, 78 FEP 1402 (D. Or. 1998). \textit{But see} Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 86 FEP 803 (4th Cir. 2001) (affirming summary judgment because “dissemination of ‘an effective anti-harassment policy provides compelling proof’ that an employer has exercised reasonable care to prevent and correct sexual harassment,” absent evidence that employer implemented the policy in bad faith or was deficient in enforcing the policy; deposition testimony that some employees had trouble recalling the details of their orientation briefings on the policy is not sufficient to establish that employees do not understand the policy). \textit{See generally} EEOC \textit{Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors}, FEP MAN. (BNA) 915.002 (June 18, 1999) (“If feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities.”).\textsuperscript{284} \textit{See} Coates v. Sundor Brands, Inc., 164 F.3d 1361, 1369, 78 FEP 1553 (11th Cir. 1999) (per curiam) (Barkett, J., concurring) (approving “user-friendly” plan that authorized harassment victims to complain to “their line manager, Personnel Contact, or other manager with whom they feel comfortable”) (emphasis added).\textsuperscript{285} \textit{See} Hatley v. Hilton Hotels Corp., 308 F.3d 473 (5th Cir. 2002) (evidence was sufficient to support jury’s finding that employer failed to establish affirmative defense to harassment claims,
An employer’s failure to abide by its own policies is evidence tending to show that the employer’s response was inadequate.\textsuperscript{286} In one case, the court went even further by examining a university’s failure to take corrective action against the school’s chancellor in response to allegations of an alleged assault that took place years before the chancellor’s alleged assault on the plaintiff.\textsuperscript{287} The court reasoned that an employer is obligated to prevent sexual harassment of which it is aware, and concluded that the university had knowledge of the chancellor’s propensity toward sexually inappropriate behavior and was therefore obligated to take corrective action before the plaintiff was assaulted.\textsuperscript{288}

Although what constitutes an adequate response to sexual harassment is a fact-specific inquiry, some courts have held that the more severe and frequent the harassment, the less likely that a nonpunitive remedy will be deemed adequate.\textsuperscript{289} Further, where the employer’s prompt remedial response effectively ends the complained-of conduct, the response may protect the employer from liability even if a different response might have been more effective or more satisfactory to the victim.\textsuperscript{290}

\textsuperscript{286} See Spriggs v. Diamond Auto Glass, 242 F.3d 179, 190, 85 FEP 342 (4th Cir. 2000) (company failed to adhere to own antiharassment policy); Hurley v. Atlantic City Police Dep’t, 174 F.3d 95, 98, 79 FEP 808 (3d Cir. 1999) (even though employer had an antiharassment policy, it did not enforce the policy, did not investigate harassment, and did not punish harassment like other offenses); Distasio v. Perkin Elmer Corp., 157 F.3d 55, 65, 78 FEP 531 (2d Cir. 1998).

\textsuperscript{287} Fall v. Indiana Univ. Bd. of Trustees, 12 F. Supp. 2d 870, 881, 79 FEP 121 (N.D. Ind. 1998).

\textsuperscript{288} Id.

\textsuperscript{289} E.g., Knabe v. Boury Corp., 114 F.3d 407, 413, 73 FEP 1877 (3d Cir. 1997) (warning to harasser that violations of sexual harassment policy could result in discharge deemed adequate response if plaintiff failed to present evidence that it was not reasonably calculated to end harassment).

\textsuperscript{290} Mikels v. City of Durham, 183 F.3d 323, 80 FEP 248 (4th Cir. 1999) (stating that courts afford “great weight to the fact that a particular response was demonstrably adequate to cause cessation of the conduct in question”); Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 76 FEP 1667 (10th Cir.)
The measure of adequate timeliness in an employer’s response to a harassment complaint can vary depending upon the need for extensive investigation or the complexity of the employer’s organization.

iii. Unreasonable failure to take advantage of preventative or corrective opportunities or to avoid harm otherwise.

A literal reading of the test promulgated in Ellerth and Faragher indicates that an employer must establish both elements to prevail on the affirmative defense, and indeed most courts interpreting these decisions have characterized the affirmative defense in the conjunctive.\textsuperscript{291} Thus, if the plaintiff properly files a complaint about a harassing supervisor, he or she has rebutted the employer’s affirmative defense. That is, he or she has “taken advantage” of the employer’s corrective mechanism and the employer can be held liable even if it had taken reasonable care to promulgate and enforce a harassment policy.\textsuperscript{292}

\begin{addendum}
\item \textsuperscript{291} See Harrison v. Eddy Potash, Inc., 248 F.3d 1014, 85 FEP 990 (10th Cir. 2001); Richardson v. New York Dep’t of Corr. Serv., 180 F.3d 426, 442–43, 80 FEP 110 (2d Cir. 1999) (stating that defendant establishes Ellerth/Faragher affirmative defense by showing “both” that it acted appropriately and that employee did not complain; reversing summary judgment for defendant because plaintiff complained and reasonable juror could find employer’s response inadequate); Lissau v. Southern Food Serv., Inc., 159 F.3d 177, 182–83, 78 FEP 503 (4th Cir. 1998) (concluding that on remand “[i]f . . . the district court finds no effective anti-harassment policy was in place or that [plaintiff] did avail herself of the policy, then summary judgment would be inappropriate”); Brown v. Perry, 184 F.3d 388, 395, 80 FEP 567 (4th Cir. 1999) (describing employer’s burden to satisfy “both elements” of affirmative defense); Watts v. Kroger Co., 170 F.3d 505, 509, 81 FEP 6 (5th Cir. 1999) (“The affirmative defense consists of two prongs, both of which the employer must fulfill. . . .”); Haugerud v. Amery Sch. Dist., 259 F.3d 678, 698–99, 87 FEP 1326 (7th Cir. 2001); Greene v. Dalton, 164 F.3d 671, 674, 79 FEP 375 (D.C. Cir. 1999) (stating that test is conjunctive and reversing summary judgment for employer: “Even if the [company] can satisfy the first element of the Faragher test, . . . it plainly has not met the second. . . .”).
\item \textsuperscript{292} E.g., Haugerud, 259 F.3d at 698–700. In his dissent in Ellerth, Justice Thomas criticized the
\end{addendum}
Some courts, however, have resisted a strict conjunctive application of the Ellerth/Faragher affirmative defense, often limiting application of the test to the particular facts of the case, holding that the employer can escape liability without asserting the affirmative defense in cases where the plaintiff promptly complains and the employer promptly responds. In Indest v. Freeman Decorating, Inc., the Fifth Circuit found that Ellerth and Faragher were inapplicable, at least in terms of imposing the requirements of the affirmative defense, because those cases did not address circumstances in which the plaintiff quickly reported a complaint of sexual harassment and the employer took prompt remedial action. The employee in Indest reported to management within days of the alleged conduct that her supervisor had made four crude sexual remarks during a convention. Although the harasser was a supervisor, the Fifth Circuit exempted the employer from having to satisfy the elements of the affirmative defense to achieve summary judgment. Instead, the court held, “if the plaintiff complains promptly, the then-incidential misbehavior can be stymied before it erupts into a hostile environment, and no actionable Title VII violation will have occurred.” Moreover, even assuming that the plaintiff

majority’s formulation of the employer’s affirmative defense, in part on the ground that “employers will be liable notwithstanding the affirmative defense, even though they acted reasonably, so long as the plaintiff in question fulfilled her duty of reasonable care to avoid harm.” 524 U.S. 742, 773, 77 FEP 1 (1998) (Thomas, J., dissenting) (emphasis in original). According to Justice Thomas, “[i]n practice, . . . employer liability very well may be the rule, . . . . the one result that it is clear Congress did not intend.” Id. (Thomas, J., dissenting) (emphasis in original). See Watts, 170 F.3d at 510–11; Distasio v. Perkin Elmer Corp., 157 F.3d 55, 78 FEP 531 (2d Cir. 1998); Williamson v. City of Houston, 148 F.3d 462, 467, 77 FEP 613 (5th Cir. 1998); Hurley v. Atlantic City Police Dep’t, 174 F.3d 95, 79 FEP 808 (3d Cir. 1999), cert. denied, 528 U.S. 1074 (2000).

See Indest v. Freeman Decorating, Inc., 164 F.3d 258, 265, 78 FEP 1527 (5th Cir. 1999) (distinguishing facts from Ellerth and Faragher and concluding that employer’s prompt remedial response to employee’s timely complaint of five harassing statements and acts relieved employer of Title VII employer liability); Todd v. Ortho Biotech, Inc., 175 F.3d 595, 597–99, 79 FEP 1015 (8th Cir. 1999) (remanding to district to determine whether Ellerth/Faragher defense was applicable in cases of single, severe, unanticipated sexual harassment, where employer takes appropriate remedial measures). Chief Judge Richard Arnold concurred in the judgment, observing “[i]f a supervisor abuses his authority to commit a sufficiently severe act of harassment, the employer’s affirmative defense, if established, should serve to reduce the damages, but I don’t understand why it should always erase the tort completely.” Id. at 599; Coates v. Sundor Brands, Inc., 164 F.3d 1361, 1364, 78 FEP 1553 (11th Cir. 1999) (per curiam) (describing legal test as whether employer has harassment policy, if employer complied with policy, and, if so, whether employer “responded reasonably to [plaintiff’s] complaint,” thus suggesting that elements of affirmative defense are not conjunctive). In his concurrence, Judge Barkett explained: “Under the framework established by the Court in Faragher and Burlington Industries, a prompt response by an authorized agent to halt reported harassment is sufficient to relieve the employer of liability under Title VII in cases where the harassment has not culminated in the taking by a supervisor of a tangible employment action against the victim.” Id. at 1369 (Barkett, J., concurring).

164 F.3d 258, 78 FEP 1527 (5th Cir. 1999).

Id. at 265.

Id. at 260.

Id. at 265–67.
had proven severe or pervasive harassment, the court nevertheless held that summary judgment for the employer was appropriate because it had taken prompt remedial action in response to the employee’s complaint of sexual harassment.\textsuperscript{298}

Conversely, if an employee fails to come forward with a complaint of sexual harassment, the courts typically find the employee unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer.\textsuperscript{299} A generalized fear of retaliation is not a reasonable excuse for failing to avail oneself of the employer’s policy.\textsuperscript{300}

\textsuperscript{298} Id. In Judge Wiener’s separate concurrence, he argued that the majority’s opinion chooses “to disregard totally the Supreme Court’s express and carefully explained linking of (1) the employer’s prompt and appropriate response with (2) the employee’s unreasonable failure to invoke the employer’s complaint mechanism.” \textit{Indest}, 168 F.3d at 798 (Wiener, J., concurring). He stated that because the employer could not meet the second prong of the \textit{Ellerth} affirmative defense, it would be vicariously liable unless the conduct was insufficiently severe or pervasive to constitute actionable sexual harassment. \textit{Id.} (Wiener, J., concurring).

\textsuperscript{299} See Holly D. V. California Inst. Of Tech., 339 F.3d 1158 (9th Cir. 2003) (Caltech established as a matter of law the affirmative “reasonable care” defense, where plaintiff knew that Caltech had a sexual harassment policy and knew that she was being harassed, but did not report her professor/supervisor’s harassment because she felt the administration was biased in favor of its faculty and therefore felt that a report would have been futile) Gawley v. Indiana Univ., 276 F.3d 301 (7th Cir. 2001) (where supervisor harassed plaintiff for approximately seven months with up to three inappropriate comments per day, and where plaintiff’s repeated requests to supervisor that he stop harassing her had no effect, plaintiff’s wait of seven months before complaining constituted an unreasonable failure to take advantage of the employer’s corrective procedures; thus, summary judgment was appropriate); Madray v. Publix Supermarkets, Inc., 208 F.3d 1290, 82 FEP 1071 (11th Cir.) (employee failed to complain of the alleged harassment for two years even though she received and was familiar with employer’s antiharassment policy), \textit{cert. denied}, 531 U.S. 926 (2000); Scrivner v. Socorro Indep. Sch. Dist., 169 F.3d 969, 972, 79 FEP 429 (5th Cir. 1999) (summary judgment for employer affirmed; as a matter of law, eight-month delay in filing complaint was unreasonable, and when questioned during investigation, plaintiff said harasser treated her “professionally”).

\textsuperscript{300} Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 295–96, 80 FEP 627 (2d Cir. 1999) (delay of several months in reporting harassing conduct was not “based on credible fear that [plaintiff’s] complaint would not be taken seriously or that she would suffer some adverse employment action as a result of filing a complaint”), \textit{cert. denied}, 529 U.S. 1107 (2000); Shaw v. AutoZone, Inc., 180 F.3d 806, 813, 80 FEP 1185 (7th Cir. 1999) (subjective fear of confrontation, unpleasantness, or retaliation not sufficient), \textit{cert. denied}, 528 U.S. 1076 (2000); Robinson, 1999 WL 33887, at *7 (subjective fear of coming forward to complain does not alter assessment of whether employer exercised reasonable care to prevent and correct promptly any harassing behavior); Fierro v. Saks Fifth Ave., 13 F. Supp. 2d 481, 487, 79 FEP 101 (S.D.N.Y. 1998) (generalized fears that lodging complaint will result in “not a very pleasant outcome” “can never constitute reasonable grounds for an employee’s failure to complaint to his or her employer”); Jones v. USA Petroleum Corp., 20 F. Supp. 2d 1379, 1386, 78 FEP 305 (S.D. Ga. 1998) (unsubstantiated “fear of repercussion” insufficient as matter of law to defeat employer’s affirmative defense); Montero v. Agco Corp., 19 F. Supp. 2d 1143, 77 FEP 1443 (E.D. Cal. 1998), \textit{aff’d}, 192 F.3d 856...
makes some complaint to the employer, however, even if to a nominal supervisor, courts generally consider the issue a fact question.\textsuperscript{301}

Some courts have also concluded that the circumstances of a plaintiff’s delay in invoking the corrective mechanism may create an issue of fact for the jury.\textsuperscript{302}

For example, in Reed v. MBNA Marketing Systems, Inc.,\textsuperscript{303} the court concluded that summary judgment was not appropriate because, although the employer took reasonable precautions to prevent and correct promptly any sexually harassing behavior through its antiharassment policy, investigation, and remedial action in response to complaints, there was a genuine issue of material fact as to whether the then-seventeen-year-old employee was “reasonable” in waiting a year to report her supervisor’s assault and other harassing conduct. Plaintiff argued that her age and embarrassment, her supervisor’s threat that they would both be fired if she reported the conduct, and his claim of family friendship with the company’s owner were enough to make “reasonableness” a jury issue. The court pointed out that there is no bright-line rule to determine when a failure to complain becomes unreasonable, but that the Supreme Court must have realized that “reporting sexually harassing conduct by a supervisor...
would for many or most employees be uncomfortable, scary or both.”  

Because the Supreme Court was crafting a compromise for policy reasons, “more than ordinary fear or embarrassment is needed.”  

Thus, the employee must have a “credible fear” that her complaint would not be taken seriously or that it would result in some adverse employment action. But sometimes inaction is reasonable, the court said, and a jury would not be acting irrationally if it concluded that plaintiff was acting reasonably to be cowed by her supervisor’s threats.

At the other extreme, in *Holly D. v. California Inst. of Technology*, the court concluded that an employee’s failure to complain until a full year after the first of many incidents of unwelcome sexual activity with her supervisor was not reasonable, where the plaintiff asserted that she did not complain to the Employee Relations department because she was dissatisfied with the way they handled her earlier complaint about disability discrimination, especially since the policy listed a number of other available avenues for complaints of sexual harassment, and plaintiff presented no evidence to explain her failure to complain to the other listed persons or departments.

The time between the first incidents of harassment and the employee’s complaints, as well as the time it takes the employer to respond to those complaints, is often of crucial importance. In *Walton v. Johnson & Johnson Services, Inc.*, for example, the court ruled that, when the complaining employee first contacted the Human Resources department on September 3rd and by September 13th the company’s investigators had met with the complaining employee and met with and suspended the accused supervisor, the company’s remedial measures were timely, and reasonably designed to stop the harassment, correct its effects on the employee, and ensure that the harassment did not recur. Additionally, the court concluded that plaintiff’s fear of reprisal was not “credible” and did not excuse her failure to report what she claimed were repeated sexual assaults for a period of two and a half months.

6. **Harasser Is a Co-Worker**

As the Supreme Court noted in *Faragher* and *Ellerth*, the lower courts have unanimously applied a negligence standard— ”knew or should have known”—to determine an employer’s

---

304 *Id.* at 35.
305 *Id.*
306 339 F.3d 1158 (9th Cir. 2003).
307 347 F.3d 1272 (11th Cir. 2003). *See also* Matvia v. Bald Head Island Management, Inc. 259 F. 3d 261 (4th Cir. 2001) (where company had policy that clearly defined sexual harassment and listed persons to whom harassment could be reported, and where company investigated promptly and took prompt disciplinary action after learning of harassment, plaintiff could not survive summary judgment by arguing that policy was deficient simply because employees failed to recall their orientation briefings about the policy).
308 *But see* Hardy v. University of Illinois at Chicago, 328 F.3d 361 (7th Cir. 2003) (concluding that a delay of only six weeks from the first incident in reporting her supervisor’s harassment to his supervisor was not unreasonable as a matter of law, and summary judgment was therefore inappropriate); *see also* Mack v. Otis Elevator, 326 F.3d 116 (2d Cir. 2003) and Wyatt v. Hunt Plywood Co., Inc., 297 F.3d 405 (5th Cir. 2002).
liability for co-worker harassment. Courts of appeal considering co-worker sexual harassment since Faragher and Ellerth have continued to apply the negligence standard.

a. Notice to the Employer

An employer may be on notice of an employee’s harassment of a co-worker where the employer is aware of prior instances of harassment of others by the same individual, even if the plaintiff herself did not complain. The extent and seriousness of the earlier harassment, as well as the similarity and temporal proximity to the later harassment, are factors in determining whether evidence of harassment of others may be received to prove notice. Courts have held that

309 See Faragher v. City of Boca Raton, 524 U.S. 775, 799 (1998) (federal courts have “uniformly judged employer liability for co-worker harassment under a negligence standard”); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760, 77 FEP 1 (1998) (employer is liable for co-worker harassment if it “knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action”) (citing EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(d) (1997)).

310 See, e.g., Diaz v. Swift-Eckrich, Inc., 318 F.3d 796 211 (8th Cir. 2003) (because alleged harassers did not have supervisory power over plaintiff, plaintiff was required to show that employer knew or should have known about the harassment and failed to respond in prompt and effective manner); Ferris v. Delta Air Lines, Inc., 277 F.3d 128, 136 (2d Cir. 2001) (employer liable for co-worker harassment “only if it is negligent, that is, if it either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it.”); Swinton v. Potomac Corp., 270 F.3d 794, 803, 87 FEP 65 (9th Cir. 2001) (district court did not err in denying instruction on Faragher/Ellerth defense in co-worker harassment case); Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864 (9th Cir. 2001); Burrell v. Star Nursery, Inc. 170 F.3d 951, 79 FEP 764 (9th Cir. 1999) (employer is vicariously liable for co-worker sexual harassment only if employer “knew or should have known” about the harassment); Williams v. General Motors Corp., 187 F.3d 553, 561, 80 FEP 753 (6th Cir. 1999) (plaintiff must show that employer “knew or should have known of the charged sexual harassment and failed to implement prompt and effective remedial action”); Richardson v. New York Dep’t of Corr. Serv., 180 F.3d 426, 440, 80 FEP 110 (2d Cir. 1999); Carter v. Chrysler Corp., 173 F.3d 693, 700, 79 FEP 1253 (8th Cir. 1999) (“employer knew or should have known of the harassment and failed to take prompt and effective remedial action”); Mockler v. Multnomah County, 140 F.3d 808, 812, 76 FEP 890 (9th Cir. 1998) (plaintiff required to show that employer knew or should have known of harassment and took “no effectual action” to correct it); Kunin v. Sears Roebuck & Co., 175 F.3d 289, 79 FEP 1350 (3d Cir. 1999); Fenton v. HiSAN, Inc., 174 F.3d 827, 79 FEP 1138 (6th Cir. 1999); Baty v. Willamette Indus., Inc., 172 F.3d 1232, 79 FEP 1451 (10th Cir. 1999); Burrell v. Star Nursery, Inc., 170 F.3d 951, 79 FEP 764 (9th Cir. 1999); Shepherd v. Slater Steels Corp., 168 F.3d 998, 79 FEP 311 (7th Cir. 1999); Bailey v. Runyon, 167 F.3d 466, 79 FEP 225 (8th Cir. 1999); Coates, 164 F.3d at 1364; Distasio v. Perkin Elmer Corp., 157 F.3d 55, 78 FEP 531 (2d Cir. 1998); Williamson v. City of Houston, 148 F.3d 462, 77 FEP 613 (5th Cir. 1998).

311 See Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1279, 87 FEP 1209 (11th Cir. 2002); Ferris v. Delta Air Lines, Inc., 277 F.3d 128 (2d Cir. 2001); Davis v. U.S. Postal Serv., 142 F.3d 1334, 1342, 76 FEP 1515 (10th Cir. 1998). See also Watson v. Blue Circle, Inc., 324 F.3d 1252 (11th Cir. 2003) for a thorough discussion of actual versus constructive notice.
where previous incidents of harassment were never brought to management’s attention, however, the employer lacks notice even if the alleged perpetrator was regarded as a harasser by co-workers. One court has held, however, that the employer may be deemed to have knowledge of harassing conduct even though the conduct is reported to supervisory personnel other than those specified in the employer’s sexual harassment policy. Other courts have held that, where a plaintiff initially reports harassment to someone other than the designated point person and such reporting proves ineffective, there may be no imputed notice to the employer. An employer may receive notice from someone other than the victim of the harassment.

An employer cannot assert a lack of knowledge defense to co-worker sexual harassment if the employer did not communicate to employees that they should notify the employer of harassment and that the employer will address such complaints. Moreover, notice of sexual harassment will be imputed to an employer when its own supervisory employee took actions that discouraged the plaintiff from reporting incidents.

b. The Employer’s Remedial Response.

Although what constitutes an adequate response to sexual harassment is a fact-specific inquiry, courts have held that the more severe and frequent the harassment, the less likely that a nonpunitive remedy will be deemed adequate. As the Ninth Circuit noted in *Nichols v. Azteca*

---

312 Compare *Garcia v. ANR Freight Sys., Inc.*, 942 F. Supp. 351, 358, 77 FEP 75 (N.D. Ohio 1996) (unreported internal sentiment did not provide employer with notice of misconduct), *with* *Zimmerman v. Cook County Sherif’s Dep’t*, 96 F.3d 1017, 1018–19, 71 FEP 1537 (7th Cir. 1996) (sheer pervasiveness of harassment might support inference that employer must have known of it).

313 *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213–14, 71 FEP 1367 (8th Cir. 1996) (employer had knowledge of alleged sexual harassment of plaintiff by co-worker in light of her boyfriend’s reporting of incidents to store manager, even though employer’s sexual harassment policy provided that such incidents were to be reported to human resources department; employer’s policy “in effect required [plaintiff’s] supervisor to remain silent notwithstanding his knowledge of the incidents”).

314 Compare *Parkins v. Civil Constructors of Ill.*, Inc., 163 F.3d 1027, 1038, 78 FEP 1329 (7th Cir. 1998) (employer held not on notice when the two nonsupervisory employees to whom the plaintiff reported harassment failed to communicate complaints to those with proper authority to provide a remedy), *with* *Distasio*, 157 F.3d at 64 (employee who reports sexual harassment in compliance with company policy is not required to report it a second time, when first complaint is ineffective, before the employer is charged with notice).

315 *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1364, 78 FEP 1553 (11th Cir. 1999) (employer on notice where victim confided in co-worker that another co-worker was harassing her, and confidant reported harassment to human resources); *Varner*, 94 F.3d at 1213 (employee on notice where plaintiff’s fiancee, rather than plaintiff; reported alleged harassment to store manager).

316 See, e.g., *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149, 74 FEP 1292 (2d Cir. 1997).

317 See *Distasio*, 157 F.3d at 59 (supervisor told plaintiff with regard to incident by harasser: “don’t say nothing, keep in here, because if you say something, you cannot work here no more”).

318 E.g., *Knabe v. Boury Corp.*, 114 F.3d 407, 413, 73 FEP 1877 (3d Cir. 1997) (warning to harasser that violations of sexual harassment policy could result in discharge deemed adequate response
In this circuit, as in others, “remedies [for sexual harassment] should be “reasonably calculated to end the harassment.” The reasonableness of the remedy depends on its ability to: (1) “stop harassment by the person who engaged in harassment;” and (2) “persuade potential harassers to refrain from unlawful conduct.” When the employer undertakes no remedy, or where the remedy does not end the current harassment and deter future harassment, liabilities attaches for both the past harassment and any future harassment.

In Nichols, “The company made no effort to investigate Sanchez’s complaint; it did not discuss his allegations with the perpetrators; it did not demand that the unwelcome conduct cease; and it did not threaten more serious discipline in the event the harassment continued.” Because “Azteca failed to remedy the harassment and discipline those responsible for it,” the court held that the company was liable for the harassment by Sanchez’s co-workers.

Cessation of the harassment by the disciplined perpetrator evidences the effectiveness of the employer’s response. Where the employer’s prompt remedial response to complaints of harassment effectively ends the complained-of conduct, the response may protect the employer from liability even if a different response might have been more effective or more satisfactory to the victim. In assessing the reasonableness of the employer’s remedial measures, courts will consider “the amount of time elapsed between the notice of harassment... and the remedial action, and the options available to the employer such as employee training sessions, disciplinary

where plaintiff failed to present evidence that it was not reasonably calculated to end harassment); Mart v. Dr. Pepper Co., 923 F. Supp. 1380, 1388, 71 FEP 478 (D. Kan. 1996) (what is reasonable in terms of remedial action depends on gravity of alleged harassment).

256 F.3d 864 (9th Cir. 2001). See also Swenson v. Potter, 271 F.3d 1184 (9th Cir. 2001) (holding that, especially where proof of harassment is “weak and disputed,” the employer need not take formal disciplinary action to escape liability; permanent separation of plaintiff from alleged harasser is sufficient).

Id. at 875-76.

Id. at 876.

E.g., Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 76 FEP 1667 (10th Cir. 1998).

Knabe, 114 F.3d at 414 (if remedial action selected by employer is adequate, aggrieved employee cannot object); Fleenor v. Hewitt Soap Co., 81 F.3d 48, 51, 70 FEP 737 (6th Cir. 1996) (employer’s response in reprimanding harassing co-worker insulated employer from liability where harassing conduct stopped); Spicer v. Virginia Dep’t of Corrs., 66 F.3d 705, 711, 69 FEP 1255 (4th Cir. 1995) (employer not required to make most effective response possible; where employer’s prompt response resulted in cessation of complained-of conduct, liability ceased). Where the identity of the harasser is unknown, however, an employer may still avoid liability as long as it takes prompt remedial action, even if the harassment does not stop. E.g., Hirras v. National R.R. Passenger Corp., 95 F.3d 396, 399–400, 72 FEP 454 (5th Cir. 1996) (employer not liable for conduct of unidentified sexual harasser(s) who over three-year period left threatening written messages and telephone calls and spray-painted graffiti on employer’s door; employer notified police, independently investigated incidents, and assured plaintiff that harasser would be fired if discovered).
action taken against the harasser(s), reprimands in personnel files, and terminations, and whether or not the measures end the harassment.”

An employer’s obligation to take appropriate measures to end harassment is not met merely because it undertook an investigation and the alleged harasser denied the allegations. However, “[t]he most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified.” Merely suggesting that the victims or potential victims of abuse alter their behavior does not amount to an adequate response, and can, in fact, prove notice on the part of the employer.

The Seventh Circuit held en banc that a company’s collective bargaining agreement, which it claimed limited its ability to terminate an alleged harasser, was inadmissible on the issue of liability for co-worker harassment, although it was admissible to demonstrate the employer’s “good faith” compliance with Title VII for the purpose of punitive damages.

7. Employer Responsibility for Hostile Environment Harassment Based on the Conduct of Nonemployees

Several courts, following the EEOC Guidelines, have held employers liable for sexual harassment committed by nonemployees where the employer “knows or should have known of

---

324 Rheinbeck v. Hutchinson Technology, Inc., 261 F.3d 751, 756 (8th Cir. 2001). Accord, Scarberry v. Exxonmobil Oil Corp., 328 F.3d 1255 (10th Cir. 2003). See also Longstreet v. Ill. Dept. of Corrections, 276 F.3d 379 (7th Cir. 2002), where plaintiff argued that, had the employer reacted more harshly to an earlier complaint against her harasser by another employee, she would not later have been harassed. The court stated that deterrence is “an objective in imposing liability on employers for the creation of a hostile environment by a plaintiff’s co-workers.” An employer’s response to allegations of harassment must be reasonably calculated to prevent further harassment under the circumstances of the individual case, and a response which ends the harassment is “not obviously unreasonable.”

325 Hathaway v. Runyon, 132 F.3d 1214, 76 FEP 194 (8th Cir. 1997) (holding that investigation is only way to determine whether harassment occurred and what, if any, remedy is needed; it is not substitute for remedy) (citing Fuller v. City of Oakland, 47 F.3d 1522, 67 FEP 153 (9th Cir. 1995)).

326 Swenson, 271 F.3d at 1193.

327 See, e.g., Fuller, 47 F.3d at 1529 (remedy must target harasser, not victim) (citing Intlekofer, 973 F.2d at 780 n.9); Carr v. Allison Gas Turbine, 32 F.3d 1007, 1012, 65 FEP 688 (7th Cir. 1994) (suggestion that “the woman work harder than the men to prove she could do the job” did not amount to remedial response); Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 63 FEP 880 (8th Cir. 1993) (fact that female employees were warned to avoid looking harasser in eye indicated that employer was aware of harassment and failed to respond).

328 EEOC v. Indiana Bell Tel. Co., 256 F.3d 516, 86 FEP 1 (7th Cir. 2001).

329 29 C.F.R. § 1604.11(e) (1997) (“An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.”).
the [harassment by the nonemployee] and fails to take immediate and appropriate corrective action.”

Courts have reasoned that it does not matter whether the hostile work environment is caused by an employee or nonemployee; the employer is liable for failing to remedy harassment because it “ultimately controls the conditions of the work environment.”

Employers have been held liable for failing to remedy known sexual harassment by patients or residents of the employer, as well as for allowing sexual harassment by visitors accompanying employees.

---

330 E.g., Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 78 FEP 1026 (10th Cir. 1998) (restaurant that tolerated customers grabbing female waitress could be liable under Title VII); Quinn v. Green Tree Credit Corp., 159 F.3d 759, 78 FEP 371 (2d Cir. 1998) (employer has duty to protect employees from harassment by customers); Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 854, 75 FEP 1228 (1st Cir. 1998) (affirming plaintiff’s verdict where employee complained about sexual advances made by important customer but employer “not only acquiesced in the customer’s demands, but explicitly told her to give in to those demands and satisfy the customer”); Folkerson v. Circus Circus Enters., Inc., 107 F.3d 754, 756, 73 FEP 219 (9th Cir. 1997) (stating that “an employer may be held liable for sexual harassment on the part of a private individual . . . where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective action when it knew or should have known of the conduct”); Kudatzky v. Galbreath Co., 1997 WL 598586, at *5 (S.D.N.Y. Sept. 23, 1997) (brokerage firm could be liable for failing to stop sexual harassment of its employee by president of the firm’s client); D.W. v. Radisson Plaza Hotel, 958 F. Supp. 1368 (D. Minn. 1997) (failure to protect employees from acts of hotel guests could amount to Title VII violation); Jarman v. City of Northlake, 950 F. Supp. 1375, 1378–79, 79 FEP 1095 (N.D. Ill. 1997) (city could be liable for elected official’s harassment of city employee; city’s five-month delay in acting after it learned of harassment prevented it from characterizing its response as “immediate”); Mart v. Dr. Pepper Co., 923 F. Supp. 1380, 1387–88, 71 FEP 478 (D. Kan. 1996) (soft drink manufacturer could be liable for conduct of employee of bottling company if it failed to end harassment after being made aware of it; granting soft drink manufacturer summary judgment where, upon learning of alleged harassment, it took prompt and effective remedial action); Hallberg v. Eat’n Park, 70 FEP 361 (W.D. Pa. 1996) (restaurant not liable for patron’s harassment of waitress where it took prompt and appropriate remedial action).

331 Lockard, 162 F.3d at 1073–74.

332 Crist v. Focus Homes, Inc., 122 F.3d 1107, 74 FEP 1023 (8th Cir. 1997) (home for developmentally disabled individuals held liable for permitting resident to repeatedly sexually assault employees); Murry v. New York Univ. Coll. of Dentistry, 57 F.3d 243, 68 FEP 249 (2d Cir. 1995) (Title IX case analyzing harassment of dental student by patient in school clinic under Title VII hostile environment principles); Ligenza v. Genesis Health Ventures of Mass., 995 F. Supp. 226, 230 (D. Mass. 1998) (employer can be liable for failing to remedy sexual harassment by patient at long-term health care facility, despite consideration that patients are likely to be physically or mentally ill; patients’ rights at such facilities do not shield employer from obligation to provide protection from sexual harassment).

What constitutes “appropriate corrective action” is contingent upon the amount of authority and control the employer had over the nonemployee. Reassignment of the harassed employee may be considered an adequate remedy.

II. HARASSMENT ON BASES OTHER THAN SEX

Although most harassment cases are sexual harassment cases, not all are. Understanding the law of harassment on other bases besides sex is important for that reason alone, but it is also important because (1) it provides a useful basis for understanding the law of sexual harassment; (2) sexual harassment can sometimes occur in combination with other types of prohibited harassment; and (3) some cases say that the facts that support a harassment claim on a basis other than sex can contribute toward the showing of the “pervasiveness” element of a hostile environment sexual harassment claim. Claims of harassment based on characteristics other than sex continue to be evaluated under the same legal standard as applied to sexual harassment claims. The EEOC’s enforcement guidance addressing vicarious liability provides

---

334 29 C.F.R. § 1604.11(e).
335 Lockard, 162 F.3d at 1074–75. But see EEOC v. Federal Express Corp., 1995 WL 569446, at *3 (W.D. Wash. Aug. 8, 1995) (removal of building from driver’s route where customer was sexually harassing her may not be reasonable corrective action; change in driver’s schedule reduced her pay and company could have removed customer).
336 In Vinson, for example, Justice Rehnquist recognized the relevance of non-sexual harassment cases, explaining that “a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.” 477 U.S. at 67 (Citation omitted); See, Harris v. Forklift Systems, 114 S.Ct. 367, 371, 63 FEP 225 (1993) (adopting a harassment definition that broadly encompasses discrimination based on “race, gender, religion, or national origin”); See, e.g., 29 CFR §1604 (a); Jeffries v. Metro-Mark, Inc., 45 F.3rd 258, 260-61, 66 FEP 1316 (8th Cir.) (employer was not liable for co workers racial harassment; same standard as for sexual harassment), cert. denied, 116 S. Ct. 102 (1995); Rogers v. Western-Southern Life Insurance Company, 12 F. 3d 668, 673, 63 FEP 694 (7th Cir. 1993) (consciously borrowing from sexual harassment law in evaluating a claim of racial harassment); Boutros v. Canton RTA, 997 F. 2d 198, 203, 62 FEP 369 (6th Cir. 1993) (citing EEOC Guidelines in the EEOC Compliance Manual and noting that the elements for a case of racially or sexually hostile work environment are the same as the elements for a case of national origin hostile environment).
338 Hicks v. Gates Rubber Company, 833 F. 2d 1406, 1416-17, 45 FEP 608 (10th Cir. 1987) (evidence of racial harassment considered in determining the pervasiveness element of a hostile environment sex claim). Contra Wall v. AT&T Technologies, 754 F. Supp. 1084, 1094-96, 54 FEP 1540 (M. D. N. C. 1990) (allegations of separate incidents of racial and sexual harassment; the evidence of racial harassment cannot be used to support the claim of sexual harassment).
339 Accord Harrison v. Metropolitan Gov’t., 80 F. 3d 1107, 1118, 73 FEP 109 (6th Cir. 1996) (“the elements and burden of proof that a Title VII plaintiff must meet are the same for racially
that “[t]he rule in Ellerth and Faragher regarding vicarious liability applies to harassment by supervisors based on race, color, sex, (whether or not of a sexual nature), religion, national origin, protected activity, age, or disability.”

A. Race, Color, and National Origin

In 1971 Rogers v. EEOC, a national origin case, addressed an issue of first impression: whether Title VII prohibits harassment that entails no tangible job detriment. There, the plaintiff was an optometrist’s assistant who claimed she was abused by white co-workers and was limited in her ability to attend white clients. The Fifth Circuit held that “the relationship between an employee and his working environment is of such significance as to be entitled to statutory protection.” Later cases made clear that the legality of the offensive conduct depends on its gravity and frequency, and racially discriminatory statements are compelling, if not always determinative, evidence of racial harassment. Such remarks, whether they are sufficiently pervasive to prove a hostile environment, can also constitute direct evidence of other discriminatory employment practices.

Many cases have analyzed the issue of pervasiveness. In Reedy v. Quebecor Printing Eagle, Inc., the court found that the plaintiff raised a valid claim where he demonstrated five incidents that could be characterized as racial harassment. These included a number of racially derogatory statements using racial epitaphs, a threat to physically harm a co-employee who was African-American, and two incidents of racially offensive graffiti, which stayed on the wall for charged harassment as for sexually charged harassment”), cert. denied, 519 U. S. 863, 73 FEP 192 (1996).


454 F. 2d 234, FEP 92 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

Id. at 237-38.

National Railroad Passenger Corporation v. Morgan, 536 U.S. 101 (2002) (recognizing the viability of a claim of hostile work environment based upon racial jokes, epitaphs, and racially derogatory acts); Jackson v. Quanex Corp., 191 F. 3d 647, 661-62, 80 FEP 1425 (6th Cir. 1999) (use of racial epitaphs to supply contexts for other actions alleged to be racially motivated); Aman v. Cort Furniture Rental Corp., 85 F. 3d 1074, 1083-84, 70 FEP 1614 (3rd Cir. 1996) (Although acts of racial harassment do not have to be accompanied by racially discriminatory statements to prove intentional discrimination on a regular and pervasive basis, such statements make plaintiff’s claim more compelling); Vance v. Southern Bell Tel. Company, 863 F. 2d 1503, 1510-11, 50 FEP 742 (11th Cir. 1989) (The lower court incorrectly applied the “pervasiveness” standard in evaluating racially harassment claims; the law requires the finder of fact to examine not just the frequency of the incidents but the gravity of the incidents as well).

Brown v. East Mississippi Electric Power Association, 989 F. 2d 858, 861-62, 61 FEP 1104 (5th Cir. 1993) (white supervisor’s routine use of the term “Nigger” is direct evidence that disciplinary actions against African-American employees were discriminatory).

333 F. 3d 906, 908-09, 92 FEP 133 (8th Cir. 2003).
over five months.\textsuperscript{346} In Ferguson v. Pipefitters Association Local Union 597,\textsuperscript{347} the court found that the harassment in dispute clearly created a hostile work environment even though the court determined that the union was not liable because it had acted sufficiently to prevent the harassment from continuing. The harassment at the employee’s work site included graffiti on the interior walls of portable toilets, the placing of a swastika in an African-American Pipefitter’s tool box, the hanging of a Ku Klux Klan poster in a trailer used by African-American Pipefitters, and the display of a hangmen’s noose.\textsuperscript{348}

The issue of whether racial harassment is sufficiently severe and pervasive is often a factual question left to the jury.\textsuperscript{349}

Some courts, in assessing whether racial epitaphs and conduct are sufficiently severe or pervasive to be actionable, have analyzed the issue from the perspective of a “reasonable black person.” For example, in Harris v. International Paper Company,\textsuperscript{350} three African-American employees complained of racial epitaphs, the Ku Klux Klan garb worn by white co-workers, and a co-employee’s insubordination to a minority supervisor. The court concluded that these instances of “racial violence or threatened violence which might appear to white observers as mere “pranks” are, to black observers, evidence of threatening, pervasive attitudes.”\textsuperscript{351}

White employees, as well as employees of other races, are protected against racial harassment.\textsuperscript{352} Racial harassment may also be actionable under state fair employment practices

\textsuperscript{346} Id. at 908-09.
\textsuperscript{347} 333 F. 3rd 656, 92 FEP 360 (7th Cir. 2003).
\textsuperscript{348} Id. at 658. See also Woodland v. Ryerson and Son, Inc., 302 F. 3d 839, 843-44, 89 FEP 1485 (8th Cir. 2002) (court concluded that three uses of a racial epitaph, racial graffiti, and distribution of a racist poem were insufficient evidence of harassment where Ryerson acted promptly and adequately to address the instances of co-worker harassment); Williams v. Waste Management of Illinois, 361 F. 3d 1021, 1029-31, 93 FEP 1054 (7th Cir. 2004)(telling of racial jokes, use of racial epitaphs, and racially motivated horseplay insufficient to find a hostile work environment where the employer acted promptly to end the harassment).
\textsuperscript{349} See e.g. Hafford v. Seidner, 183 F. 3d 506, 513, 80 FEP 801 (6th Cir. 1999) (racial slurs, graffiti, and physical threats sufficient to raise jury issue); Richardson v. New York State Department of Corrections, 180 F. 3d 426, 438-40, 80 FEP 110 (2nd Cir. 1999) (repeated use of racial slurs was “severe” enough to present the issue to the jury); Carter v. Chrysler Corp., 173 F. 3d 693, 701-02, 79 FEP 1253 (8th Cir. 1999) (regular use of racial slurs and sabotage of the worksite creates issue of fact for the jury on the pervasiveness of harassment); But see also, Little v. United Tech., 103 F. 3d 956, 960, 72 FEP 1560 (11th Cir. 1997) (employees objection to single racist comment made by one co-worker insufficient to establish an unlawful employment practice).
\textsuperscript{351} Id. at 1516.
\textsuperscript{352} See Bowen v. Missouri Department of Social Services, 311 F. 3d 878, 883-84, 90 FEP 782 (8th Cir. 2002) (finding of sufficient evidence of harassment based on race where African-American supervisor referred to an employee as an “white bitch” on two occasions); Davis v. Kansas City
C. Religion

Religious harassment cases continue to be easily divided into cases involving religious activity and cases involving membership in a protected group. Religious harassment may take several forms. It may occur in quid pro quo harassment where, for example, a supervisor demands that an employee engage in some unwelcome and undesired religious activity to obtain or retain the job or benefits. Alternatively, religious harassment may exist in a hostile environment claim where, for example, a person’s religious affiliation or practices are disparaged or ridiculed.

1. Activity

Where employers or supervisors require engaging in religious activity as a condition for employment, courts have held this requirement to be an unlawful quid pro quo for job retention.

2. Membership

Religious harassment often takes the form of comments disparaging to the employee’s membership in a particular religion or to the employee’s religious views. Hostile work

_Housing Authority_, 822 F. Supp. 609, 615, 61 FEP 1577 (W. D. Mo. 1993) (white manager subjected to racial harassment when called “white bitch” and humiliated at meetings as the only white employee present); _McNeal v. Aguills_, 831 F. Supp. 1079, 1081-82, 66 FEP 789 (S. D. N. Y. 1993) (African-American hospital employee who was English speaking had an actionable claim where her complaint was that the employer’s policy allowed her Filipino co-workers to communicate in Tagalog causing harassment to her as a native English speaker).


The 1991 Civil rights Act reversed the Supreme Court’s decision in _Patterson v. McClain Credit Union_, 491 U.S. 164 (1989), which held that § 1981 prohibits race discrimination only in the initial formation of an employment contract and not in the performance or breach of the contract; thus, § 1991 did not prohibit racial harassment. _See_ Chapter 24 (the Civil Rights Act of 1866 and 1871).

_See e.g. Venters v. Delphi_, 123 F.3d 956, 975-77, 74 FEP 1095 (7th Cir. 1997) (reversing the trial court’s grant of summary judgment in favor of the employer on a religions harassment claim where discharge employee alleged that the Born Again Christian supervisor made adherence to his religious values a requirement of employment).

_See e.g. Johnson v. Spencer Press of Maine, Inc._, 364 F.3d 368, 93 FEP 999 (1st Cir. 2004) (remarks about employee’s Catholic faith, calling the employee a “religious freak,” telling the
environment religious harassment claims should be evaluated using the same analytical framework applied in other types of harassment claims. To demonstrate harassment, the complainant must show that the conduct was pervasive, unwelcome, and due to the employee’s religious practices or beliefs. For the employer to be responsible for the conduct employee he was tired of his “religious bullshit,” and screaming at the employee to “take Mary and turn her upside down and pull her dress over her head”; jury properly found that the motivation for the comments stemmed from the supervisor’s animosity toward Johnson’s religious beliefs; Weiss v. United States, 595 F.Supp. 1050, 1056-57, 36 FEP 1 (E. D. Va. 1984) (remarks such as “resident Jew,” “Jew faggot,” “Christ killer,”; such continuous abusive of religious based language can “pollute a healthy working environment...and can affect the employee’s emotional and psychological stability”); Vaughan v. A. G. Processing, Inc., 459 N. W. 2d 627, 631, 57 FEP 1227 (Iowa 1990) (continuous reference to complainant as “God damned stupid fucking Catholic”); Turner v. Barr, 806 F. Supp. 1025, 1028 (D. D.C. 1992) (Jewish plaintiff subject to hostile work environment through comments by fellow employees and supervisors including jokes about the Holocaust, and Jews’ skills in dealing with money); but see Rosario Rivera v. Puerto Rico Aqua Duct and Sewer Authority, 331 F. 3d 183, 190, 92 FEP 1 (1st Cir. 2003) (employee nicknamed “Mother Theresa” by co worker not considered harassment but merely a response to the employee’s scolding of co employee’s vulgarity).  

Johnson v. Spencer Press of Maine, Inc., 364 F. 3d 368, 376, 93 FEP 999 (1st Cir. 2004) (use of the routine hostile work environment analysis in order to determine that religious harassment occurred); Hafford v. Seidner, 183 F.3d 506, 512, 80 FEP 801 (6th Cir. 1999) (elements and burdens of proof for hostile work environment claim do not vary regardless of the context in which the claim arises); Rosario Rivera v. Puerto Rico Aqua Duct and Sewer Authority, 331 F. 3d 183, 189, 92 FEP 1 (1st Cir. 2003) (in the religious harassment arena, plaintiff must establish that: “(1) she is a member of a protected class; (2) she was subject to the uninvited harassment; (3) the offending conduct was because of her religion; (4) the harassment was severe and pervasive; (5) the offending conduct was both objectively and subjectively offensive and (where employer liability is sought); (6) there was a basis for such liability).  

Johnson v. Spencer Press of Maine, Inc., 364 F.3d 368, 376, 93 FEP 999 (1st Cir. 2004) (finding of harassment where the harassment specifically invoked Johnson’s religion even while some of the harassment did not); Glaser v. Levitt, 2000 U. S. Dist. LEXIS 10967 (N. D. Ill. 2000) (Orthodox Jew’s allegation that employer’s negative comments regarding time off for religious observances constituted harassment found not severe or pervasive enough because the incidents were infrequent, the conduct was not physically threatening or humiliating, employee was not intimidated or ridiculed because of his beliefs and work performance did not suffer); Beasley v. Health Care Service Corp, 940 F. 2d 1085, 1089-90, 56 FEP 1047 (7th Cir. 1991) (not religious harassment where a Christian fundamentalist was called “Bible Bertha” by a co-worker and was told by her boss to put her job first); Rosario Rivera v. Puerto Rico Aqua Duct and Sewers Authority, 331 F. 3d 183, 191, 92 FEP 1 (1st Cir. 2003) (single incident of being provided a birthday card which contained pejorative religious imagery insufficient to support claim of religious harassment).  

Rivera v. Puerto Rico Aqua Duct and Sewers Authority, 331 F. 3d 183, 190-91, 92 FEP 1 (1st Cir. 2003) (taunts from co workers a response to plaintiff’s scolding of co workers in an office created a vulgar and unprofessional environment, but “[t]here is a conceptual gap between an environment that is offensive to a person of strong religious sensibilities and an environment that
alleged, the complainant must show that the employer failed to take effective remedial action to correct the conduct after obtaining actual or constructive knowledge of the harassment. In this area, an anti-harassment policy related to religion, as well as any other bases, can be relevant to the issue of employer responsibility. However, the policy will not serve as a defense where supervisory personnel had notice of the harassment and failed to take action to stop it. Additionally, where the harasser is a supervisor, the affirmative defense set out in Faragher may be relevant. Religious harassment may give rise to state common law claims such as intentional infliction of emotional distress; state FEP statutes may also prohibit religious harassment.

D. Age

The Age Discrimination in Employment Act “ADEA,” which in many respects closely tracks Title VII, has been held by some courts to prohibit age based harassment. Courts are increasingly analyzing age based harassment claims under the same framework applied to sexual and racial harassment claims. Other circuit courts, however, have declined to rule on whether the hostile work environment doctrine applies to the ADEA.

E. Disability

The Americans With Disabilities Act of 1990 (ADA) prohibits employment
discrimination against disabled individuals.\textsuperscript{368} Although the ADA does not expressly prohibit disability based harassment,\textsuperscript{369} the ADA is modeled after § 703(a) of Title VII, which has been construed to prohibit harassment. Therefore, several courts have held that harassment on the basis of disability may be actionable under the ADA.

In 2001, the Fifth Circuit became the first circuit court to analyze affirmatively a harassment claim brought under the ADA. In \textit{Flowers v. Southern Regional Physician Services, Inc.},\textsuperscript{370} the court reviewed the ADA’s language, purpose, and remedial framework in determining that Congress’s intent was to eradicate disability based harassment in the workplace. The Fifth Circuit also outlined the elements of a prima facie case of disability based harassment as follows:

(1) that the employee belongs to a protected group; (2) that the employee was subjected to unwelcome harassment; (3) that the harassment complained of was based on the employee’s disability or disabilities; (4) that the harassment complained of affected a term, condition, or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt, remedial action.\textsuperscript{371}

Since this analysis, other courts have found harassment based on a disability actionable under the ADA.\textsuperscript{372} Additionally, courts continue to consider disability harassment claims asserted under the Rehabilitation Act.

III. SPECIAL ISSUES IN HARASSMENT CASES

A. Discovery

Discovery of the plaintiff’s psychological and medical condition, discovery of prior conduct of both the plaintiff and the alleged harasser (including sexual history in sexual harassment cases) and discovery of other incidents of harassment and the employer’s investigation of same are the most frequently contested discovery issues in harassment suits.

1. Behavior of the Plaintiff

In \textit{Meritor Savings Bank v. Vinson},\textsuperscript{373} the U.S. Supreme Court held that, in a hostile work

\textsuperscript{368} 42 U.S.C. § 12101 \textit{et. seq.} See generally, Chapter 15 (Disability).
\textsuperscript{369} \textit{EEOC Regulations Interpreting the Employment Provisions of the ADA}, 29 C. F. R. Pt. 1630, does not specifically address harassment on the basis of disability.
\textsuperscript{370} 247 F. 3d 229, 232-34, (5\textsuperscript{th} Cir. 2001).
\textsuperscript{371} \textit{Id.} at 235-36.
\textsuperscript{372} \textit{See} \textit{Fox v. General Motors Corporation}, 247 F. 3d 169, 175-176 (4\textsuperscript{th} Cir. 2001); \textit{Trepka v. The Board of Education of the Cleveland City School District}, 2002 U. S. App. Lexis 1357 (unpublished decision) (6th Cir. 2002); \textit{Shaver v. Independent Stave Company}, 350 F. 3d 716, 721 (8\textsuperscript{th} Cir. 2003).
\textsuperscript{373} 477 U.S. 57, 40 FEP 1822 (1986).
environment sexual harassment case, evidence of a plaintiff’s sexually provocative speech, dress and conversation may be relevant in assessing whether a defendant’s sexual advances were unwelcome. Thus, in hostile work environment sexual harassment cases, defendants often seek discovery concerning the plaintiff’s sexual and social behavior in order to show that the plaintiff welcomed and/or consented to the sexual conduct at issue.

In deciding whether to permit such discovery, courts often look to Federal Rule of Evidence 412, which provides that evidence of an alleged victim’s prior sexual conduct (including predisposition or behavior) is presumptively inadmissible unless its “probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.” Although Rule 412 is an evidentiary not a discovery standard, the admissibility of the information sought often informs the court’s decision on the proper scope of discovery. Thus, courts frequently permit discovery, with certain limitations, of the plaintiff’s workplace sexual behavior and/or sexual behavior with the alleged harasser or other employees. On the other hand, courts are reluctant to permit discovery of a plaintiff’s sexual or social conduct with third parties that occurs off duty and outside the workplace.

374 477 U.S. at 69, 40 FEP 1822.
376 See EEOC v. Danka Indust., 990 F. Supp. 1138, 1140, 75 FEP 685 (E.D. Mo. 1997) (defendant entitled to discovery regarding plaintiff’s romantic or sexual relationships with co-workers or managers which took place outside of workplace and whether plaintiff ever discussed her private sexual activities at work); Holt v. Welch Allyn, Inc., 3 WH 2d 1622, 1628 (N.D.N.Y. 1997) (defendant entitled to discovery of photographs that plaintiff showed of herself at a party where male exotic dancer entertained co-workers at the workplace as well as plaintiff’s sexual activity at work or on duty); Herchenroeder v. The Johns Hopkins Univ., 171 F.R.D. 179, 182 (D. Md. 1997) (court permits very limited discovery, via written interrogatories and confidentiality order, regarding whether plaintiff and co-worker had ever discussed engaging in sexual activity); Sanchez, 166 F.R.D. at 502, 71 FEP 835 (employer entitled to discovery of employee’s past history of making romantic or sexual advances toward other employees within three years before any conduct with alleged harasser, except for plaintiff’s consensual relationship with co-worker who later became spouse; discovery permitted for “attorney’s eyes only”).
377 See Jenson v. Evelth Taconite Co., 130 F.3d 1287, 1292-93, 75 FEP 852 (8th Cir. 1997), cert. denied, 524 U.S. 953 (1998) (discovery into plaintiff’s history of domestic abuse, emotional illness or stressors and off-premises relationships “was not relevant or was so remote in time, that it should not have been allowed”); Howard v. Historic Tours of Am., 177 F.R.D. 48, 51-52 (D.D.C. 1997) (plaintiffs in sexual harassment case not required to answer interrogatories about their sexual histories with co-workers not named as defendants on grounds that affairs that alleged harassers did not know about could not have led them to believe that their conduct would be welcome); Danka Indust., 990 F. Supp. at 1140, 75 FEP 685 (information regarding
2. Discovery of Plaintiff’s Psychological and Medical Condition

Plaintiffs claiming sexual or other forms of harassment often seek damages for emotional distress they have allegedly suffered as a result of the defendant’s harassing conduct. By asserting such a damages claim, a plaintiff may open the door to discovery of his or her psychological and medical condition. This discovery can include production of plaintiff’s psychological and medical records, depositions of plaintiff’s treating healthcare providers and/or proposed expert witnesses, direct questions of the plaintiff about his or her condition, and, in some cases, a mental or physical exam of the plaintiff.

Courts are inclined to permit discovery into a harassment plaintiff’s mental and emotional condition when he or she asserts a claim for emotional distress damages. The rationale is that by asserting such a claim, the plaintiff has put his or her emotional state at issue, thereby waiving any privileges or privacy rights that might apply. A minority of courts take a narrow view, limiting discovery only to documents and information relevant to the claim of emotional distress and not permitting discovery of plaintiff’s other medical or psychological records. Courts

employee’s past sexual history with persons not employed by defendant not discoverable); Barta, 169 F.R.D. at 136 (evidence of plaintiff’s sexual conduct while off duty, outside workplace and which did not involve conduct with named defendants protected from discovery, although discovery permitted of plaintiff’s sexual conduct while on duty, on-site or which involved a named defendant).


379 See Manessis v. New York City Dep’t of Transp., 2002 WL 31115032 at *2 (S.D.N.Y. Sept. 24, 2002) (where employee in Title VII and ADA action claimed emotional distress damages, employer entitled to discovery of plaintiff’s mental health treatment records, but not medical treatment records unless plaintiff indicated in discovery that a physical ailment caused him emotional distress during relevant period), aff’d, 2004 WL 206316 (2d Cir. 2004); Bottomly v. Leucadia Nat’l, 163 F.R.D. 617, 620 (D. Utah 1995) (in sexual harassment action alleging damages for “severe psychological and emotional distress,” employer not entitled to full “personality inventory of employee’s character” unrelated to the condition at issue).
may also limit the time period for which records may be sought.\textsuperscript{380}

Courts may also permit a defendant in a harassment case to conduct a mental examination of the plaintiff pursuant to Fed. R. Civ. P. Rule 35 in order to obtain additional evidence about a plaintiff’s psychological condition and background. Rule 35(a) provides, in relevant part:

\begin{quote}
[w]hen the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by an examiner. . . . The order may be made only on a motion for good cause shown. . . .
\end{quote}

Thus, a defendant in a harassment suit seeking a mental examination of the plaintiff must show that the plaintiff’s mental condition is “in controversy” and that “good cause” exists for the examination.

A minority of courts have held that a plaintiff puts his or her mental condition “in controversy” by simply making a claim for emotional distress in a pleading.\textsuperscript{381} However, a majority of courts require the presence of one or more of the following before ordering the plaintiff to undergo a mental examination: (1) a cause of action for intentional or negligent infliction of emotional distress; (2) an allegation of a specific mental or psychiatric injury or disorder; (3) a claim of unusually severe emotional distress; (4) plaintiff’s offer of expert testimony to support a claim of emotional distress; and/or (5) plaintiff’s concession that his or her mental condition is “in controversy” within the meaning of Rule 36(a).\textsuperscript{382} Courts have routinely ordered mental examinations in harassment cases where one or more of these factors are present.\textsuperscript{383} On the

\textsuperscript{380} See Kirchner, 184 F.R.D. at 129 (limiting discovery of plaintiff’s mental health records to time period that she was employed in office where sexual harassment allegedly occurred); Fox v. The Gates Corp., 179 F.R.D. 303, 306-07 (D. Colo. 1998) (records relating to treatment of plaintiff during time period when distress occurred are discoverable).

\textsuperscript{381} See Jansen v. Packaging Corp. of America, 158 F.R.D. 409, 410, 66 FEP 558 (N.D. Ill. 1994) (court orders mental exam of plaintiff based on allegation in her complaint that she suffered and continued to suffer, ongoing emotional distress attributable to alleged sexual harassment and retaliation by supervisor); Zabkowicz v. West Bend Co., 585 F. Supp. 635, 636, 35 FEP 610 (E.D. Wis. 1984) (court orders mental examination of plaintiffs, a husband and wife, based on allegations that they suffered “extensive emotional distress” as a result of workplace sexual harassment of female plaintiff).

\textsuperscript{382} See Turner v. Imperial Stores, 161 F.R.D. 89, 95 (S.D. Cal. 1995) (setting forth five-factor test).

\textsuperscript{383} See Greenhorn v. Marriott Int’l, 216 F.R.D. 649, 651-52 (D. Kan. 2003) (ordering plaintiff in sexual harassment case to undergo mental examination where plaintiff alleged serious and ongoing emotional injury and identified her own expert psychiatric witness); Stoner v. New York City Ballet, 2002 WL 31875404 at *5 (S.D.N.Y. Dec. 24, 2002) (court orders mental examination in harassment suit where plaintiff put emotional and psychiatric status at issue by seeking damages for serious emotional distress and proferring own psychiatric expert); Bovey v. Mitsubishi Motor Manuf., 88 FEP 866, 867 (C.D. Ill. 2002) (where employee’s emotional distress damages were major component of her damages claim in sexual harassment action and
other hand, courts have rejected requests for mental exams in harassment cases where none of these factors are present and the plaintiff alleges only “garden variety” emotional distress.  

Even where courts have ordered mental examinations, they have, where appropriate, placed certain restrictions on the examination, including time limits and limitations on the scope and use of psychiatric testing. Plaintiffs have generally not been successful in requests to have third parties such as attorneys or psychiatric experts present or to tape record the sessions. Courts find these conditions impede the effectiveness of the examination and, in the

plaintiff intended to introduce mental health evidence at trial, defendant entitled to mental examination of plaintiff).

See Curtis v. Express Inc., 868 F. Supp. 467, 469, 66 FEP 449 (N.D.N.Y. 1994) (defendant not entitled to mental examination of plaintiff in racial harassment case, despite claims for emotional distress damages, where plaintiff did not assert separate tort claim for emotional distress, claimed damages only for past emotional distress, did not allege any psychological disorder and did not plan to offer expert testimony regarding her mental health at trial); Bridges, 850 F. Supp. at 221-22, 64 FEP 1100 (S.D.N.Y. 1994) (defendants not entitled to order compelling mental examinations of sexual harassment plaintiffs where plaintiffs made allegations of emotional suffering and mental anguish but did not assert separate tort claim for emotional distress and did not allege any ongoing severe emotional injury or psychiatric disorder). Cf. Fox, 179 F.R.D. at 307 (plaintiff did not place her mental condition “in controversy” by asserting “garden variety” claim for emotional distress damages in ADA failure to hire action).

See Hirschheimer v. Associated Minerals & Minerals Corp., 1995 WL 736901 at *5 (S.D.N.Y. Dec. 12, 1995) (granting plaintiff’s request to restrict examination to two 90-minute sessions, plus time necessary to administer MMPI-11 test). But see Greenhorn, 216 F.R.D. at 654 (court refuses to impose two-hour time limitation on exam in light of seriousness and extensiveness of injuries alleged by plaintiff); Stoner, 2002 WL 31875404 at *5 (rejecting plaintiff’s request to limit exam to two 90-minute sessions and permitting examiner to conduct two 4-hour sessions).

See Greenhorn, 216 F.R.D. at 654 (where plaintiff’s mental exam to include psychiatric testing, plaintiff entitled to copy of any answer sheets, corresponding test booklets and any written instructions for test booklets immediately upon completion of tests; however, court would not limit scope of examiner’s inquiry into non-work-related sexual activities and sexual matters between plaintiff and co-employees); Hirschheimer, 1995 WL 736901 at *4 (examiner limited to conducting one test that is specifically identified, MMPI-II, and plaintiff entitled to raw data from test). But see Ziemann, 155 F.R.D. at 502 (requiring plaintiff to undergo separate psychiatric and psychological exams).

See Greenhorn, 216 F.R.D. at 654 (denying plaintiff’s request to have her counsel present during mental exam); Hirschheimer, 1995 WL 736901 at *3 (rejecting plaintiff’s request to have counsel present during Rule 35 exam).

See Stoner, 2002 WL 31875404 at *5 (rejecting plaintiff’s request to have her psychiatric expert present at Rule 35 exam).

See Hirschheimer, 1995 WL 736901 at *4 (rejecting plaintiff’s request to tape record examination). But see Greenhorn, 216 F.R.D. at 654 (requiring examiner to tape record sessions with plaintiff and provide to plaintiff in light of concerns raised by plaintiff about examiner’s
case of attorneys, turn the process into an adversarial one and make the attorney a potential witness. Plaintiffs have also had little success in objecting to the defendant’s selection of examiner.

3. Discovery From Defendants

Plaintiffs in harassment cases typically seek discovery from defendants on a wide range of issues, including documents and information about the alleged harasser, other incidents and complaints of harassment and the employer’s response to such complaints.

Courts generally permit discovery concerning the alleged harasser where the information sought relates to the harassment allegations of plaintiff or other employees. On the other hand, courts are reluctant to permit discovery of purely personal information about an alleged harasser.

Courts often permit discovery of other incidents or complaints of harassment not directly involving the alleged harasser. This information is typically sought to establish the employer’s awareness of workplace harassment and/or the existence of a hostile work environment.

---

conduct during such exams); Stoner, 2002 WL 31875404 at *6 (permitting examiner to audiotape sessions).


See Greenhorn, 216 F.R.D. at 654 (rejecting plaintiff’s objection to expert selected by defendant); Lahr v. Fulbright & Jaworski L.L.P., 164 F.R.D. 204, 212 (N.D. Tex. 1996) (court rejects plaintiff’s objections to defendant’s chosen psychologist on grounds that expert lacked experience in dealing with victims of sexual harassment and discrimination).

See Jackson v. Entergy Operations, Inc., 76 FEP 673, 674-75 (D. La. 1998) (plaintiff entitled to inquire at deposition into whether alleged harasser had social relations with other employees of defendant); Butta-Brinkman v. FCA Int’l, 164 F.R.D. 475, 476, 69 FEP 1276 (N.D. Ill. 1995) (in sexual harassment case, plaintiff entitled to discovery of other allegations of sexual harassment involving alleged harasser); Mockler v. Skipper, 1994 WL 41334 at *4 (D. Or. Feb. 3, 1994) (plaintiff entitled to documents in alleged harasser’s personnel files relating to incidents of sexual harassment alleged by any employee, including any disciplinary action taken as a result, during period of plaintiff’s employment); Jones v. Commander, 147 F.R.D. 248, 251 (D. Kan. 1993) (plaintiff entitled to inquire into whether employer was aware of other allegations of sexual harassment against supervisor accused of sexual harassment by plaintiff). Cf. Lewis v. Herrman’s Excavating, Inc., 200 F.R.D. 657, 660-61 (D. Kan. 2001) (while plaintiff had good cause to seek Rule 35 physical examination of genitals of employee of defendant who allegedly exposed self to plaintiff and denied plaintiff’s allegation that he was uncircumcised, court denied request because employee was not a party to lawsuit and thus was not under custody and control of defendant such that court could order exam of employee over his objection).

See Jones, 147 F.R.D. at 252 (alleged harasser’s sexual preference, habits, history, or behavior other than the extent to which she is alleged to have engaged in sexual harassment in past, is irrelevant and plaintiff not entitled to discover same in sexual harassment case).

See Butta-Brinkman, 164 F.R.D. at 476, 69 FEP 1276 (plaintiff entitled to discovery of allegations of sexual harassment in offices other than one where plaintiff was employed; complaints may be probative on whether employer’s sexual harassment policy was adequate);
Information about the employer’s investigation of these complaints and the results of the investigation is also sought to test the adequacy of the employer’s complaint procedures. The discovery of an employer’s harassment investigation may, depending on the purpose of the investigation, raise issues of privilege under the attorney-client privilege and attorney work product doctrine. However, to the extent that the employer seeks to rely upon its investigation as a defense to the claim of harassment, courts have generally held that the privileges attendant to the investigation are waived and that therefore, a plaintiff may discover certain documents and information relating to the employer’s investigation.

Mockler, 1994 WL 41334 at *5 (plaintiff entitled to discovery of employer’s files concerning any complaints of sexual harassment in three-year period; evidence of sexually harassing conduct not directed to plaintiff may be relevant to plaintiff’s hostile work environment claim); Cook v. Yellow Freight Sys., 132 F.R.D. 548, 552, 53 FEP 1681 (E.D. Cal. 1990) (sexual harassment plaintiff entitled to names, addresses and phone numbers of female employees in company; information relevant to plaintiff’s claims of history of harassment to which employer failed to respond appropriately).

But see Spina v. Our Lady of Mercy Med. Ctr., 86 FEP 246, 248 (S.D.N.Y. 2001) (sexual harassment plaintiff not entitled to discovery of information about employer’s treatment of another alleged harasser who was discharged 18 months before plaintiff was hired, where other alleged harasser was terminated for sexual harassment; plaintiff failed to support allegation that employer failed to correct sexually hostile work environment and production of evidence could have chilling effect on employer’s willingness to take action in harassment cases).

Mockler, 1994 WL 41334 at *5 (plaintiff entitled to discovery of other complaints of sexual harassment, documents relating to investigation of complaints and disciplinary action taken). But see Spina v. Our Lady of Mercy Med. Ctr., 86 FEP 246, 248 (S.D.N.Y. 2001) (sexual harassment plaintiff not entitled to discovery of information about employer’s treatment of another alleged harasser who was discharged 18 months before plaintiff was hired, where other alleged harasser was terminated for sexual harassment; plaintiff failed to support allegation that employer failed to correct sexually hostile work environment and production of evidence could have chilling effect on employer’s willingness to take action in harassment cases).

See Harding v. Dana Transport, 914 F. Supp. 1084, 1091, 69 FEP 1603 (D.N.J. 1996) (notes and memoranda of an attorney investigating sexual harassment charges for company are protected by attorney-client privilege and, therefore, not discoverable). Cf. Payton v. New Jersey Turnpike Auth., 691 A.2d 321, 334-35, 73 FEP 1149 (N.J. 1997) (attorney-client privilege would not apply to attorney-conducted investigation if purpose was simply to enforce company’s anti-harassment policy or comply with legal duty to investigate, and not to provide legal advice or prepare for litigation).

A harassment case based on sexual or other forms of unlawful conduct involves many different categories of evidence. The primary evidence typically consists of the plaintiff’s testimony that the alleged harasser actually engaged in offensive conduct, and the defendant’s denial or explanation. The parties will also seek corroborating testimony to avoid the swearing match that simply pits the plaintiff’s word against the alleged harasser’s.

Other evidence typically includes the timing and nature of the plaintiff’s report of unwelcome conduct, the presence or absence of changes in the plaintiff’s behavior noticed by co-workers and friends following the incident(s), the atmosphere of the workplace in question, the complainant’s prior conduct, the alleged harasser’s prior conduct, and facts that bear on the credibility of the alleged harasser and complainant. In addition, expert testimony is frequently proffered by the parties on a wide range of issues relating to both the merits of plaintiff’s harassment claim and his or her claims for damages.

The most hotly contested evidentiary issues in harassment cases include the prior sexual history of the plaintiff in sexual harassment cases and the prior conduct, sexual or otherwise, of the alleged harasser. The admissibility of these types of evidence turns on a careful balancing of their probative value against their potential to invade the party’s privacy or cause undue prejudice.

Rptr.2d 543 (1998) (“Wellpoint does not hold that when defendant claims it has investigated a complaint of harassment and taken appropriate remedial action based on its own investigation, a plaintiff is entitled to discover all communications involving the employer’s investigation,” regardless of who conducted the investigation and the employer’s invocation of privilege).
1. Evidence of Plaintiff’s Prior Sexual Conduct — Rule 412

In order to sustain a claim of sexual harassment, a plaintiff must show, among other things, that the behavior complained of was unwelcome and that it was offensive to him or her. These two factors place the prior conduct of the plaintiff at issue in a sexual harassment case. However, courts generally have not permitted defendants to explore a complainant’s sexual history away from the workplace with persons other than the alleged harasser to prove that the sexual conduct was actually welcomed. Indeed, Federal Rule of Evidence 412 provides:

**RULE 412. SEX OFFENSE CASES; RELEVANCE OF ALLEGED VICTIM’S PAST SEXUAL BEHAVIOR OR ALLEGED SEXUAL PREDISPOSITION**

(a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

1. Evidence offered to prove that any alleged victim engaged in other sexual behavior.

2. Evidence offered to prove any alleged victim’s sexual predisposition.

(b) Exceptions.

* * *

2. In a civil case, evidence offered to prove the sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim’s reputation is admissible only if it has been placed in

---

398 See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68, 40 FEP 1822 (1986). For further discussion of the issue of welcomeness, see Section I.D. supra, of this chapter.
399 See Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1326–27, 65 FEP 341 (8th Cir. 1994) (evidence of female complainant’s affair with married co-worker was inadmissible to show that such workplace conduct did not offend her); Katz v. Dole, 709 F.2d 251, 254 n.3, 31 FEP 1521 (4th Cir. 1983) (“A person’s private and consensual sexual activities do not constitute a waiver of his or her legal protections against unwelcome and unsolicited sexual harassment.”); Longmire v. Alabama State Univ., 151 F.R.D. 414, 418 (M.D. Ala. 1992) (during discovery, defendant is not entitled to inquire into plaintiff’s sexual history based solely on allegation that plaintiff’s sexual relationships with superiors were relevant in her motive in events surrounding case with defendant); Mitchell v. Hutchings, 116 F.R.D. 481, 484, 44 FEP 615 (D. Utah 1987) (evidence of plaintiffs’ sexual conduct which was remote in time and place to plaintiffs’ working environment was irrelevant). Cf. Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 962–64, 61 FEP 592 (8th Cir. 1993) (appearing nude in photographs in pornographic magazines was not invitation to engage in workplace sexual discourse). See generally, Chapter ___ (Discovery).
controversy by the alleged victim.

(c) Procedure to Determine Admissibility.

(1) A party intending to offer evidence under subdivision (b) must—
   (A) file a written motion at least 14 days before trial specifically
describing the evidence and stating the purpose for which it is offered. . . .

* * *

(2) Before admitting evidence under this rule the court must conduct a
hearing in camera and afford the victim and parties a right to attend and be
heard. The motion, related papers, and the record of the hearing must be
sealed and remain under seal unless the court orders otherwise.

Many of the decisions applying revised Rule 412 to harassment cases were decided during the
course of discovery rather than at trial, because admissibility at trial is a factor governing the
scope of discoverable information. The Advisory Committee’s Notes to Rule 412 state “that the
policies underlying Fed. R. Evid. 412 must inform the application of Fed. R. Civ P. 26
[permitting discovery of information reasonably calculated to lead to the discovery of admissible
evidence] when information subject to Fed. R. Evid. 412, if offered at trial, is sought by
discovery”:

The procedures set forth in subdivision (c) do not apply to discovery of a victim’s
past sexual conduct or predisposition in civil cases, which will continue to be
governed by Fed. R. Civ. P. 26. In order not to undermine the rationale of Rule
412, however, courts should enter appropriate orders pursuant to Fed. R. Civ. P.
26(c) to protect the victim against unwarranted inquiries and to ensure
confidentiality. Courts should presumptively issue protective orders barring
discovery unless the party seeking discovery makes a showing that the evidence
sought to be discovered would be relevant under the facts and theories of the
particular case, and cannot be obtained except through discovery. In a action for
sexual harassment, for instance, while some evidence of the victim’s alleged
sexual behavior and/or predisposition in the workplace may be relevant, non-
workplace conduct will usually be irrelevant. Confidentiality orders should be
presumptively granted as well.

In *Howard v. Historic Tours of America*, the district court held that the plaintiffs alleging
harassment did not have to answer interrogatories about their sexual relationships with
employees other than the alleged harassers. The court explained:

---

Committee Note to Fed. R. Evid. 412 (internal citations omitted)).
401 177 F.R.D. at 50-51.
402 177 F.R.D. at 53; *see also* Holt, 3 WH 2d at 1628 (quoting Advisory Committee Notes that, in a
sexual harassment case, “while some evidence of the alleged victim’s sexual behavior and/or
Additionally, . . . even if one amended the interrogatory to seek only the plaintiff’s sexual behavior with other employees of which the harassing employees knew, the probative force of that evidence is premised on three hopelessly illogical propositions: (1) that a woman who has a sexual relationship with one co-employee is so morally degraded that she welcomes a similar relationship with any other employee; (2) that a woman who is sexually attracted to one employee and yields to that attraction is equally attracted to any other employee and would welcome his advances; and (3) that a woman who has a sexual relationship with one employee welcomes the sexual advances of another employee, no matter how gross, crude and boorish. That these propositions are so illogical and at variance with human experience means that what little, if any, probative force the evidence defendants seek is utterly overwhelmed by the harm done these victims by being forced to answer them.403

Revised Rule 412 reverses the usual approach of the Federal Rules of Evidence to admissibility of evidence; evidence covered by Rule 412 is admissible only if its probative value “substantially outweighs” its prejudicial effect.404 Thus, the First Circuit has ruled that evidence of the complainant’s reputation is admissible only if it has been placed in controversy by the complainant;405 and evidence of a complainant’s “moral character” or “promiscuity” will not be admissible,406 although evidence of the complainant’s alleged flirtatious behavior in the workplace generally will be admissible.407

predisposition in the workplace may perhaps be relevant, non-workplace conduct will usually be irrelevant”; plaintiff ordered to produce suggestive photographs of plaintiff that had allegedly been shown to other employees in workplace) (emphasis in original).

403 177 F.R.D. at 53.
404 B.K.B. v. Maui Police Dep’t, 276 F.3d 1091, 1104, 87 FEP 1306 (9th Cir. 2002) (reversing judgment for employer and granting plaintiff new trial because employer presented evidence in violation of Rule 412 that plaintiff, a fellow police officer, sexually propositioned male fellow officer other than alleged harasser); Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 856, 75 FEP 1228 (1st Cir. 1998).
405 Rodriguez-Hernandez, 132 F.3d at 856, 75 FEP 1228.
406 132 F.3d at 856. See also Chamblee v. Harris & Harris, Inc., 154 F. Supp.2d 670, 679-80 (S.D.N.Y. 2001) (evidence that plaintiff had worked as call girl/escort prior to employment at defendant inadmissible under Rule 412, though fact that plaintiff did not pay income taxes on this and other jobs was admissible for impeachment purposes).
407 132 F.3d at 856. See also Beard v. Flying J. Inc., 266 F.3d 712, 798, 802, 87 FEP 1836 (8th Cir. 2001) (without deciding whether Rule 412 applies, court holds that it was not error for district court to admit evidence that plaintiff touched a male employee’s thigh in sexually suggestive manner and used sexually suggestive terms in workplace where conduct allegedly took place in public place and plaintiff submitted document into evidence containing these allegations); Woodward v. Metro I.P.T.C., 2000 WL 68401 at *7 (S.D. Ind. Mar. 16, 2000) (in sexual harassment case, probative value of evidence of plaintiff’s outside work at a lingerie shop, which she advertised and marketed at her workplace, as well as her provocative clothing, passing around of photographs and participation in sexual banter and horseplay at workplace substantially outweighs any potential for unfair
Thus, since the 1994 revision of Rule 412, courts have uniformly concluded, based on the Advisory Committee Notes, that Rule 412 applies to claims of sexual harassment.\textsuperscript{408} “Evidence subject to Rule 412 is presumptively inadmissible, even when offered to disprove ‘unwelcomeness’ in a sexual harassment case.”\textsuperscript{409} Thus, although evidence of the victim’s sexual conduct “on-duty, at the workplace, and with named defendants” may be discoverable,\textsuperscript{410} the reputation of an alleged victim is not admissible if she does not place it in controversy,\textsuperscript{411} and nonworkplace conduct is usually irrelevant and, therefore, inadmissible.\textsuperscript{412}

2. Evidence Concerning Prior Conduct of Alleged Harasser

Courts have admitted evidence of prior misconduct by an alleged harasser, including prior sexual conduct, with certain limitations. Federal Rule of Evidence 404 provides that “[e]vidence of other crimes, wrongs, acts is not admissible to prove the character of a person in order to show action in conformity therewith.” In other words, a plaintiff in a harassment case may not proffer evidence that the alleged harasser previously engaged in sexual harassment or other prior bad acts in order to show the alleged harasser’s propensity to engage in workplace harassment and that he or she harassed plaintiff on a specific subsequent occasion.\textsuperscript{413} However, under Federal Rule of Evidence 403(b), such evidence may be admissible for other purposes, such as “proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.”\textsuperscript{414} If offered for a proper purpose, the evidence of prior bad acts will be admissible only if: (1) it is relevant under Fed. R. Evid. 401; (2) the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice under Fed. R. Evid. 403; and (3) the district court, upon request, instructs the jury to consider the evidence only for the purpose for

\textsuperscript{408} E.g., B.K.B., 276 F.3d at 1104; Wolak v. Spucci, 217 F.3d 157, 160, 83 FEP 253 (2d Cir. 2000); Rodriguez-Hernandez, 132 F.3d at 855-56, 75 FEP 1228.


\textsuperscript{411} Fed. R. Evid. 412; Ratts, 189 F.R.D. at 451–52.

\textsuperscript{412} B.K.B., 276 F.3d at 1105, 87 FEP 1306; Wolak, 217 F.3d at 160-61, 83 FEP 253 (evidence of plaintiff’s out-of-work viewing of pornography inadmissible under Rule 412); Excel Corp. v. Bosley, 165 F.3d 635, 641, 78 FEP 1844 (8th Cir. 1999) (district court did not abuse discretion in excluding evidence of alleged sexual relations between plaintiff and ex-husband, who was also plaintiff’s co-worker, outside of work and not known to employer, when plaintiff complained about sexual harassment at work by ex-husband); Ratts, 189 F.R.D. at 452; see also Barta, 169 F.R.D. at 136 (holding that evidence of the victim’s “off-duty outside the workplace,” conduct with persons other than the named defendants was not discoverable). Cf. Morales-Evans v. Administrative Office of Cts. of New Jersey, 102 F. Supp.2d 577, 581 n.7, 84 FEP 1687 (D.N.J. 2000) (information about prior sexual relationship between plaintiff and another employee did not implicate Rule 412 where information provided context for alleged inappropriate remark about which plaintiff complained, rather than being evidence of sexual predisposition or sexual behavior).

\textsuperscript{413} Wilson v. Muckala, 303 F.3d 1207, 1217, 89 FEP 1217 (10th Cir. 2002).

\textsuperscript{414} 303 F.3d at 1217.
which it was admitted.\textsuperscript{415}

Applying the above standards, courts have admitted evidence in sexual harassment cases that an alleged harasser previously engaged in sexual harassment to show that the employer knew about the alleged harasser’s conduct and failed to properly address it.\textsuperscript{416} Such evidence has also been admitted to show a defendant’s intent or motive to discriminate against the plaintiff, where intent and motive are relevant to the plaintiff’s claim.\textsuperscript{417} However, courts will exclude such evidence if it is too remote in time or attenuated from the plaintiff’s situation.\textsuperscript{418}

Courts have also considered, and in many cases admitted, evidence of prior workplace

\textsuperscript{415} 303 F.3d at 1217. \textit{See also} Loring v. Universidad Metropolitana, 190 F. Supp.2d 268, 271-72 (D.P.R. 2002) (applying standards under Fed. R. Evid. 401, 403 and 404(b), including proposed limiting jury instruction, to grant in part sexual harassment defendant’s motion \textit{in limine}).

\textsuperscript{416} \textit{See} Griffin v. City of Opa-Locka, 261 F.3d 1295, 1301, 86 FEP 1254 (11th Cir. 2001) (evidence of alleged harasser’s sexual harassment of other women who worked under him may be relevant to show defendant had custom or policy of being indifferent to women), \textit{cert. denied}, 535 U.S. 1034 (2002); Loring, 190 F. Supp.2d at 271-72 (evidence of university employee’s sexual harassment of female students relevant to proving an employee’s sexual harassment claim that university administration knew or should have known that university administrator was acting in a way that created hostile work environment); \textit{cf.} Madison v. IBP, Inc., 257 F.3d 780, 793, 86 FEP 77 (8th Cir. 2001) (evidence of racial and sexual harassment towards other female and black employees by employees other than one accused of harassing plaintiff relevant to plaintiff’s claim that defendant had consistently failed to prevent illegal conduct and correct it promptly), \textit{vacated by/remanded by} 536 U.S. 919 (2002).

\textsuperscript{417} \textit{See} Heyne v. Caruso, 69 F.3d 1475, 1480-81, 69 FEP 408 (9th Cir. 1995) (district court committed reversible error by not admitting evidence concerning alleged harasser’s harassment of other female employees as such evidence was relevant to prove defendant’s discriminatory motive for termination of plaintiff in \textit{quid pro quo} sexual harassment claim where plaintiff claimed she was discharged for refusing alleged harasser’s sexual advances); Loring, 190 F. Supp.2d at 271-72 (evidence that university employee sexually harassed female students may be relevant to issues of motive and/or intent); \textit{cf.} Eaton v. American Media Operations Inc., 1997 WL 7670 at *5 (S.D.N.Y. Jan. 7, 1997) (evidence of alleged harasser’s prior acts of sexual harassment may be admissible to demonstrate defendants’ discriminatory intent to support plaintiff’s sex discrimination claim); \textit{but see} Wilson, 303 F.3d at 1217, 89 FEP 1217 (district court did not abuse discretion in excluding evidence of alleged harasser’s prior sexual harassment that occurred in placed outside of defendant hospital, of which hospital was not aware, as such evidence could not prove hospital’s discriminatory intent).

\textsuperscript{418} \textit{See} Stair v. Lehigh Valley Carp. Union, 813 F. Supp. 1116, 1119-20, 66 FEP 1471 (E.D. Pa. 1993) (evidence of alleged sexual harasser’s harassment of other female employees, which occurred four years before alleged acts against plaintiff, while relevant to plaintiff’s hostile environment claim, was too remote in time to be admissible); Garvey v. Dickinson College, 763 F. Supp. 799, 801-02, 64 FEP 156 (M.D. Pa. 1991) (evidence of supervisor’s alleged harassment of other female employees and students, while relevant to alleged harasser’s attitude toward women and intent, limited to incidents of sexual harassment involving persons in plaintiff’s department).
harassment by the accused or other employees of defendant, of which plaintiff was aware, to show the existence of a hostile work environment. Courts have admitted such evidence even where the plaintiff was not aware of the conduct involving the other employees for the purpose of establishing the employer’s knowledge or intent. The courts, however, are divided on whether workplace harassment of others of which the plaintiff was not aware is admissible to prove the existence of a hostile work environment.

Courts have not hesitated to exclude evidence concerning an alleged harasser’s prior conduct,

419 See Schwapp v. Town of Avon, 118 F.3d 106, 109-10, 74 FEP 955 (2d Cir. 1997) (evidence of individual defendant’s racial harassment of other employees of which plaintiff was made aware by co-workers relevant to determining whether racially hostile work environment existed); Sheppard v. River Valley Fitness One, 203 F.R.D. 56, 57, 87 FEP 953 (D.N.H. 2001) (evidence of alleged sexual harasser’s harassment of other women in working environment of which plaintiff was aware admissible to prove plaintiff’s claim that hostile work environment existed); Loring, 190 F. Supp.2d at 268 (evidence of sexual harassment by alleged harasser toward female students, of which plaintiff was aware, may be relevant to prove that there was hostile work environment in general at defendant university).

420 See Madison, 257 F.3d at 794 & n.10, 86 FEP 77 (district court did not err in sexual and racial harassment case in admitting evidence of harassment of other female and black employees of which plaintiff was aware and which affected plaintiff, to determine whether discriminatory or harassing conduct was sufficiently severe or pervasive).

421 See Madison, 257 F.3d at 794 & n.10, 86 FEP 27 (district court did not err in admitting in sexual and racial harassment case evidence of harassment of other female and black employees of which plaintiff was not aware on issue of intent and whether harassment of others was part of pattern and practice of harassment against her); Hurley v. Atlantic City Police Dep’t, 174 F.3d 95, 110-12, 79 FEP 808 (3d Cir. 1999) (evidence of sexual harassment of others of which plaintiff did not have personal knowledge relevant to considering whether employer’s asserted reasons for its actions were a pretext for discrimination); Perry v. Ethan Allen Inc., 115 F.3d 143, 151-52, 74 FEP 1292 (2d Cir. 1997) (“[e]vidence of the harassment of women other than [plaintiff] but not known to [plaintiff], if part of a pervasive or continuing pattern of conduct, was surely relevant to show the existence of a hostile environment at [defendant] and would have been found probative of the company’s notice of that environment”; nevertheless exclusion of such evidence was harmless error because jury found in any event that plaintiff had established that she was subject to a hostile work environment).

422 See Quinn v. Consolidated Freightways Corp., 283 F.3d 572, 579, 88 FEP 459 (3d Cir. 2002) (district court committed error in excluding testimony of co-worker about sexually charged worksite, other than the plaintiff’s, that co-worker complained about, where such testimony could establish atmosphere of condoned sexual harassment); Madison, 257 F.3d 794 n.10, 86 FEP 27 (harassment of others not known to plaintiff not admissible to show existence of hostile environment); Perry, 115 F.3d at 151-52 (suggesting that evidence of harassment of other employees, even if not known to plaintiff, is relevant to whether hostile work environment exists); Waterson v. Plank Road Motel Corp., 43 F. Supp.2d 284, 288, 79 FEP 1248 (N.D.N.Y. 1999) (testimony of another female regarding her own experience of alleged sexual harassment and discrimination while working for defendant company relevant and admissible in hostile environment sexual harassment case in showing hostile work environment existed).
sexual or otherwise, when the conduct has little or no relation to the workplace and appears intended only to portray the alleged harasser as a bad person. Such exclusion is based on a finding that the evidence is not relevant or that any relevance is outweighed by the potential for unfair prejudice.

In sexual harassment cases that include allegations of sexual assault, Rule 415 of the Federal Rules of Evidence may permit the plaintiff to introduce evidence that the alleged harasser previously engaged in other acts of sexual assault. Rule 415 provides, in relevant part, that in a civil case where “a party’s alleged commission of conduct constituting an offense of sexual assault” is at issue, “evidence of that party’s commission of another offense or offenses of sexual assault . . . is admissible.” Federal Rule of Evidence 413(d) defines sexual assault, for purposes of Rule 415, to include sexual touching, an allegation sometimes present in sexual harassment cases. Rule 415, which was enacted as part of the same legislation that amended Rule 412, was intended to create a limited exception to the general bar against propensity evidence. Recognizing the underlying purpose of Rule 415, courts must still apply the probative

---

423 See Wilson, 303 F.3d at 1217, 84 FEP 1217 (district court properly excluded evidence of alleged harasser’s extramarital affairs and sexual harassment outside of defendant hospital as such evidence was not relevant to plaintiff’s sexual harassment claim); Gray v. Genlyte Group, 289 F.3d 128, 139-41, 88 FEP 1055 (1st Cir. 2002) (district court did not abuse discretion in excluding evidence in female employee’s sexual harassment action that alleged harasser had physically assaulted his wife, was convicted of misdemeanor of “accosting” plaintiff by making tongue gesture to her, and displayed anger toward plaintiff after workers compensation hearing; prejudice of such testimony outweighed probative value); Williams v. City of Kansas City, 233 F.3d 749, 755, 83 FEP 1338 (8th Cir. 2000) (evidence that supervisor engaged in two prior consensual relationships, one with customer and another with subordinate, was improperly admitted in plaintiff’s sexual harassment action as relationships were too remote in time, with one being 19 years old at time of trial, and both occurred prior to alleged harasser’s employment with defendant; any minimal relevance was outweighed by its inflammatory nature); Stahl v. Sun Microsystems, Inc., 19 F.3d 533, 539, 64 FEP 468 (10th Cir. 1994) (district court did not abuse discretion in refusing to admit evidence that alleged harasser in sexual harassment case had a consensual sexual relationship with his administrative assistant who was a witness in the case; slight probative value outweighed by potential for unfair prejudice). But see Lewis v. Triborough Bridge & Tunnel Auth., 88 FEP 1765, 1768 (S.D.N.Y. 2001) (evidence of bridge manager’s alleged viewing of pornographic videos on duty and purported reputation as “porno king” of office admissible in sexual harassment action as such evidence is highly relevant to plaintiffs’ claim that manager was sole representative in charge of investigating their complaints and to claims of hostile work environment; evidence is relevant and satisfies the probative-prejudice balancing test of Rule 403).

424 Similar to Rule 412, Rule 415 requires the party seeking to offer the evidence to give all other parties 15 days notice of its intention to do same. Fed. R. Evid. 415(b). See discussion of Rule 412 in Section III.B.1. of this Chapter.

value/prejudicial effect balancing test under 403(b).\textsuperscript{426}

In one of the first sexual harassment cases applying Rule 415, \textit{Frank v. County of Hudson},\textsuperscript{427} the court held inadmissible a statement by the step-daughter of a sexual harassment defendant who claimed to have been sexually abused by the defendant during her childhood. The court found that plaintiff’s allegations that defendant sexually touched her shoulders, breasts and buttocks and threatened to harm her or anyone else that tried to harm him, constituted sexual assault for purposes of Rule 415.\textsuperscript{428} However, applying the Rule 403 balancing test, the court found the evidence to be inadmissible on the grounds that the evidence of child sexual abuse, which was based on events ten years earlier, had minimal probative value on the defendant’s propensity to commit sexual assault and the requisite intent to commit assault,\textsuperscript{429} and the potential for great prejudice.\textsuperscript{430}

In another sexual harassment case applying Rule 415 decided shortly after \textit{Frank}, \textit{Cleveland V. KFC National Management Co.},\textsuperscript{431} the court held that the alleged harasser’s prior sexual misconduct may be admissible in a case where the plaintiff made numerous allegations of overt sexual touching even though the alleged harasser was not a named defendant.\textsuperscript{432} The court reasoned that the issue of individual liability under Title VII “cannot shield the employer from the valid, supportive evidence of [the alleged harasser’s] prior acts.”\textsuperscript{433} In order to be admissible, the court ruled that the “evidence of [the alleged harasser’s] misconduct must be probative in that it proves corporate knowledge of similar misconduct and it must corroborate plaintiff’s story; otherwise the prejudicial effect on the jury is not substantially outweighed.”\textsuperscript{434} As Rule 415 only applies to sexual harassment cases involving allegations of sexual assault, the courts have not had many opportunities to consider Rule 415 in sexual harassment cases.\textsuperscript{435}

C. Experts

Expert witnesses are regularly retained by both plaintiffs and defendants to testify on a variety of

\textsuperscript{426} 924 F. Supp. at 624.
\textsuperscript{427} 924 F. Supp. at 624, 76 FEP 739.
\textsuperscript{428} 924 F. Supp. at 625, 76 FEP 739.
\textsuperscript{429} 924 F. Supp. at 626-27, 76 FEP 739.
\textsuperscript{430} 924 F. Supp. 626-27, 76 FEP 739.
\textsuperscript{432} Cleveland, 948 F. Supp. at 66, 76 FEP 610.
\textsuperscript{433} 948 F. Supp. at 66, 78 FEP 610.
\textsuperscript{434} 948 F. Supp. at 66, 78 FEP 610
\textsuperscript{435} See Frank and Cleveland, supra; see also Jones v. Clinton, 993 F. Supp. 1217, 1221-22, 76 FEP 430 (E.D. Ark. 1998) (without finding whether Rule 415 applies to conduct at issue, court holds that Rule 403 balancing test applies to Rule 415 and thus under balancing test evidence concerning relationship between Monica Lewinsky and President Clinton is not admissible in trial of Paula Jones); Wilson v. Webb, 2000 U.S. App. LEXIS 23585 at *31 (6th Cir. 2000) (unpublished) (noting in Title IX sexual harassment case that district court had denied defendant’s motion in limine and declined to exclude evidence of prior sexual misconduct of alleged harasser under 415).
subjects concerning the key elements of a harassment case. These experts, who most commonly are human resources or employment practices experts, sociologists, psychologists or medical physicians, cover a wide range of issues that address the merits of the parties’ claims and defenses as well as damages. The admissibility of expert testimony in harassment cases is governed by the same standards utilized in other employment discrimination cases. The most common subjects of expert testimony in harassment cases include the plaintiff’s psychological and mental condition, perceptions and behavior of the reasonable woman or victim, and the adequacy (or inadequacy) of the employer’s anti-harassment policies, procedures and investigations.

1. Expert Testimony on the Plaintiff’s Psychological and Mental Condition

In a harassment case, the psychological and mental condition of the plaintiff is a critical issue that often calls for expert testimony and evaluation. Expert testimony from mental health or medical experts is frequently used to prove or disprove the plaintiff’s allegations that sexual or other forms of harassment caused plaintiff emotional and/or physical injury. In addition, expert testimony that a plaintiff did or did not exhibit certain psychological or physiological symptoms may be used in an effort to prove that the plaintiff was (or was not) harassed.

Courts generally permit the testimony of qualified experts, typically psychologists or psychiatrists, to support a plaintiff’s claims that sexual or other forms of harassment caused the plaintiff’s emotional and/or physical injuries. In addition, these experts may be used to confirm the existence and severity of the plaintiff’s alleged injuries and to assist the trier of fact

436 See Rule 702 of the Federal Rules of Evidence (“If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise”); Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579, 592-94 (1993) (setting forth several factors to assist trial courts in assessing reliability of expert testimony); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147-48 (1999) (holding that trial court’s “gatekeeping” function described in Daubert applies to all types of expert testimony, not just “scientific testimony”). For a further discussion of the standards for admissibility of expert testimony in employment discrimination cases, see Chapter ____.

437 See Skidmore v. Precision Printing and Packaging Inc., 188 F.3d 606, 618, 81 FEP 1252 (5th Cir. 1999) (district court did not abuse discretion in permitting plaintiff’s expert psychiatrist to testify to diagnosis that plaintiff suffered post-traumatic stress disorder and depression due to co-employee’s sexual harassment); Nichols v. American Nat’l Insur. Inc., 154 F.3d 875, 881, 77 FEP 1338 (8th Cir. 1998) (plaintiff’s expert, a licensed psychologist, permitted to testify that plaintiff’s emotional distress was caused by sexual harassment at work); Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1297-98, 75 FEP 852 (8th Cir. 1997) (holding that special master erred in excluding expert testimony regarding causation and prognosis of plaintiff’s alleged emotional injuries in sexual harassment case), cert. denied, 524 U.S. 953 (1998). Cf. Hrabak v. Marquip, Inc., 58 FEP 908, 910 (W.D. Wis. 1992) (plaintiff not permitted to testify that sexually harassing environment caused miscarriage; only expert medical testimony could establish causation).
in assessing damages. Where a plaintiff presents such expert testimony, the defendant will be given the opportunity to present a rebuttal expert or other evidence to challenge the assertions of causation and/or injury. However, courts have generally not permitted such experts to testify about a party’s credibility as such testimony is viewed to be an invasion of the jury’s province to determine credibility and thus beyond the scope of proper expert testimony.

Plaintiffs in sexual harassment cases may also proffer testimony from psychiatric or psychological experts to help establish that the plaintiff was in fact sexually harassed. Specifically, an expert psychiatrist may testify that the behaviors and symptoms exhibited by the plaintiff are consistent with those of a victim of sexual harassment or assault. The defendant

---

438 See Katt v. City of New York, 151 F. Supp. 2d 313, 324, 350-51 (S.D.N.Y. 2001) (plaintiff’s expert, licensed clinical psychologist, testified that due to defendant’s sexual harassment plaintiff suffered severe emotional distress and was in “nonfunctional, barely functioning” state that was unlikely to improve much, even with professional counseling); Stockett v. Tolin, 791 F. Supp. 1536, 1549-50, 58 FEP 1441 (S.D. Fl. 1992) (plaintiff’s expert, a clinical psychologist, testified that plaintiff suffered severe emotional distress requiring six months of psychotherapy as a result of sexual harassment by senior executive of employer).

439 See Nichols, 154 F.3d at 881-82, 77 FEP 1335 (defendant’s psychiatric expert permitted to testify that plaintiff’s emotional problems were longstanding and unrelated to alleged sexual harassment at work and that plaintiff had a psychological disorder); Katt 151 F. Supp. 2d at 324 n.8 (defendant’s expert witness testified plaintiff suffered no psychological harm from sexual harassment and that any symptoms established were caused by other trauma in her life, principally abuse from then-boyfriend); Marshall v. Nelson Electric, 766 F. Supp. 1018, 1023, 62 FEP 1355 (N.D. Okla. 1991) (defendant rebutted plaintiff’s claim of psychological and emotional distress from harassment with plaintiff’s treating physician who specialized in psychiatry and who treated plaintiff before she commenced litigation and testified that plaintiff’s physical symptoms were attributable to a work-related injury and family problems, not sexual harassment), aff’d, 999 F.2d 547 (10th Cir. 1993), cert. denied, 510 U.S. 1092 (1994); Broderick v. Ruder, 685 F. Supp. 1269, 1273, 46 FEP 1277 (D.D.C. 1988) (defendant’s psychiatric expert in hostile work environment case testified that plaintiff suffered from paranoid personality disorder which caused her to have difficulties functioning in work environment).

440 See Nichols, 154 F.3d at 883-84, 77 FEP 1338 (holding that district court erred in permitting defendant’s psychiatric expert in sexual harassment case to testify that plaintiff exhibited poor “psychiatric credibility” and that her story was unreliable; determining credibility is task exclusive to jury and “an expert should not offer an opinion about the truthfulness of witness testimony”); Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1358, 67 FEP 300 (4th Cir. 1995) (plaintiff’s psychological experts not permitted to testify about plaintiff’s truthfulness or sexual harassment defendant’s guilt). Cf. Skidmore, 188 F.3d at 618, 81 FEP 1252 (plaintiff’s psychiatric expert permitted to testify that plaintiff’s symptoms and recollections appeared genuine and that he felt she had not lied to him or fabricated her psychiatric symptoms).

441 See Wilson v. Kenneth Muckala, 303 F.3d 1207, 1218, 89 FEP 1217 (10th Cir. 2002) (plaintiff’s expert permitted to testify about psychological and emotional traits of abuse victims, so long as witness does not comment on alleged victim’s credibility or identify alleged victim as victim of abuse); Griffin v. City of Opa-Locka, 261 F.3d 1295, 1302, 86 FEP 1254 (11th Cir. 2001) (district court did not abuse discretion in sexual harassment action by employee who
will have the opportunity to challenge this evidence as well.

2. **Expert Testimony on the “Reasonable Woman” or “Reasonable Victim”**

Some courts have admitted expert testimony in sexual harassment cases on whether a hostile work environment existed. Several of these cases involved bench trials in which the court allowed testimony on “sexual stereotyping” and whether a reasonable woman would have found plaintiff’s working environment to be abusive. However, this same type of evidence was excluded in a sexual harassment hostile environment case tried before a jury on the grounds that it “usurp[ed] the prerogative of the jury and would not assist the jury in understanding the evidence.”

On a related subject, courts have also been inconsistent on whether to permit expert testimony to explain a sexual harassment plaintiff’s failure to utilize an employer’s internal complaint procedure. Courts appeared more willing to accept this evidence prior to the U.S. Supreme

---

442 See Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 57 FEP 971 (M.D. Fla. 1991) (court allowed both parties to introduce expert testimony on whether a reasonable woman would have found plaintiff’s working environment to be abusive, including testimony from psychology expert on sexual stereotyping in the workplace, i.e., women categorized based on their gender rather than job performance); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 61 FEP 1252 (D. Minn 1993) (allowing social psychology professor to give expert testimony in hostile work environment case on sexual stereotyping and its relation to acts that occurred at defendant’s workplace).

443 See Lipsett v. Univ. of Puerto Rico, 740 F. Supp. 921, 925, 54 FEP 257 (D.P.R. 1990) (expert witness not permitted to testify on existence of hostile work environment; “this subject does not lend itself to expert testimony because it deals with common occurrences that the jurors have knowledge of through their experiences in everyday life and their attitudes toward sexual matters”).

444 See Snider v. Consolidation Coal Co., 973 F.2d 555, 558 (7th Cir. 1992) (district court permitted expert sexual harassment consultant to testify that most victims of non-consensual relationships do not complain or report problem for fear of reprisal or loss of privacy); Robinson, 760 F. Supp. at 1506, 57 FEP 971 (allowing plaintiff’s expert to testify that formal complaint is rare “because the victim of harassment fears an escalation of the problem, retaliation from the harasser, and embarrassment in the process of reporting”). But see Karibian v. Columbia Univ., 930 F. Supp. 134, 144, 71 FEP 325 (S.D.N.Y. 1996) (upholding refusal to admit clinical social worker’s testimony on plaintiff’s failure to make timely complaint of sexual harassment where such testimony was an excuse to explain inconsistencies in plaintiff’s prior testimony and was unnecessary to assist jury in its credibility determinations).
Court’s decisions in *Faragher v. City of Boca Raton*445 and *Burlington Industries Inc. v. Ellerth*,446 which held that an employee’s reluctance to bring a harassment complaint to the attention of the employer is no longer an excuse for failing to utilize the complaint process where the employee suffers no tangible employment action.447 Since *Faragher* and *Ellerth*, courts have held that a generalized fear of repercussions or embarrassment, without more, is not reasonable grounds for the failure to complain to the employer.448 Thus, plaintiffs in harassment cases now face a higher burden to justify a failure to use an employer’s complaint procedure.449

3. **Expert Testimony on Employer Policies and Procedures**

Courts have been receptive to testimony from a variety of human resources experts concerning the adequacy (or lack thereof) of an employer’s policies and procedures to prevent and remedy complaints of sexual or other forms of harassment.450 These type of experts are likely to assume

447 *Faragher*, 524 U.S. at 807-08, 77 FEP 14; *Ellerth*, 524 U.S. at 745, 77 FEP 1. For further discussion of the *Faragher* and *Ellerth* affirmative defense, see Section I.E.1.c., *supra*, of this chapter.
448 *See Leopold v. Baccarat*, 239 F.3d 243, 246, 84 FEP 1660 (2d Cir. 2001) (plaintiff’s conclusory assertion that she did not report complaint of harassment because she feared she would be fired for speaking up fails to satisfy burden to explain why she did not make use of employer’s remedial procedures). *See additional cases and discussion in Section ___ of this chapter.*
449 *See Katt*, 151 F. Supp.2d at 359-60 (expert testimony of former police department employee with expertise in sociology and criminology permitted in sexual harassment case on existence of “code of silence” in New York City police department, described as a reluctance of members of department to come forward to testify about or report the misconduct of fellow employees due to fear of retaliation).
450 *See Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 571, 73 FEP 87 (8th Cir. 1997) (plaintiff’s expert testified that employer’s “open-door” policy encouraging employees to report harassment to any level of management was ineffective because supervisors were not trained on sexual harassment, sexual harassment complaints were not adequately investigated and open-door policy was inadequate for a company as large as Wal-Mart); *Robinson*, 760 F. Supp. at 1505-06, 57 FEP 971 (plaintiff’s expert, a human resources consultant with substantial experience in sexual harassment prevention and training, testified about the elements of a comprehensive, effective sexual harassment policy and training program); *Perkins v. General Motors Corp.*, 129 F.R.D. 655, 666-68 (W.D. Mo. 1990) (plaintiff’s expert qualified to testify about appropriate responses of employers to complaints of sexual harassment), *aff’d*, 965 F.2d 597 (8th Cir. 1992); *Shrout v. Black Clawson Co.*, 689 F. Supp. 774, 777, 46 FEP 1339 (S.D. Ohio 1988) (plaintiff’s expert, a human resources consultant, permitted to testify that defendant’s open-door policy was too broad to be an effective sexual harassment policy, was not adequately communicated to employees, did not specifically mention sexual harassment and did not assure employees protection against retaliation). *But see Wilson*, 303 F.3d at 1218, 89 FEP at 1217 (district court did not abuse discretion in prohibiting testimony of defendant’s human resources expert regarding defendant’s response plan in cases of sexual harassment and reasonableness of
increased importance in harassment cases following *Faragher* and *Ellerth* in which the Supreme Court held that an employer may have an affirmative defense to a sexual harassment claim not involving a tangible employment action where the employer can show, among other things, that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior.”\(^4\)

D. Relief

A plaintiff who prevails in a harassment case under Title VII, § 1981, the ADEA or ADA is presumptively entitled to the full range of equitable relief, which may include back pay, reinstatement, front pay, injunctive relief and attorneys’ fees.\(^5\) In addition, as with other discrimination cases, a harassment plaintiff has a duty to mitigate damages, while the employer carries the burden of showing that the plaintiff did not do so.\(^6\) Although not unique to these cases, issues relating to injunctive relief and compensatory and punitive damages are more frequently presented to the courts in cases involving sexual and other forms of harassment.

1. Injunctive Relief

Injunctions in harassment cases may include not only orders to cease harassing conduct, but also orders for affirmative relief such as educating employees about harassment and implementing harassment policies and complaint procedures.\(^7\)

2. Compensatory Damages

response to plaintiff’s complaint as “facts were not so complicated as to require expert testimony on either adequacy of policy or plan or the investigation”).


\(^6\) See Henderson v. Simmons Foods, 217 F.3d 612, 617-18, 83 FEP 279 (8th Cir. 2000) (plaintiff claiming constructive discharge on account of sexual harassment has duty to attempt to mitigate damages; employer bears burden of showing that employee did not do so). See also EEOC v. Gurnee Inn Corp., 914 F.2d 815, 818 n.4, 53 FEP 1425 (7th Cir. 1990) (no abuse of discretion for district court to award back pay to 15-year-old and 20-year-old constructively discharged waitresses despite their failure to seek other employment; district court concluded that they would feel “gun-shy” about entering work force again after enduring sexual harassment at work).

\(^7\) See Stair v. Lehigh Valley Carp. Union, 66 FEP 1473, 1491 (E.D. Pa. 1993) (employer enjoined from future actions creating a hostile work environment and affirmatively ordered to develop and implement policies for the prevention and control of sexual harassment and education of its members and officers as well as disciplinary measures for those who violate the policies); Robinson v. Jacksonville Shipyards Inc., 760 F. Supp. 1486, 1534, 57 FEP 971 (M.D. Fl. 1991) (court in sexual harassment case includes order to remove and prohibit further posting of sexually explicit pictures and to prohibit verbal harassment).
Harassment plaintiffs who prevail under Title VII or the ADA may recover a combined amount of compensatory and punitive damages from up to $50,000 (for an employer with 100 employees or fewer) to up to $300,000 (for an employer with more than 500 employees). Plaintiffs suing for racial harassment under § 1981 may be entitled to compensatory damages, where warranted, without any statutory cap. Conversely, plaintiffs claiming age harassment under the ADEA are not entitled to any compensatory damages under that statute. Compensatory damages include “future pecuniary losses, emotional pain, suffering, inconvenience, mutual anguish, loss of enjoyment of life and other nonpecuniary losses.”

To recover emotional distress or mental anguish damages in a harassment case, the plaintiff must show real injury to his or her emotional state although he or she need not seek medical or psychological help. Plaintiffs and defendants are with increasing frequency retaining medical or psychological experts to assist courts and juries in assessing harassment plaintiffs’ claims for compensatory damages.

3. Punitive Damages

Punitive damages may be awarded under Title VII or the ADA up to the statutory cap against a nongovernmental defendant who has engaged in a discriminatory practice “with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” Section 1981 allows for uncapped punitive damages, whereas the ADEA does not permit recovery of any punitive damages.

---

455 See 42 U.S.C. § 1981a(b) (authorizing compensatory and punitive damages under Title VII); 42 U.S.C. § 121117 (authorizing Title VII remedies for violations of ADA). Plaintiffs may recover compensatory damages with no cap under many state and local discrimination laws and common law tort theories.
456 See Tomka, 66 F.3d at 1316, 68 FEP 1508 (2d Cir. 1995) (no limit to compensatory damages under § 1981 based on employer size).
457 See Johnson v. Al Tech Specialties Steel Corp., 731 F.2d 143, 147, 34 FEP 861 (2d Cir. 1984).
459 See Farpella-Crosby v. Horizon Health Care, 97 F.3d 803, 808-09, 72 FEP 254 (5th Cir. 1996) (to recover mental anguish damages in hostile work environment case, plaintiff must show “some specific discernible injury” to emotional state; plaintiff’s showing of stress and humiliation was sufficient to support jury’s award of $7,500); Hollis v. City of Buffalo, 28 F. Supp.2d 812, 826-27, 78 FEP 1677 (W.D.N.Y. 1998) (plaintiff awarded $30,000 in compensatory damages for emotional distress suffered as result of male supervisor’s sexual harassment where plaintiff suffered physical manifestations of nervousness and emotional distress but did not seek any medical, psychiatric or psychological treatment).
460 See Section III.C., supra, of this chapter.
462 See 42 U.S.C. § 1981a(b)(4); Johnson, 731 F.2d at 148, 34 FEP 861. Although punitive damages are not available under the ADEA, a plaintiff who establishes a willful violation of the ADEA may recover liquidated damages in an amount equal to the back pay award. See 29
In *Kolstad v. American Dental Association*,

the U.S. Supreme Court rejected the argument that punitive damages are only available in “extraordinarily egregious” cases, instead finding an award proper where the employer knew that it may be acting in violation of federal law. Such liability can be proven by showing either that the individual who discriminated was familiar with the law or that the principals of the company authorized the action. The Supreme Court further held that an employer will not be vicariously liable for punitive damages based on discriminatory actions by one of its managerial employees where the employer implemented, in good faith, policies prohibiting discrimination and the actions of the managerial employees are contrary to the employer’s good-faith efforts to comply with Title VII.

Since *Kolstad*, courts have attempted to define the quantum of proof required for a punitive damage award as well as the circumstances under which the *Kolstad* good-faith defense will be available in harassment cases. An employer’s knowledge that it is violating the law, combined with proof of unlawful harassment, is generally sufficient to support an award of punitive damages. In addition, an employer’s failure to respond to known complaints of harassment may support a finding of malice or reckless indifference.

U.S.C. § 626(b).


527 U.S. at 534-35.

527 U.S. at 536, 543.

527 U.S. at 545.

See Fine v. Ryan Int’l Airlines, 305 F.3d 746, 752-53, 89 FEP 1543 (7th Cir. 2002) (sustaining $300,000 punitive damage award where evidence showed employer knew it was dismissing plaintiff for complaining of sexual harassment yet documented lack of interpersonal skills as the reason, and company president certified decision). But see Ocheltree v. Scollon Productions, Inc., 335 F.3d 325, 3335-36, 92 FEP 433 (4th Cir. 2003) (en banc) (setting aside award of punitive damages in case of co-worker harassment where employer was liable on a constructive notice and negligence theory and absence of evidence that employer knew it might be acting in violation of plaintiff’s federally protected rights), cert. denied, 2004 WL 32301 (Feb. 23, 2004).

See Bandera v. City of Quincy, 344 F.3d 47, 53 (1st Cir. 2003) (affirming punitive damage award; plaintiff’s co-worker could testify about her own experience of sexual harassment and her internal reports of same to show City’s “pattern of knowing toleration of harassment by its subordinates”); Cush-Crawford v. Adchem Corp., 271 F.3d 352, 359, 87 FEP 456 (2d Cir. 2001) (affirming punitive damage award in absence of actual or nominal damages; plaintiff was victim of “persistent egregious sexual harassment by a supervisor” and complained to company officials, including a vice president, many months before employer took remedial action); Hertzberg v. SRAM Co., 261 F.3d 651, 661-62, 88 FEP 165 (7th Cir. 2001) (affirming denial of JMOL on plaintiff’s punitive damages claim; sufficient evidence that employer acted with reckless indifference because harassment was constant and employer did not respond to complaints), cert. denied, 534 U.S. 1130 (2002); Gentry v. Export Packaging Co., 238 F.3d 842, 852, 84 FEP 1518 (7th Cir. 2001) (affirming punitive damages award where upper management was aware that harasser hugged and rubbed shoulders of female employees; facts show “malice or reckless disregard”); Henderson v. Simmons Foods, Inc., 217 F.3d 612, 619, 83 FEP 279 (8th Cir. 2000) (affirming punitive damages award where plaintiff personally voiced over 40
damages against a corporate employer for the misconduct of one of its employees, a plaintiff must establish that the wrongdoing employee is a managerial agent. However, applying the Kolstad defense, an employer may avoid punitive damages in these circumstances if it can show that it had effective policies and procedures to prevent harassment and conducted an adequate investigation and took appropriate action to remedy the harassment. In addition, an

complaints and employer acted on complaints only once in two years and ignored requests for transfer and threatened her with loss of job; this “displayed deliberate indifference to . . . federally protected rights”); Deters v. Equifax Credit Inf. Services, 202 F.3d 1262, 1269, 81 FEP 1577 (10th Cir. 2000) (“recklessness and malice are to be inferred when a manager responsible for setting or enforcing policy in the area of discrimination does not respond to complaints, despite knowledge of serious harassment”). But see EEOC v. Indiana Bell Tel. Co., 256 F.3d 516, 527-28, 86 FEP 1 (7th Cir. 2000) (en banc) (reversing award of punitive damages and granting new trial where district court erroneously excluded evidence that employer was constrained in its discipline of harasser, a repeat offender, by existence of collective bargaining agreement provisions; those provisions were relevant to employer’s state of mind and reasonableness for purposes of punitive damages, even though irrelevant for liability purposes).

See Anderson v. G.N.C. Inc., 281 F.3d 452, 461, 88 FEP 309 (4th Cir. 2002) (reversing JMOL and remanding for new trial for dump truck driver seeking punitive damages where harasser could be “management employee” as he had authority to hire and fire and discipline drivers and was aided in his harassment by his position); Swinton v. Potomac Corp., 270 F.3d 794, 810, 87 FEP 65 (9th Cir. 2001) (affirming punitive award where front-line supervisor witnessed sexual harassment, failed to heed complaint, and joined in racist joking; supervisor acted in “managerial capacity” under Kolstad because employer’s policy advised employees to “notify your supervisor” if they felt harassed and supervisor failed to act, with reckless disregard to plaintiff’s rights), cert. denied, 535 U.S. 1018 (2002); Ogden v. Wax Works, 214 F.3d 999, 1010, 82 FEP 1821 (10th Cir. 2000) (affirming punitive award; harasser was district manager who supervised several stores and conducted performance evaluations that affected employee raises; his abusive conduct occurred during work hours on store premises and was actuated in part to serve the employer). Cf. Miller v. Kenworth of Dothan Inc., 277 F.3d 1269, 1280, 87 FEP 1209 (11th Cir. 2002) (reversing denial of JMOL as to punitive damages, available only if “higher management” perpetrated or “countenanced or approved harassment”; management in case had no actual notice); Cooke v. Stefani Mgmt. Services, Inc., 250 F.3d 564, 568-70, 85 FEP 1295 (7th Cir. 2001) (reversing punitive damages; on-site manager of one of numerous restaurants not high enough to be “proxy” for employer; upper manager knew only of fraternization between restaurant manager and plaintiff); Dudley v. Wal-Mart Stores, 166 F.3d 1317, 1323, 79 FEP 136 (11th Cir. 2000) (reversing punitive damages award based on racial harassment of two managers who were too low in “corporate hierarchy” and no one higher up had notice or knowledge of the discrimination; “constructive knowledge” by higher management not enough).

See Hatley v. Hilton Hotels Corp., 308 F.3d 474, 476-77, 89 FEP 1861 (5th Cir. 2002) (trial court did not err in declining to submit punitive damages issue to jury as managerial agent’s reckless indifference to plaintiff’s rights was contrary to employer’s well-publicized policy against sexual harassment, which employer enforced with new employee training, a grievance procedure for complaints, and an investigation of plaintiff’s complaints); Green v. Administrators of the Tulane Educ. Fund, 284 F.3d 642, 654, 89 FEP 587 (5th Cir. 2002)
employer’s written anti-harassment policy alone does not provide a per se good faith defense.471
An employer will not be able to show “good faith efforts” to comply with the law where its harassment policy is ineffective or the employer conducted an inadequate investigation.472

471 See Ogden, 214 F.3d at 1010-11, 82 FEP 1821.
472 See Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 29-30, 89 FEP 1361 (1st Cir. 2002)
(affirming JMOL for employer as to punitive damages, where employer had anti-harassment policy, put plaintiff on paid administrative leave when she complained of harassment and counseled alleged harasser, even if employer did not “adequately reprimand” him).

See Ogden, 214 F.3d at 1010-11, 82 FEP 1821.
See Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 29-30, 89 FEP 1361 (1st Cir. 2002)
(jury reasonably could have found that employer made no effort to comply with Title VII where supervisors failed to act on plaintiff’s complaints, vice president of human resources advised plaintiff to ignore harasser and employer failed to have sexual harassment policy or education in effect); Bruso v. UAL, 239 F.3d 848, 860-61, 84 FEP 1780 (7th Cir. 2001) (reversing JMOL for employer on punitive damages issue; employer’s implementation of formal anti-discrimination policy not itself sufficient to avoid punitive damages; jury could find that managerial agents did “sham” investigation of sexual harassment claim); Madison v. IBP Inc., 257 F.3d 780, 795-96, 86 FEP 77 (8th Cir. 2001) (upholding punitive damage award in racial harassment case where supervisors and managers were among those who harassed plaintiff and high level employees ignored her complaints, failed to investigate, and did not document illegal behavior or discipline perpetrators); Cadena v. Pacesetter Corp., 224 F.3d 1203, 1210, 83 FEP 1645 (10th Cir. 2000) (upholding punitive damages award where manager could not recall monthly education sessions employer alleged and trainer thought male supervisor would not commit sexual harassment if he exposed himself to women or grabbed her breasts so long as he then apologized); Ogden, 214 F.3d at 1010, 82 FEP 1821 (upholding punitive award where employer had policy encouraging employees with grievances to contact home office, i.e., employer “minimized” plaintiff’s complaints, performed cursory investigation that focused on her job performance and forced her to resign while imposing no discipline on the harasser). Cf. Swinton, 270 F.3d at 816, 87 FEP 65 (upholding trial court’s exclusion of evidence that employer conducted anti-harassment training after lawsuit was filed and seven months after plaintiff left job; though evidence might be relevant, exclusion not significant where evidence was that no harasser was ever disciplined).
APPENDIX B

CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT

by

Jana Howard Carey*
Baltimore, Maryland

# Table of Contents

**A** Overview of the Act.................................................................2

**B** What is a Disability?.................................................................2
  1. What is a physical or mental impairment?..................................2
  2. Does the Impairment substantially limit the Individual in a Major
      Life Activity?............................................................................4
  3. Can mitigation of the impairment be considered in determining
      whether it is substantially limiting?.........................................5
  4. An Individualized Assessment of “Substantial Limitation” Is
      Required....................................................................................6
  5. When is an employee “substantially limited” in the major life
      activity of working?.................................................................6
  6. Does the individual have a record of a substantially limiting
      impairment?.............................................................................7
  7. Was the individual regarded as having a substantially limited
      impairment?.............................................................................7

**C** Is the Individual a Qualified Person With a Disability?............8
  1. In order to be a “qualified person with disability,” a plaintiff must
      show that notwithstanding the disability he/she can perform the
      essential functions of the job with or without a reasonable
      accommodation............................................................................8
  2. Determining the “essential functions” of the job in question?.......8
  3. Determining what is a Reasonable Accommodation?...................10
  4. When does an accommodation pose an “undue hardship” on the
      employer’s business?.................................................................13
  5. When Is an Employee a “Direct Threat”......................................14
APPENDIX B: Claims Under the Americans With Disabilities Act

A  Overview of the Act

Title I of the Americans With Disabilities Act ("ADA")

in general terms, prohibits employers from discriminating against “qualified individuals with a disability” and requires that they make reasonable accommodations for a qualified applicant or employee with a disability if doing so would allow the applicant or employee to perform the essential functions of a particular job he or she is seeking. Title I is enforced by the Equal Employment Opportunity Commission (“EEOC”) and was signed into law on July 26, 1990. It applies to employers who employed 15 or more employees for 20 workweeks in the current or preceding calendar year. Final regulations governing the ADA have been promulgated along with a wide variety of “guidance” from the EEOC governing the ADA.

B  What is a Disability?

ADA § 3(2), 42 U.S.C. § 12102(2), states that an individual has a “disability” within the meaning of the ADA when he has a physical or mental impairment that substantially limits one or more of the individual’s major life activities; has a record of such an impairment; or is regarded as having such an impairment. The act also protects individuals associated with individuals with a disability e.g., the parent of a child with a disability.

1. What is a physical or mental impairment?

a. Definition of Impairment--Section 1630.2(h) of the EEOC Regulations, 29 C.F.R. § 1630.2(h), defines “physical or mental impairment” as:

any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or any mental or psychological

---

1  42 U.S.C. § 12101 et seq. (Pub. L. 101-336, 104 Stat. 328, enacted July 26, 1990). Title II of the ADA prohibits discrimination in public services, Title III prohibits discrimination in places of public accommodation and commercial facilities, and Title IV pertains to telecommunications and common carriers. These Titles are beyond the scope of this paper.
2  42 U.S.C. § 12111(5).
3  For a recent overview of the ADA, see generally EMPLOYMENT DISCRIMINATION LAW (3RD EDITION), 2000 CUMULATIVE SUPPLEMENT (Philip A. Pfeiffer, Editor-in-Chief) (Bureau of National Affairs, Washington, D.C., 2000) copyright © American Bar Association, 2000, at Chapter 9, hereinafter referred to as EDL 2000 Supp, followed by page number, and for recent cases discussing issues arising under the ADA, see generally RICHARD T. SEYMOUR AND JOHN F. ASLIN, EQUAL EMPLOYMENT LAW UPDATE, Spring 2000 (Bureau of National Affairs, Washington, D.C., 2001) copyright © American Bar Association, 2001, hereinafter referred to as EELU 2000 Update, followed by the page number.
disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

b. Mental Impairments

In its Guidance on Psychiatric Disabilities, the EEOC states that the American Psychiatric Association’s DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, (4th ed. 1996) (DSM-IV) is relevant, but not dispositive, for identifying mental disorders.

As set forth in the Guidance on Psychiatric Disabilities, traits or behaviors that often accompany mental impairments are not, in themselves, mental impairments. Guidance on Psychiatric Disabilities, 8 F.E.P. Manual (BNA) at 405:7463, Q 1. These include such traits as stress, irritability, chronic lateness, and poor judgment. See, e.g., Pouncy v. Vulcan Materials Co., 920 F. Supp. 1566 (N.D. Ala. 1996) (poor judgment, irresponsible behavior, and poor impulse control do not amount to mental condition that Congress intended to be considered impairment);

c. Conditions that are not covered

1. Illegal drug use--Section 104(a) of the ADA states that, for purposes of the employment provisions of the Act, any person “who is currently engaging in the illegal use of drugs” is not a “qualified individual with a disability.” 42 U.S.C. § 12114(a). See also 42 U.S.C. § 12210(a). A person who has participated or is participating in a supervised rehabilitation program and is no longer engaging in the illegal use of drugs is considered disabled under the employment provisions of the ADA. 42 U.S.C. § 12114(b)

2. Other statutory exclusions--The following conditions are specifically excluded from the statutory definition of disability: homosexuality, bisexuality, transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, and other identity or sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; and “psychoactive substance use disorders resulting from the current illegal use of drugs.” 42 U.S.C. § 12211.

3. Physical characteristics, personality traits, and disadvantages--In interpretations accompanying the EEOC rules, a distinction is drawn between covered impairments, on the one hand, and mere physical characteristics, personality traits, or environmental, cultural, or economic disadvantages, which are not covered. For example, a person who cannot read due to dyslexia is an individual with a disability, but a person who is illiterate because he dropped out of school is not an individual with a disability. EEOC TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT, EXPLANATION OF KEY LEGAL
requirements (technical manual) § 2.2(a)(i). By “physical characteristics”, the EEOC means such characteristics as eye or hair color, left-handedness, or height, weight, or muscle tone within normal ranges. What constitutes “within normal ranges” is clarified in the EEOC COMPLIANCE MANUAL SECTION 902: DEFINITION OF THE TERM “DISABILITY” (COMPLIANCE MANUAL (CCH)). Further, the EEOC states that pregnancy generally is not an impairment id., nor is advanced age “although medical conditions frequently associated with advanced age (e.g., hearing loss, arthritis) may qualify. 29 C.F.R. app. § 1630.2(h). Infertility may be an impairment of the reproductive system. See Bragdon v. Abbott, 524 U.S. 624, 118 S.Ct. 2196 (1998).

4. Temporary impairments--Impairments that are temporary in nature generally are not covered. See Adams v. Citizens Advice Bureau, 187 F.3d 315 (2d Cir. 1999) (finding three and one-half month and seven month disability insufficient to qualify for protection under the ADA). But see Shannon v. City of Philadelphia, No. CIV.A. 98-5277, 1999 WL 1065210 (E.D. Pa. Nov. 23,1999) (holding that severe conditions that are or could be long-term, or which are expected to last for at least several months can be considered disabilities under the Act.)

2. Does the Impairment substantially limit the Individual in a Major Life Activity?
   a. What is a Major Life Activity?--The EEOC Regulations describe “major life activities” as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. § 1630.20(i.) The Guidance on Psychiatric Disabilities also identifies “sleeping” as a major life activity but points out that an individual is not substantially limited in the ability to sleep just because the individual has some trouble getting to sleep or occasionally sleeps fitfully. Guidance on Psychiatric Disabilities, 8 F.E.P. Manual (BNA) at 405:7463, Q 3. In the COMPLIANCE MANUAL, the EEOC further defines major life activities to include “mental and emotional processes such as thinking, concentrating, and interacting with others.” COMPLIANCE MANUAL § 902.3(b).
   b. In addition to the major life activities set forth in the EEOC’s regulations, the Supreme Court has recognized reproduction as a major life activity. Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196 (1998) (individual infected with human immunodeficiency virus (HIV) was substantially limited in major life activity of reproduction). In fact, in a determination letter published by the EEOC stated that an employer’s medical plan’s denial of fertility treatments
   c. When is impairment “substantially limiting”?

4
1. EEOC definition

According to 29 C.F.R § 1630.26, the phrase “substantially limits” means the individual is wholly unable to perform a major life activity or is significantly restricted in the manner in or duration for which he can perform it as compared to an average person in the general population. According to EEOC Regulations, the following factors should be considered in determining whether an individual is substantially limited in a major life activity:

-- the nature and severity of the impairment;
-- the duration or expected duration of the impairment; and
-- the permanent or long-term impact resulting or expected to result from the impairment.

In Toyota Motor Manufacturing Kentucky, Inc., v. Williams 534 U.S. 184, 122 S.Ct. 681 (2002), the Supreme Court indicated that the plaintiff must demonstrate that they are substantially limited in an activity that is central to daily life. It is unclear if this requirement applies only to the major life activity of performing manual tasks, or to all major life activities. The subsequent case law is mixed on this issue.

3. Can mitigation of the impairment be considered in determining whether it is substantially limiting?

The Supreme Court recently ruled in Sutton v. United Airlines, Inc., 119 S. Ct. 2139, 2146 (1999), that, in assessing whether an individual is “substantially limited” in performing a major life activity and, therefore, “disabled” under the ADA, the courts should take into account any measures that the individual has taken “to correct for, or mitigate, a physical or mental impairment.” The Court refused to follow a prior EEOC interpretive guideline which would require an evaluation of the individual without regard to mitigating measures [29 C.F.R. app. § 1630.20] finding that “the agency approach would often require courts and employers to speculate about a person’s condition and would, in many

---

4 The Supreme Court held in Sutton that the plaintiffs, who both had myopia that severely impaired their vision, did not have a disability under the ADA. The specific basis for the Court’s ruling was the plaintiffs’ statements that corrective lenses improved their visual acuity to 20/20 and allowed them to “function identically to individuals without a similar impairment.” Id. at 2149. Similarly, in Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133, 2137 (1999), the Supreme Court upheld the lower court’s determination that the plaintiff was not disabled where there was evidence that medication controlled his high blood pressure and allowed him to “function[,] normally doing everyday activity that an everyday person does.” See also Todd v. Academy Corp., 1999 WL 591996, No. 98-1620 (S.D. Tex. Aug. 5, 1999) (plaintiff with epilepsy was not disabled for purposes of ADA where medication limited seizures to “light seizures” of five to fifteen seconds in duration at a rate of one per week).
cases force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual’s actual condition:” Sutton, supra. As the Court explained,

[a] “disability” exists only where an impairment “substantially limits” a major life activity, not where it “might,” “could,” or “would” be substantially limiting if mitigating measures were not taken. A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently “substantially limits” a major life activity. To be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not “substantially limit[ ]” a major life activity”. Id. at 2146-47 (emphasis added).


The inquiry into whether the individual’s impairment is substantially limiting under the ADA must be made on an individualized case-by-case basis. Making determinations of whether an individual is or is not impaired based upon stereotypical assumptions is impermissible under the ADA. See Sutton, 199 S. Ct. 2147.”

5. When is an employee “substantially limited” in the major life activity of working?

The EEOC Regulations explain that the term “substantially limits” as it pertains to working means more than the mere inability to perform a single, particular job. Rather, the individual must be “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.” 29 C.F.R. § 1630.2(j)(3)(i). Some courts have required that the plaintiff provide in the record a comparison between the plaintiff’s condition and that of a member of the average population. The EEOC has stated that the factors that should be considered in determining whether an individual is substantially limited in the major life activity of “working” are

--the geographical area to which the individual has access;

--the job from which the individual has been disqualified because of an impairment, and the number of jobs and career fields utilizing the same skills and training that the individual is also disqualified from; and/or

5 See also Sutton, 119 S. Ct. at 2147 (“whether a person has a disability under the ADA is an individualized inquiry); 20 C.F.R. pt. 1630, App. § 1630.2(j) (1998) (“whether an individual has a disability is not necessarily based on the name of diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual”).
--the job from which the individual has been disqualified, and the number and types of jobs not utilizing similar skills and training from which the individual is also disqualified. 29 C.F.R. § 1630.2(j)(3)(ii).

The Supreme Court indicated in *Sutton* that an individual is not excluded from a class or broad range of jobs “if jobs utilizing an individual’s skills (but perhaps not his or her unique talents) are available,” or “if a host of different types of jobs are available”. For example, because there were a number of other positions, such as regional pilot or pilot instructor, that the *Sutton* plaintiffs could perform, they were not disabled, even though they could not be global airline pilots. *See Sutton, supra.*

6. Does the individual have a record of a substantially limiting impairment?

As indicated above, even if an employee is not currently a qualified individual with a disability, he can still obtain ADA coverage if he has a record of impairment or is regarded as having an impairment by his employer. To “have a record” of a substantially limiting condition includes, according to the EEOC, not only having a history of a disability (e.g., a former cancer patient), but also having been misclassified as disabled. TECHNICAL MANUAL § 2.2(b).

Failure to prove both elements—both a record of an impairment, and its substantially limiting nature—will preclude the plaintiff from establishing that he has a covered “record of a disability.” *See e.g., Kresee v. Circuitek*, 958 F. Supp. 223 (E.D. Pa. 1997) (plaintiff’s record of knee operations did not render him “disabled” under ADA when none of the knee injuries were substantially limiting); *Glidden v. County of Monroe*, 950 F. Supp. 73, 76 (W.D.N.Y. 1997) (plaintiff failed to establish she had record of a “substantially limiting” condition when she had been hospitalized for depression on only one occasion for five days and doctor’s physiological evaluation provided “I am of the professional opinion that [plaintiff] does not suffer a significant mental disease or defect”).

7. Was the individual regarded as having a substantially limited impairment?

The “regarded as” theory covers an individual who is mistakenly believed by the employer to have a physical impairment that substantially limits one or more major life activities, or who has an impairment that is not substantially limiting, but whose employer mistakenly believes to be substantially limiting. This section protects those individuals who are subjected to employer misconceptions that “result from stereotypic assumptions not truly indicative of... individual ability.” *Sutton*, 119 S. Ct. at 2150.

The EEOC Regulations state that an individual comes within the “regarded as having an impairment” language in the following circumstances:

a. The individual has an impairment that really does not substantially limit major life activities but is treated by the employer as having a disability. 29 C.F.R. § 1630.2(n.).
b. The individual has an impairment that substantially limits major life activities only as a result of the attitudes of others. 29 C.F.R. § 1630.2(1).

c. The individual is unimpaired but is treated by a covered entity as having a substantially limiting impairment. Id.

C Is the Individual a Qualified Person With a Disability?

1. In order to be a “qualified person with disability,” a plaintiff must show that notwithstanding the disability he/she can perform the essential functions of the job with or without a reasonable accommodation. 42 U.S. C. § 12111(8). This requires an analysis of

--what are the “essential” functions of the job in question,

--whether the employee can perform them notwithstanding his or her impairment,

--if not, whether a “reasonable accommodation” would enable the employee to perform the essential functions, and

--if so, whether that accommodation would result in undue hardship to the employer. See, e.g., Nicholson v. Boeing Co., 176 F.3d 489, 1999 WL 270406 (10th Cir. 1999) (employee with permanent shoulder injury not qualified individual with disability because unable to do overhead work and could offer no type of accommodation which would allow her to do the work). Mortiz v. Frontier Airlines, Inc., 147 F.3d 784 (8th Cir. 1998) (employee with multiple sclerosis failed to show that she could perform all the essential functions of job with or without a reasonable accommodation).

2. Determining the “essential functions” of the job in question?

a. According to § 1630.2(n) of the EEOC Regulations, the term “essential functions” refers to the “fundamental job duties” of the position in question. 29 C.F.R. § 1630.2(n). A job function may be considered essential for the following reasons:

1. The position exists to perform that function. “For example, a person is hired to proofread documents. The ability to proofread accurately is an essential function, because this is the reason the job exists.” Similarly, the ability to work any time of the day or night is an essential function of the job of a floating supervisor whose job it is to substitute for regular supervisors on any shift who are absent. EEOC Technical Manual §23(a)(1).

2. Performance of the function can be distributed to only a limited number of employees. “It may be an essential function for a file clerk to...
answer the telephone if there are only three employees in a very busy office and each employee has to perform many different tasks.” EEOC Technical Manual § 23(a)(2).

3. The incumbent is hired for his expertise or ability to perform the function or the consequences of not performing the function are significant to the business. EEOC Technical Manual § 23(a)(3). For example, a firefighter may only occasionally have to carry a heavy person from a burning building, but being able to perform this function may be essential to a firefighter’s job. EEOC Technical Manual § 23(a)(3)(d). But see Kiphart v. Saturn Corp., 251 F.3d 573 (6th Cir. 2001) (court rejected Saturn’s content on that rotating assignments was an essential function of the assembly line job).

b. Elements of proof:

1. Are employees actually required to perform the function? See, e.g., Miller v. Illinois Dep’t of Corrections, 107 F.3d 483, 485 (7th Cir. 1997)(ability to help in emergencies was an essential function for a blind correctional officer who could perform only the duties of a switchboard officer and armory officer).

2. Would removing the function fundamentally alter the job? If so, the function is essential. See, e.g., Mole v. Buckhorn Rubber Prods., 165 F.3d 1212, 1218 (8th Cir. 1999).

3. What percentage of the employee’s time is spent on the function?

4. What would be the consequences if the employee were unable to perform the function?

5. Are there relevant provisions of a collective bargaining agreement suggesting that the function is essential? See generally, EDL, 2000 Supplement at 141.

c. Special job functions that may be “essential.”

1. Attendance typically is considered an essential function, but there are some cases where the employer is required to accommodate an employee’s absenteeism by allowing him to take accrued leave. See generally EDL 2000 Supplement at pp. 9-198-200.

2. An employer’s production standards are generally considered essential functions. The inquiry into essential functions is not intended, to second-guess an employer’s production standards. Thus, if a hotel operator requires its housekeepers to thoroughly clean 16 rooms per day, it does not have to justify this standard as “essential.” TECHNICAL MANUAL § 2.3(a). It must only show that it does in fact require
employees to perform at this level, that these are not merely paper requirements, and that the standard was not established for a discriminatory reason, i.e., to keep disabled persons as a class from being able to perform the job.

d. Impact of prior sworn statements regarding ability to perform

In Cleveland v. Policy Management Systems, Corp., 526 U.S. 795, 119 S. Ct. 1597 (1999), the Supreme Court held that an individual may be able to both claim to suffer from a total disability for the purposes of collecting social security benefits, and also claim that he could be able to perform the essential functions of his job with an appropriate reasonable accommodation. The plaintiff in such cases must provide the court with sufficient explanation to overcome the contradiction between these two positions, however... See also EEOC Guidance on Workers’ Compensation, 8 F.E.P. Manual (BNA) at 405:7398, Q 15, and EEOC. Guidance on Disability Representations, 8 F.E.P. Manual (BNA) at 405:7431, 405:7450 - 405:7452

3. Determining what is a Reasonable Accommodation?

a. Under Title I, “reasonable accommodation” may, depending upon all the circumstances, include measures such as

1. making facilities used by employees readily accessible to the disabled, including making sure the job application process enables a qualified disabled applicant to have an equal opportunity to be considered for a job (42 U.S.C. § 12111(9)(A)); this may include

2. flexible work schedules, which may include allowing employees to have flex hours, to take frequent breaks or rest periods, or to change times when certain functions are done

3. permitting use of accrued paid leave or extended unpaid leave for necessary treatment

4. reassignments to other VACANT positions;

5. acquisition or modification of equipment or devices provided such acquisition can be done at a reasonable cost;

6. modifications of examinations, training materials, or policies (NOTE: However, the EEOC regulations provide that an employer may hold all employees, disabled and nondisabled, “to the same performance and conduct standards.” 29 C.F.R. app. § 1630.16(b). Thus, courts have held that an employer is not required to rescind or modify discipline as a reasonable accommodation, even if the employer later learns that the
conduct giving rise to the discipline is the result of an individual’s disability. See Palmer v. Circuit Court of Cook County, 117 F.3d 351 (7th Cir. 1997).

7. provision of qualified readers or interpreters (29 C.F.R. § 1630.2(o));

8. job restructuring by reallocating the nonessential functions of the job to other employees or by changing when and how the essential functions of the job are to be performed;

9. providing alternate methods of training employees so that disabled employees have equal access to be trained for a position (42 U.S.C. § 12111(9)); (TECHNICAL MANUAL § 3.10);

10. making transportation provided by the employer accessible;

11. providing personal assistants for certain job-related functions such as a page turner for a person who has no hands or a travel attendant to act as a sighted guide to assist a blind person on occasional business trips;

12. temporary use of a coach for people with mental retardation and other disabilities who benefit from individualized on-the-job training and services provided at no cost by vocational rehabilitation agencies in “supported employment” programs (Id.).

b. Undue hardship

1. Accommodation is not required when it would result in “undue hardship,” i.e., if it would entail “significant difficulty or expense.” 42 U.S.C. § 12111(10). This standard is not further delineated in the Act. The EEOC Regulations state that employers must show substantially more difficulty or expense than is necessary to satisfy the de minimis standard excusing the accommodation of religious beliefs under Title VII of the 1964 Civil Rights Act. 29 C.F.R. app. § 1630.2(p).

2. In determining whether an accommodation would impose an undue hardship, the following are to be considered:

3. the nature and cost of the accommodation;

4. the financial resources of the particular facility involved, the number of persons employed there, and the effect on expenses and resources;

5. the financial resources of the overall covered entity, the size of that entity’s business with respect to the number of its employees, and the number, type, and location of its facilities;
6. the type of operations of the covered entity, including the composition, structure, and functions of its work force, and the geographic, administrative, and fiscal relationship between the facility in question and the covered entity; and

7. the impact of the accommodation on the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business. 42 U.S.C. § 12111(10)(B).

c. Notice to the employer of the need for accommodation

1. The employer must be made aware of the employee’s need for an accommodation but under the EEOC’s Enforcement Guidance (hereinafter “the Guidance”), almost any request by an employee related to a medical condition is considered sufficient. --For example, if an employee informs her supervisor that she needs six weeks off for a back problem, the employee has made a request for a reasonable accommodation under the ADA according to the EEOC. A third party can give notice of a need for an accommodation. Taylor v. Phoenixville School District, 184 F. 3d 296 (3d Cir. 1999). An employer may need to initiate the request if the employer has notice of the need for an accommodation and the employee has a disability that prevents them from asking. Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996).

d. The “interactive process”

1. The EEOC regulations provide that, in order to determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation.

2. This process should first identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. 29 C.F.R. § 1630.2(o)(3).

3. Once the need for an accommodation has been established, the determination of what accommodation is appropriate must often be determined by informal discussions between the employee and the employer.

4. There has been litigation over the issue of who is responsible for breakdowns in this “interactive process.” communications/ Generally, the employee’s claim will fail if he or she has been uncooperative or refused to provide relevant information. See, e.g., Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130 (7th Cir. 1996), (affirming summary judgment for the employer, stating that although the employer and the
employee should engage in an interactive exchange, it is incumbent on both parties to make a reasonable effort to determine what accommodation might be reasonable “Because the University was never able to obtain an adequate understanding of what action it should take, it cannot be held liable for failure to make ‘reasonable accommodation.’” 75 F.3d’at 1137.

In *U.S. Airways, Inc., v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516 (2002), the Court recognized that policies may have to be modified to accommodate disabled employees because the ADA does require a preference in that regard. It held that in the ordinary course a company would not be required to violate seniority rights in order to accommodate a disabled employee. However, the plaintiff can demonstrate that this presumption should not be followed if there is evidence suggesting the seniority rights are not sacrosanct in practice. ⁶

The cases are mixed on whether the reasonable accommodation requirement extends to individuals who are regarded as disabled. Compare *Williams v. Philadelphia Housing Authority Police Department*, 380 F.3d 751 (3d Cir. 2004) (reasonable accommodation required) with *Kaplan v. North Las Vegas*, 323 F.3d 1226 (9th Cir. 2003) (not required) and *Weber v Strippit*, 186 F.3d 907 (8th Cir. 1999) (same).

e. Employer’s Right To Select Among Reasonable Accommodations

1. The EEOC recognizes that in some instances there may be more than one possible accommodation for the employee and that as long as the accommodation made by the employer. The employer must select an effective accommodation that provides equal employment opportunity to the disabled employee. The employer has no duty to make the particular accommodation that the employee prefers.

4. When does an accommodation pose an “undue hardship” on the employer’s business?

   a. Accommodation is not required when it would result in “undue hardship,” i.e., if it would entail “significant difficulty or expense.” 42 U.S.C. § 12111(10). This standard is not further delineated in the Act.

   b. The EEOC Regulations state that employers must show substantially more difficulty or expense than is necessary to satisfy the de minimis standard

⁶ The Ninth Circuit had held in *Barnett* that the interactive process is mandatory for employers and is triggered by an employee's or his or her representative's requesting accommodation. The Circuit court held that employers who fail to engage in the interactive process in good faith face liability if a reasonable accommodation would have been possible. *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000) (en banc), vacated on other grounds, 535 U.S. 391 (2002). The Supreme Court did not address this issue in its opinion in *Barnett*. 10
excusing the accommodation of religious beliefs under Title VII of the 1964 Civil Rights Act. 29 C.F.R. app. § 1630.2(p). They provide that, in determining whether an accommodation would impose an undue hardship, the following are to be considered:

1. the nature and cost of the accommodation;

2. the financial resources of the particular facility involved, the number of persons employed there, and the effect on expenses and resources;

3. the financial resources of the overall covered entity, the size of that entity’s business with respect to the number of its employees, and the number, type, and location of its facilities;

4. the type of operations of the covered entity, including the composition, structure, and functions of its work force, and the geographic, administrative, and fiscal relationship between the facility in question and the covered entity; and

5. the impact of the accommodation on the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business. 42 U.S.C. § 12111(10)(B). See, also, 29 C.F.R. § 1630.2(p)(2).

c. An accommodation may also impose an undue hardship if it would be unduly disruptive to other employees or to the functioning of the business as long as the disruption is not attributable merely to employees’ fears or prejudices. 29 C.F.R. app. § 1630.2(r). Exactly what constitutes a disruption to other employees will again be an individualized determination. However, the TECHNICAL MANUAL § 3.9(5) gives some guidance in this regard:

“If an employee with a disability requested that the thermostat in the workplace be raised to a certain level to accommodate her disability, and this level would make it uncomfortably hot for other employees or customers, the employer would not have to provide this accommodation. However, if there was an alternative accommodation that would not be an undue hardship, such as providing a space heater or placing the employee in a room with a separate thermostat, the employer would have to provide that accommodation.”

5. When Is an Employee a “Direct Threat?”

a. The ADA permits employers to exclude an individual who, by reason of his disability, poses a “direct threat to the health or safety of others” that cannot be reasonable accommodated. See 42 U.S.C. § 12113 (b).
Section 1630.15(b) of the EEOC Regulations provide that it is permissible for an employer to exclude an individual whose disability would pose a “direct threat to the health or safety of the [disabled] individual or others in the workplace.” 29 C.F.R. § 1630.15(b)(2).

b. Factors to be considered in determining if an employee is a direct threat include:

1. the duration of the risk;
2. the nature and severity of the potential harm;
3. the likelihood that the potential harm will occur; and
4. the imminence of the potential harm. 29 C.F.R. § 1630.2(r).

c. In assessing issues involving a “direct threat,” the employer must consider “the most current medical knowledge and/or the best available objective evidence.” Id. See also Bragdon v. Abbott, 524 U.S. 624, 649 (1998).

Direct threat is an affirmative defense and the defendant must prove that the threat cannot be reduced or eliminated by a reasonable accommodation. See, 29 C.F.R. sec 1630.2(r). In Chevron USA Inc. v. Echazabal, 536 U.S. 73, 122 S.Ct. 2045 (2002), the Court held that the direct threat defense can be established if the defendant can prove that the plaintiff would pose a direct threat to themselves, or others. The Court gave deference to the EEOC’s guidance in that regard.
American Bar Association
Section of Labor and Employment Law
in cooperation with the Federal Judicial Center

EEO LITIGATION:
PRACTICE AND PROCEDURE

by

Richard T. Seymour*
Law Office of Richard T. Seymour, P.L.L.C.
Washington, D.C.
and
Mark Dichter*
Morgan, Lewis & Bockius, LLP
Philadelphia, Pennsylvania

* The opinions expressed herein are those of the authors, and not necessarily of our firms or of our clients. Parts of this paper are taken by permission from the forthcoming Fall 2005 edition of RICHARD T. SEYMOUR AND JOHN F. ASLIN, EQUAL EMPLOYMENT LAW UPDATE (Bureau of National Affairs, Washington, D.C., 2005) copyright © American Bar Association, 2005.
### Table of Contents

A. The Equal Employment Opportunity Commission .......................................................... 1
   1. Key Fair-Employment Statutes Administered by the EEOC ........................................ 1
   2. Key Fair-Employment Statutes Not Administered by the EEOC ............................. 1
   3. EEOC Procedures ........................................................................................................ 2
      a. The Requirement of Filing a Charge of Discrimination ........................................ 2
      b. The EEOC’s Procedures After a Charge is Filed Against a Private, or State or Local
         Government-Agency Respondent ........................................................................... 2
B. Administrative Exhaustion ................................................................................................ 5
C. Timeliness ....................................................................................................................... 8
D. Bars to Suit .................................................................................................................... 10
   1. Judicial Estoppel ........................................................................................................ 11
   2. Res Judicata, Claim Preclusion, and ................................................................. 11
   3. Collateral Estoppel, and Issue Preclusion ............................................................ 12
   4. Moontness ................................................................................................................ 12
   5. Preemption Under the Federal Labor Laws and ERISA ......................................... 12
   6. Releases, Waivers, and Prior Settlements ............................................................... 14
   7. Arbitration ................................................................................................................ 14
   8. Pleading Requirements ............................................................................................ 15
E. Discovery ....................................................................................................................... 16
   1. Confidential Information and Protective Orders .................................................... 17
   2. Mandatory Initial Disclosures ............................................................................... 17
   3. Medical and Psychiatric Examinations Under Rule 35 ........................................... 18
F. Limitations On Discovery ............................................................................................... 18
   1. Scope Of Discovery: Burdensome/Irrelevant ......................................................... 18
   2. Privileges ................................................................................................................ 20
      a. Discovery from the EEOC .................................................................................. 20
      b. Attorney-Client and Work Product Privileges .................................................... 20
      c. Self-Critical Analysis ....................................................................................... 21
      d. Patient-Psychotherapist .................................................................................. 22
      e. Rejections of Other Claims of Privilege .......................................................... 22
   3. Ex Parte Contact with Certain Employees or Ex-Employees .................................... 22
G. Taking the Case From the Jury ...................................................................................... 23
   1. General Considerations ........................................................................................... 23
   2. Application of Reeves ............................................................................................. 27
   3. Rule 56 Summary Judgments: Technical Questions ................................................ 32
   4. Rule 50 Judgments as a Matter of Law .................................................................... 35
   5. Cases Presenting Both Jury and Nonjury Questions ............................................. 36
H. Types of Evidence ......................................................................................................... 36
   1. Comparators ............................................................................................................ 36
   2. Statistics .................................................................................................................. 39
   3. Bona Fide Occupational Qualifications .................................................................. 44
   4. Biased Remarks ...................................................................................................... 46
   5. Mixed-Motive Cases .............................................................................................. 48
   6. Other Circumstantial Evidence .............................................................................. 52
   7. Other Occurrences of Similar Conduct .................................................................. 53
   8. Expert Evidence ...................................................................................................... 54
I. Types of Relief
   1. Injunctive Relief
   2. Back Pay
   3. Prejudgment Interest
   4. Front Pay
   5. Liquidated Damages
      a. The ADEA and the Equal Pay Act
      b. The Family and Medical Leave Act
   7. Compensatory Damages
   8. Punitive Damages
   9. Taxes on Monetary Relief
J. Attorneys’ Fees
   1. Entitlement to Fees
   2. The Lodestar
      a. Reasonable Hours
      b. Reasonable Hourly Rates
      c. Billing Judgment
   3. Enhancements to, and Deductions from, the Lodestar

1. Key Fair-Employment Statutes Administered by the EEOC.


   • Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., as amended (including the amendment sometimes called the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k)), prohibits both disparate treatment (intentional discrimination) and disparate impact based on race, color, gender, pregnancy, or religion. See generally EQUAL EMPLOYMENT LAW UPDATE, Chapter 5.

   • Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq., an amendment to the Fair Labor Standards Act, bars discrimination based on age, but covers only persons over the age of forty. See generally EQUAL EMPLOYMENT LAW UPDATE, Chapter 7.

   • Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq., bars discrimination based on disability against otherwise qualified persons with a disability, persons the employer perceives as disabled, and persons who associate with other persons with a disability. The statute incorporates the administrative-exhaustion and procedural provisions of Title VII. See generally EQUAL EMPLOYMENT LAW UPDATE, Chapter 9.


   • Most of the above statutes also include express prohibitions against retaliation. See generally EQUAL EMPLOYMENT LAW UPDATE, Chapters 3, 5, 7, 9, and 22. Special issues with the EEOC as a litigant are covered in Chapter 60.

2. Key Fair-Employment Statutes Not Administered by the EEOC.

   • 42 U.S.C. § 1981, which bars intentional racial and ethnic discrimination in private and nonfederal public employment. See generally EQUAL EMPLOYMENT LAW UPDATE, Chapter 1.

   • 42 U.S.C. § 1983, which is often used to enforce the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, against State and municipal officials in their personal capacities, against State agencies for injunctive relief, and against municipalities for injunctive and—under certain conditions—monetary relief. See generally EQUAL EMPLOYMENT LAW UPDATE, Chapters 1 and 58.

   • Sec. 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which bars disability
discrimination by Federal grantees. This statute is enforced by the U.S. Department of Labor. See generally EQUAL EMPLOYMENT LAW UPDATE, Chapter 9.

3. EEOC Procedures.

a. The Requirement of Filing a Charge of Discrimination.

Except for the Equal Pay Act, the substantive statutes administered by the EEOC require that a person claiming discrimination file a charge of discrimination with the EEOC stating the alleged act of discrimination, the basis on which the charging party believes the discrimination occurred (race, gender, national origin, religion, age, retaliation, or unequal pay), and the entity that engaged in the discrimination. See generally EQUAL EMPLOYMENT LAW UPDATE, Chapter 26, and see the discussion below. A charging party may file with the EEOC a timely unsworn charge of discrimination, verify the charge while it is still before the EEOC even if the verification occurs after expiration of the charge-filing period, and the verification will relate back to the original filing and satisfy the exhaustion requirement.\(^1\)

The purpose of the charge-filing requirement is to give the U.S. Equal Employment Opportunity Commission (“EEOC”) an opportunity to investigate the charge and, if it finds that there is reasonable cause to believe the allegations of the charge, to seek to conciliate the charge. The EEOC’s procedural regulations, 29 C.F.R. §§ 1607.1 et seq., set forth the procedures for handling charges against private respondents and against State and local agencies. A different set of regulations, 29 C.F.R. §§ 1607.13 et seq., set forth the procedures for handling charges against private respondents and against Federal agencies.

b. The EEOC’s Procedures After a Charge is Filed Against a Private, or State or Local Government-Agency Respondent.

In brief, the EEOC must serve a copy of the charge on the respondent within ten days of its receipt. The respondent is normally asked to provide the EEOC with a statement of its position. The EEOC can request documents and other information from the respondent and interview witnesses. If the respondent fails to provide information informally requested by the EEOC, the EEOC can issue an administrative subpoena for the information. If the respondent does not then provide the information, the EEOC may seek enforcement of the subpoena in Federal court.

With respect to private respondents and State and local governmental agencies, the EEOC does not conduct hearings on charges or issue findings of fact or conclusions of law. It has no power to issue a binding order against any respondent other than a Federal agency. Its statutory task is to state whether or not it finds “reasonable cause” to believe that an unlawful employment practice has occurred or is occurring under Title VII or the ADA. Where the EEOC finds “reasonable cause,” it then invites the parties to attempt to conciliate the charge.

If conciliation fails, the EEOC can decide to file suit on behalf of the charging party, not as the charging party’s attorney but to enforce the governmental interest in nondiscrimination. In such a case, the EEOC can seek the same relief for the charging party as the charging party could

seek in his or her own lawsuit. A charging party also has a statutory right to intervene in an EEOC lawsuit brought on his or her behalf.

The EEOC currently does not issue substantive “no reasonable cause” determinations, asserting that they convey an incorrect connotation that the EEOC has performed a full investigation. Instead, it issues determinations that it is unable to conclude that there was cause.

The Federal government, including the EEOC, files only a few hundred fair-employment cases a year. The vast bulk of the almost 20,000 new fair-employment cases filed annually in the Federal district courts are filed by private plaintiffs.¹

If the EEOC decides not to file suit, it will issue a Notice of Right to Sue. In a Title VII, ADA, or ADEA case, this enables the charging party to file his or her own lawsuit within ninety days after receipt of the Notice. Notwithstanding the importance of documenting the date of receipt, many EEOC offices have decided to save money by ending the practice of sending Notices by certified mail. The courts have generally not dismissed the claims of charging parties who file suit before the receipt of the Notice, if the Notice is later received.²

The EEOC also issues Notices of Right to Sue when it finds no reasonable cause to believe that discrimination occurred, or concludes its processing of the charge for any other reason. A Notice of Right to Sue can also be issued on request of the charging party. An EEOC regulation, 29 C.F.R. § 1601.28(a)(2) (2001), allows the EEOC to issue a Notice of Right to Sue on request of the charging party even where its process is continuing and it has not had jurisdiction for 180 days, where the EEOC determines that in light of its workload it will not be able to complete processing of the charge within 180 days. There is a split among the Circuits on the validity of such early Notices of Right to Sue.⁴

---

¹ In FY 2004, a total of 19,746 new employment discrimination cases were filed in Federal district courts. Of these, only 428 were brought by Federal agencies. Table C-2 to JUDICIAL BUSINESS OF THE U.S. COURTS 2004, ANNUAL REPORT OF THE DIRECTOR, Administrative Office of the U.S. Courts. All tables in this Report are downloadable from http://www.uscourts.gov/judbus2004/contents.html.


⁴ Compare Martini v. Federal National Mortgage Association, 178 F.3d 1336 (D.C. Cir. 1999), cert. dismissed, 528 U.S. 1147 (2000) (holding that the Notice and the authorizing EEOC regulation are void, vacating the jury verdict after five years of litigation, and sending the case back to the EEOC) with Brown v. Puget Sound Electrical Apprenticeship & Training Trust, 732 F.2d 726, 729 (9th Cir. 1984), cert. denied, 469 U.S. 1108 (1985) (upholding the same EEOC regulation) and Sims v. Trus Joist MacMillan, 22 F.3d 1059, 1061–63 (11th Cir. 1994) (same). Some courts invalidating the regulation have simply required the action to be held in abeyance while the case is re-submitted to the EEOC for the number of days necessary to make the full 180 days. E.g., Spencer v. Banco Real, S.A., 87 F.R.D. 739, 741–48 (S.D. N.Y. 1980). The Supreme Court has referred to the “early notice” regulation in passing, but without ruling on its validity. EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 595 n.6 (1981). Most lower-court decisions do not mention this reference.
The EEOC ordinarily drafts the charge of discrimination based on information obtained from the charging party. Some EEOC offices try to keep details out of the charges, and demand that charging parties put the details in their responses to the EEOC’s questionnaire. Because the questionnaire is often not provided to the respondent when the charge is served, the respondent does not know the details of what has been alleged. There is a split among the Circuits as to whether the information in the questionnaire is part of the charge for purposes of exhaustion, and its resolution may turn on whether the questionnaire responses are sworn.\(^5\)

In recognition that its investigative resources are limited, and in furtherance of a broad national interest in alternative dispute resolution, the EEOC has established ADR coordinators in its larger offices and offers mediation before investigation as an option for some charges.\(^6\) Both the charging party and the respondent must agree before a charge will be diverted to mediation.

Congress has mandated that a significant part of the EEOC’s appropriation be granted to State and local fair-employment agencies (“deferral agencies”). EEOC offices commonly negotiate “worksharing agreements” with deferral agencies under which one agency is authorized as the other’s agent for the purpose of receiving charges of discrimination and sometimes for investigative purposes. A charge filed with one agency can be deemed filed with both.\(^7\) The courts have generally upheld these provisions.\(^8\) There is no standard form of agreement, and in the past some offices have not retained copies of superseded agreements even though charges processed under the former agreements are still in litigation.\(^9\)

---

\(^5\) Compare Novitsky v. American Consulting Engineers, L.L.C., 196 F.3d 699, 701–02 (7th Cir. 1999) (affirming summary judgment to the defendant for failure to exhaust the EEOC charge-filing requirement on the religious-discrimination plaintiff’s failure-to-accommodate claim, where the charge alleged only age and religious discrimination and a reasonable investigation would not likely have covered a failure-to-accommodate-religion claim, where only the questionnaire alleged a failure to accommodate) with Shempert v. Harwick Chemical Corp., 151 F.3d 793, 795, 796 (8th Cir. 1998), cert. denied, 525 U.S. 1139 (1999) (affirming the denial of intervention to a former bookkeeper who sought to “piggyback” on the plaintiff’s charge, because the plaintiff’s unverified Intake Questionnaire was not a valid charge and her verified charge of discrimination was untimely) and Laquaglia v. Rio Hotel & Casino, Inc., 186 F.3d 1172, 1175 (9th Cir. 1999) (reversing summary judgment to the defendant because the plaintiff’s detailed, sworn intake questionnaire to the deferral agency was the equivalent of a charge.)

\(^6\) The ABA Section of Labor and Employment Law is heavily involved in providing substantive training in fair-employment law to mediators. Many of our efforts are in cooperation with the National Alliance for Education in Dispute Resolution, a consortium of universities and public and private organizations including the Federal Mediation and Conciliation Service.

\(^7\) Laquaglia v. Rio Hotel & Casino, Inc., 186 F.3d 1172 (9th Cir. 1999), describes typical provisions in such agreements, and their effect on timely filing requirements.

\(^8\) E.g., Griffin v. City of Dallas, 26 F.3d 610, 612 (5th Cir. 1994).

\(^9\) E.g., Ford v. Bernard Fineson Development Center, 81 F.3d 304, 305 (2d Cir. 1996).
B. **Administrative Exhaustion.**


An employee with a claim under the the Family and Medical Leave Act of 1991, 29 U.S.C. §§ 2601, 2711 et seq., may either file an administrative charge with the U.S. Department of Labor or file a lawsuit, but is not required to file a charge before filing a lawsuit.

Exhaustion of State administrative remedies is not required as a prerequisite to bringing an action pursuant to § 1983.

Title VII requires that a charge be deferred to a State or local fair employment practices agency (“FEPA”) for a period of 60 days, or until the State agency terminates its proceedings, whichever is earlier. A FEPA may also waive its exclusive processing rights.

Where one charge of discrimination has been filed by a named plaintiff, in some circumstances other named plaintiffs or intervenors may sue as to the same practice without having to file their own EEOC charges. Because of the importance of notice to the EEOC and the defendant, the success of such “piggybacking” efforts may depend on whether the charge on which the others seek to “piggyback” put the EEOC and the defendant on notice of large-scale or class-type liability, or instead that the number of persons seeking “piggybacking” is small.


An issue that frequently arises in litigation is whether a particular claim in the judicial Complaint was exhausted in the EEOC charge. The classic test was handed down in *Sanchez v. Standard Brands*, 431 F.2d 455, 465–66 (Former 5th Cir. 1970). Stating that EEOC charges should not be construed with “literary exactitude,” it held that “it is only logical to limit the permissible scope of the civil action to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.” Courts may not allow litigation of a claim that alleges discrimination on a different basis unless the claim is closely related to the original charge.

The courts have generally held that plaintiffs may include post-charge retaliation claims in their judicial Complaints without having filed a retaliation charge with the EEOC. If the alleged retaliation occurred prior to the filing of the charge, however, the plaintiff is generally held to have failed to exhaust. Courts are divided over the issue of whether the plaintiff may litigate, without filing a new charge, incidents that take place after the initial charge on which the suit is based. Courts generally allow litigation of the subsequent events if the initial charge alleged a continuing violation. Courts sometimes are also inclined to do so if the subsequent events are “reasonably related” to the events at issue in, and the theory of, the charge, and if the EEOC investigated or had reasonable opportunity to investigate those subsequent events. Some courts have taken the contrary view, however, particularly where the subsequent, uncharged events were not actually investigated by the EEOC, where the uncharged acts were different in kind from those alleged in the charge, and where, under the circumstances, the charging party did, or reasonably might have been expected to, file a new charge. In addition, a charge that has been narrowly drafted to cover just one specific incident has been held to support a lawsuit based only on that incident.

A particular defendant may in some circumstances be included in a judicial Complaint even if that defendant had not been named in the charge. Sec. 706(f)(1) provides “that a civil filed their own charges and let their Notices of Right to Sue expire); *Whalen v. W.R. Grace & Co.*, 56 F.3d 504, 507 (3d Cir. 1995) (recognizing conflicting authority but holding that “single filing” rule does not allow amendment of an individual ADEA complaint, not alleging a class or representative action, to add new plaintiffs who have not filed charges with the EEOC, and holding that new individuals may not “opt in” to the individual action); *Forehand v. Florida State Hospital at Chattahoochee*, 89 F.3d 1562, 1565 n.8 (11th Cir. 1996) (dictum).

15 *E.g.*, *Clockedile v. New Hampshire Dept. of Corrections*, 245 F.3d 1, 4–5 (1st Cir. 2001); *Anderson v. Reno*, 190 F.3d 930, 938 (9th Cir. 1999).

16 *E.g.*, *Auston v. Schubnell*, 116 F.3d 251, 254 (7th Cir. 1997).

17 *E.g.*, *Mosley v. Pena*, 100 F.3d 1515, 1518 (10th Cir. 1996). But see *Robinson v. Dalton*, 107 F.3d 1018, 1024 (3d Cir. 1997) (declining to adopt *per se* rule and requiring analysis of facts in each case).

18 *E.g.*, *Shah v. New York State Department of Civil Service*, 168 F.3d 610, 612 (2d Cir. 1999); *Knowlton v. Teltrust Phones, Inc.*, 189 F.3d 1177, 1185 (10th Cir. 1999).
action may be brought against a respondent named in the charge.” Courts have taken different views on what it means to be “named” in the charge. The tests the courts apply focus on the reasonable scope of the EEOC investigation, actual notice to the unnamed party, and identity of interest between the named and unnamed parties. Where conciliation efforts occurred and the unnamed party had no notice of the efforts and was prejudiced thereby, courts are likely to dismiss for lack of jurisdiction. The important factor remains whether the unnamed party had actual or constructive notice of the charge and an opportunity to participate in conciliation efforts.

A plaintiff is required to have exhausted claims, not the evidence on which the plaintiff relies to establish the claim.19

Complaints of discrimination against Federal agencies are subject to completely different regulations under which the Complaint is filed with the agency charged, not with the EEOC, administrative trials are held, and the final agency decision can be appealed to the EEOC. 29 C.F.R. Part 1614 (2001). The exhaustion requirement for Federal-sector complainants requires that common-law compensatory damages under the Civil Rights Act of 1991 be claimed in the administrative process.20 The plaintiff has the right to a de novo trial in a Federal-sector case, but the administrative record and decision may be received in evidence for whatever persuasive value it possesses.21 An exception to this rule arises where the EEOC has on appeal ruled against the agency charged with discrimination and the plaintiff either seeks mandamus to enforce the ruling, or accepts the ruling on liability but challenges the adequacy of the relief. In these circumstances, the agency has been held bound by the EEOC’s determination, because only the plaintiff has the right to a trial de novo.22

This subject is treated in much fuller detail in SEYMOUR AND ASLIN, EQUAL EMPLOYMENT LAW UPDATE, Chapters 26 and 59.

---

19 E.g., Rutherford v. Harris County, 197 F.3d 173, 186 (5th Cir. 1999); Kline v. City of Kansas City Fire Department, 175 F.3d 660, 668 (8th Cir. 1999), cert. denied, 528 U.S. 1155 (2000).


22 E.g., Moore v. Devine, 780 F.2d 1559, 1562–63 (11th Cir. 1986); Morris v. Rice, 985 F.2d 143, 145–46 (4th Cir. 1993).
C. **Timeliness.**

The time for filing a Title VII or ADA charge of discrimination depends on whether there is a deferral agency. If there is no deferral agency, a Title VII or ADA charge should be filed within 180 days of the alleged practice. If there is a deferral agency, such a charge should be filed within 300 days of the alleged discriminatory employment practice, less a period of time up to sixty days for deferral of the charge to the State or local deferral agency. If the deferral agency takes the full sixty days for its own process, the effective deadline for filing the EEOC charge is 240 days after the alleged discrimination. To the extent that the deferral agency concludes its process in less than sixty days, the additional days are added to the time for filing the charge. Waivers by deferral agencies, where necessary to save the timeliness of a claim, are a common feature of worksharing agreements between the EEOC and deferral agencies, and provide the charging party with up to 300 days to file a charge.

Neither the deadline for filing a charge, nor the 90-day deadline for filing a judicial Complaint after the Title VII, ADA, or ADEA charging party’s receipt of a Notice of Right to Sue, are jurisdictional. Both are subject to waiver, equitable estoppel, and equitable tolling.

The time to file a charge, or to file a lawsuit where there is no exhaustion requirement, starts to run when the plaintiff is notified of the final adverse employment action, not when the adverse action is put into effect, even if there is a process for reconsideration still available to the plaintiff. If the plaintiff is informed by someone with authority that the decision is not yet final, however, the plaintiff’s time may not have started to run. Unequivocal communication of the adverse action, not the operation of the rumor mill, starts the plaintiff’s time running. In

---


24 *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988). Some State agencies, such as the Texas Commission on Human Rights, are barred by State law from processing a charge that has been filed with the EEOC. The EEOC’s deferral to such agencies, and their rejection of any processing of the charge, can occur by fax on the day of filing, giving the charging party the full 300 days.

25 *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990); *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). *Irwin* held that “garden variety” neglect cannot support equitable tolling. 498 U.S. at 96. Because some courts or panels use the term “equitable tolling” to refer to what other courts or panels call “equitable estoppel,” research into either concept should include both.


cases involving discrimination in pay, however, each discriminatory check is an actionable
incident of discrimination.\textsuperscript{29}

One court of appeals has addressed the question of discriminatory events, such as the
receipt of a discriminatory performance appraisal, that are not actionable at the time because they
have no adverse effect on the plaintiff or have only a small adverse effect, but which cause a
later adverse effect on the plaintiff. The court held that the period of limitations does not start
running until the implications of the evaluation have crystallized and some tangible effects of the
discrimination were apparent to the plaintiff. It relied in part on considerations of ripeness,
stating that it is unwise to encourage lawsuits before the injuries are delineated, or even before it
is certain that there will be injuries.\textsuperscript{30}

The Supreme Court has held that the fact that a \textit{bona fide} seniority system gives present
effect to a past act of discrimination does not make the past incident actionable. “A
discriminatory act which is not made the basis for a timely charge is the legal equivalent of a
discriminatory act which occurred before the statute was passed. It may constitute relevant
background evidence in a proceeding in which the status of a current practice is at issue, but
separately considered, it is merely an unfortunate event in history which has no present legal
consequences.”\textsuperscript{31} The Court rejected plaintiff’s argument that her EEOC charge was timely
because she alleged a continuing violation. United’s past actions had “a continuing impact on her
pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical
question is whether any present violation exists.”\textsuperscript{32} The system was neutral.

continuing violations under Title VII for discrete actions, but upheld the doctrine for hostile-
environment cases, subject to a laches defense of uncertain scope. “A discrete retaliatory or
discriminatory act ‘occurred’ on the day that it ‘happened.’ A party, therefore, must file a charge
within either 180 or 300 days of the date of the act or lose the ability to recover for it.” \textit{Id.}
at 110. The Court looked to the language of § 703(a) for examples of “numerous discrete acts,”
which include hiring, firing, compensation, terms and conditions of employment, and the like.
\textit{Id.} at 111. A discrete act or occurrence is a “practice” “even when it has a connection to other
acts.” \textit{Id.} It held that “discrete acts that fall within the statutory time period do not make timely
acts that fall outside the time period.” \textit{Id.} at 112. The Court noted that it was not addressing
pattern-and-practice claims, \textit{id.} at 115 n.9, and stated that the “time period for filing a charge is
subject to equitable doctrines such as tolling or estoppel.” \textit{Id.} at 113. Both the majority, \textit{id.}
at 114 n. 7, and the dissent, \textit{id.} at 123–24, spoke favorably of the discovery rule, but the Court had
no occasion to reach the question. The Court held that a claim of a racially or sexually hostile
environment is one practice although it is ordinarily composed of a number of separate actions,

\textsuperscript{29} \textit{Bazemore v. Friday}, 478 U.S. 385, 395–96 (1986).

\textsuperscript{30} \textit{Thomas v. Eastman Kodak Co.}, 183 F.3d 38, 47–55 (1st Cir. 1999), \textit{cert. denied}, 528 U.S.
1161 (2000).


\textsuperscript{32} \textit{Id.}
and held that a plaintiff may recover for all acts that were part of the same practice even if some were outside the period of limitations or if there had been an intervening break in the practice. *Id.* at 115–19. The Court stated that employers have a legitimate interest in prompt notice, and that this can be protected by equitable defenses including, but not limited to, laches. *Id.* at 121–22. “This defense ‘requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.’” We do not address questions here such as ‘how—and how much—prejudice must be shown’ or “‘what consequences follow if laches is established.’” 2 LINDEMANN 1496–1500. We observe only that employers may raise various defenses in the face of unreasonable and prejudicial delay.” *Id.* (footnote omitted) (some internal quotation marks omitted). Finally, the Court noted that employers have some protections against inordinate delay even if the EEOC is the plaintiff. *Id.* at 122 n.14.

The time to file suit is under § 1981 is not tolled during the pendency of an EEOC charge, 33 the exhaustion of an internal review procedure as to a decision that is otherwise final, 34 or a collectively-bargained grievance procedure. 35 The filing of a Notice of Right to Sue with the Clerk does not constitute the filing of a Complaint, and does not stop the suit-filing period from running. 36 However, the suit-filing period has been held tolled during the pendency of an application to the court for permission to proceed *in forma pauperis.* 37

This subject is treated in much fuller detail in SEYMOUR AND ASLIN, EQUAL EMPLOYMENT LAW UPDATE, Chapter 27.

D. Bars to Suit.

This subject is treated in much fuller detail in SEYMOUR AND ASLIN, EQUAL EMPLOYMENT LAW UPDATE, Chapter 29.


34 Delaware State College v. Ricks, 449 U.S. 250 (1980).


36 *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984). For this reason, clerk’s offices make form Complaints available, with blanks to be filled in by the would-be plaintiffs.

37 *Truitt v. County of Wayne*, 148 F.3d 644 (6th Cir. 1998) (however, time started running again on denial of the IFP petition, and the plaintiff waited too long to pay the filing fee).
1. **Judicial Estoppel.**

_Cleveland v. Policy Management Systems Corp._, 526 U.S. 795 (1999), held that a representation of disability in an application for Social Security disability benefits (“SSDI”) does not necessarily estop a plaintiff from asserting that he or she is a “qualified individual with a disability” within the meaning of the ADA, because the ADA’s definition of a “qualified individual” takes reasonable accommodation into account, whereas the SSDI program does not take reasonable accommodations into account, “nor need an applicant refer to the possibility of reasonable accommodation when she applies for SSDI.” _Id._ at 803. While the Court disapproved of a special legal presumption, it recognized that a genuine conflict may arise in some cases between an SSDI claim and an ADA claim, such as when the plaintiff has represented on her SSDI application that she is “unable to work.” _Id._ at 806. “For that reason, we hold that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation.” _Id._

2. **Res Judicata, Claim Preclusion, and “Full Faith and Credit”**

_Kremer v. Chemical Construction Corp._, 456 U.S. 461, 476 (1982), held that 28 U.S.C. § 1738 requires Federal courts to give the same preclusive effect to a State-court judgment that the judgment would be given in the other courts of that State. A New York court’s affirmance of a determination by the New York Division of Human Rights that there was no probable cause to believe that the defendant discriminated against the plaintiff would have barred State courts from considering plaintiff’s claim, so his Title VII claim was barred in Federal court. The Court stated in _dictum_ that unreviewed State administrative findings would not be given preclusive effect in Federal court even if they would be given such effect in State courts. 456 U.S. at 470 n.7.

_Astoria Federal Savings and Loan Ass’n v. Solomino_, 501 U.S. 104 (1991), held that judicially unreviewed State administrative determinations have no preclusive effect in ADEA actions but may be introduced into evidence at trial.

_Migra v. Warren City School District Board of Education_, 465 U.S. 75 (1984), held that an earlier State-court judgment against the plaintiff on State-law claims arising out of the decision not to renew her contract would bar her Federal-court § 1983 claim arising out of that decision if the State courts would give that preclusive effect to the earlier judgment.

_University of Tennessee v. Elliott_, 478 U.S. 788, 795–96 (1986), held that unreviewed State administrative proceedings do not have a preclusive effect on Federal courts, and that the complainant in such a situation is entitled to a trial _de novo_ on her or his Title VII claim. However, the Court held that actions under §§ 1981, 1983, and 1985 are subject to the same preclusive effect to which the proceedings would have been entitled in State court.

Sometimes, the same set of operative facts can give rise both to claims that require administrative exhaustion (ADA or Title VII) and to claims that do not (FMLA or 42 U.S.C. § 1981). If a plaintiff files suit on the claims not requiring administrative exhaustion while filing charges on those that do, he or she can move to stay the action or to amend the Complaint to allege the claims requiring exhaustion and receipt of a Notice of Right to Sue. If the plaintiff instead goes to judgment on the original claims, he or she is barred by _res judicata_ from filing a
second suit on the claims requiring exhaustion.\textsuperscript{38}

3. **Collateral Estoppel, and Issue Preclusion.**

*University of Tennessee v. Elliott*, 478 U.S. 788, 795–96, 799 (1986), held that plaintiffs are bound as to their Reconstruction-era civil rights claims, but not as to their Title VII claims, by a State agency’s factfinding if it meets certain conditions. As to the Reconstruction-era statutory claims, the Court stated: “when a state agency ‘acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,’ . . . federal courts must give the agency’s factfinding the same preclusive effect to which it would be entitled in the State’s courts.” No such issue preclusion applies to Title VII suits, however. Title VII plaintiffs are entitled to a trial *de novo* of facts found in administrative proceedings, even administrative proceedings resulting in issue preclusion for Reconstruction-era statutory claims. *Id.* at 795–96.

Similarly, a party can be estopped by its own prior inconsistent representation of fact,\textsuperscript{39} or by an adverse administrative determination of an issue affirmed by a State court,\textsuperscript{40} but not by the mere mention of additional claims in a brief in the earlier action, where the pleading was never amended to assert such claims,\textsuperscript{41} and not by an unsuccessful grievance hearing presided over by an official involved in the alleged wrongdoing.\textsuperscript{42}

4. **Mootness.**

The Supreme Court has recently emphasized that a case is not moot unless it is absolutely clear that the challenged conduct could not reasonably be expected to recur, that the burden of establishing mootness is heavy, and that the party asserting mootness bears that burden.\textsuperscript{43}

5. **Preemption Under the Federal Labor Laws and ERISA.**

Any claim that requires construction of a collective bargaining agreement (“CBA”) under Federal law is preempted by the Federal labor laws.\textsuperscript{44} A claim involving rights that are independent of the CBA is not preempted by the labor laws,\textsuperscript{45} and the bare fact that there may be a need to consult—rather than construe—the CBA in the course of the litigation is not enough to trigger preemption.\textsuperscript{46}

---

\textsuperscript{38} *Churchill v. Star Enterprises*, 183 F.3d 184, 191–95 (3d Cir. 1999); *O’Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1355–56 (11th Cir. 2000).

\textsuperscript{39} E.g., *Durham Life Insurance Co. v. Evans*, 166 F.3d 139, 159–60 (3d Cir. 1999).

\textsuperscript{40} E.g., *Maniccia v. Brown*, 171 F.3d 1364, 1367–68 (11th Cir. 1999).

\textsuperscript{41} E.g., *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1359–60 (11th Cir. 1998).

\textsuperscript{42} *Campbell v. Arkansas Department of Correction*, 155 F.3d 950, 960–61 (8th Cir. 1998).

\textsuperscript{43} *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 221–22 (2000) (*per curiam*).

\textsuperscript{44} E.g., *Chapple v. National Starch & Chemical Co.*, 178 F.3d 501, 507–08 (7th Cir. 1999);

However, a State law requiring payment of prevailing wages on public works projects to employees in non-State-approved apprenticeship programs is not pre-empted by ERISA.

Filippo v. Northern Indiana Public Service Corp., Inc., 141 F.3d 744, 750–51 (7th Cir. 1998); Audette v. International Longshoremen’s and Warehousemen’s Union, 195 F.3d 1107 (9th Cir. 1999).


6. **Releases, Waivers, and Prior Settlements.**

The Older Workers Benefit Protection Act of 1990\(^\text{49}\) legislated a number of conditions that had to be met—at least 21 days to consider the offer and at least 7 days to rescind acceptance of the offer, among other things—before a waiver of rights under the ADEA could be considered knowing and voluntary.\(^\text{50}\) The Supreme Court has held that an employer that did not obtain an ADEA release meeting the conditions of the OWBPA had no right to obtain a tender back of the consideration paid for the release as a condition of an ADEA plaintiff’s ability to pursue his or her suit.\(^\text{51}\) Because the OWBPA is limited to the release of ADEA claims, a release may be ineffective as to ADEA claims but valid as to Title VII, Equal Pay Act, ADA, § 1981, and other claims.\(^\text{52}\) Releases are not invalidated by the fact that the plaintiff felt economically pressured to obtain the consideration for the release,\(^\text{53}\) but real duress or evidence of mental incompetence can void a release.\(^\text{54}\)

7. **Arbitration.**

Some employers require that applicants or employees agree in advance to the binding arbitration of any disputes that arise during their employment. The Supreme Court has held that the exception for “contracts of employment” in § 1 of the Federal Arbitration Act, 9 U.S.C. § 1, applies only to persons directly involved in interstate or foreign transportation.\(^\text{55}\) Statutory discrimination claims may be submitted to arbitration pursuant to the rules of a stock exchange.\(^\text{56}\) However, without reaching the question whether a collective bargaining agreement can waive union members’ rights to a judicial forum for their statutory claims, the Court has held that there can be no such waiver where the CBA does not contain a “clear and unmistakable” waiver of members’ rights to a judicial forum.\(^\text{57}\)

---


\(^\text{50}\) 29 U.S.C. § 626(f).

\(^\text{51}\) *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998). The Court expressed doubt as to whether even claims not covered by the OWBPA would be subject to a “tender-back” requirement; “in equity, a person suing to rescind a contract, as a rule, is not required to restore the consideration at the very outset of the litigation.” *Id.* at 426.

\(^\text{52}\) *E.g.*, *Tung v. Texaco Inc.*, 150 F.3d 206, 208–09 (2d Cir. 1998) (ADEA release ineffective, but Title VII release effective).


\(^\text{54}\) *E.g.*, *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437–38 (2d Cir. 1998).


discrimination filed by a person who had signed an arbitration agreement, the EEOC is not bound by the arbitration agreement and can seek both individual and general relief. The Ninth Circuit, alone among the Circuits, had formerly held that § 118 of the Civil Rights Act of 1991 bars mandatory pre-dispute arbitration agreements. The Ninth Circuit has now overruled this decision en banc.

Several Circuits have held that arbitration agreements cannot be enforced if they impose on complainants a level of cost for arbitrators’ and forum fees substantially higher than the complainant would have had to pay in court. At least in the context of consumer arbitration, however, a plaintiff cannot avoid an arbitration agreement by asserting without any record support that the agreement imposes the risk of prohibitive costs on the claimant. Finally, an arbitration agreement may be unenforceable if the employer tips the scales heavily in its own favor in establishing the rules of the arbitration. The Supreme Court has emphasized that arbitration is only a change of forum, and does not authorize any change in substantive rights or in remedies. The Supreme Court has not yet been confronted with a case in which the employer not only required applicants and employees to agree to arbitration as a condition of employment, but also required them to surrender some of the limitations periods, substantive provisions, or remedies enacted by Congress.

This subject is treated in much fuller detail in Seymour and Aslin, Equal Employment Law Update, Chapter 28.

8. Pleading Requirements.


60 EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003) (en banc).
63 Hooters of America, Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) (“Because Hooters set up a dispute resolution process utterly lacking in the rudiments of even-handedness, we hold that Hooters breached its agreement to arbitrate. Thus, we affirm the district court’s refusal to compel arbitration.”).
employment-discrimination plaintiffs plead facts sufficient to constitute a prima facie case, on pain of dismissal. “The prima facie case under McDonnell Douglas . . . is an evidentiary standard, not a pleading requirement.” The Court pointed out that discovery may produce direct evidence of discrimination, enabling a plaintiff to escape the McDonnell Douglas approach entirely, and added: “Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.” The court also rejected the Second Circuit’s holding that the facts alleged in the Complaint were insufficient to make out a case on which the plaintiff could prevail.

In Raytheon Co. v. Hernandez, 540 U.S. 44, 124 S. Ct. 513 (2003), the Court held that an ADA plaintiff cannot rely on a disparate-impact theory on appeal when he had pleaded and presented his case solely as a disparate-treatment case.

E. Discovery.

The discovery rules were substantially amended on December 1, 2000, but there has been little opportunity for discovery disputes under these amendments to arise and to be resolved in published opinions. Cases decided under the prior version of the rules may no longer be relevant.

Today, discovery of information in electronic format is regularly sought by parties, plaintiffs in particular, in various forms. For example, plaintiffs may serve Rule 34 requests seeking computerized data, inter alia, to support pattern and practice allegations or to rebut defendant’s asserted non-discriminatory reason for adverse employment action. A party may request a 34(b) inspection to review a computer hard drive: however, the party may need to show particularized likelihood of discovering critical information or may need to focus the request in a manner that would minimize costs or risks of obtaining confidential information.

Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D. N.Y. 2003), a Title VII case, set out a seven-factor test to determine which party should pay for the discovery of deleted e-mails available only on 94 backup tapes.

65 Thornton v. Mercantile Stores Co. 180 F.R.D. 437, 444 (M.D. Ala. 1998) (ordering production of computerized information regarding promotions, job assignments, transfers, and compensation; Zapata v. IBP, Inc., 1994 WL 649322 (D. Kan. Nov. 10, 1994) (granting plaintiffs’ request for companywide discovery of defendant’s computerized work histories and dispensary records); Sattar v. Motorola, Inc., 138 F.3d 1164, 1171 (7th Cir. 1998) (approving district court’s order that employer either download e-mail data from back-up tapes or hard drive, loan plaintiff copy of software needed to read tapes, or provide plaintiff on-site access to employer’s computer systems, rather than requiring employer to product 210,000 pages of hard copy e-mail at employer’s expense).

66 Fennell v. First Step Designs, Ltd., 83 F.3d 526, 532-34 (1st Cir. 1996) (n 15 p 912)
1. **Confidential Information and Protective Orders.**

Because of the wide variety of personal information and confidential business information that can properly be the subject of discovery in an employment discrimination case, protective orders are commonly used to keep such personal and business information confidential. Indeed, a protective order barring discovery can be granted to save the deponent from unusually extreme forms of embarrassment, particularly where the plaintiff has hired a press spokesperson to publicize the deposition in lurid terms.

2. **Mandatory Initial Disclosures.**

There has been substantial recent law on the effect of a party’s failure to make mandatory initial disclosures. Inadvertent failures to make timely disclosure are not punished. A defendant’s failure to disclose information on a timely basis might not result in a substantial sanction where the delay did not harm the plaintiff. The time pressures caused by intense litigation can also provide at least a partial excuse for failure to make a timely disclosure. The “impeachment witness” excuse for nondisclosure does not work if the witnesses should have been part of the primary line of defense. Where a party’s failure to make a timely disclosure sidetracks the litigation and results in a waste of opposing counsel’s time, sanctions can be imposed. Finally, a party that deliberately attempts to “hide the ball” as to its claim or defense can be sanctioned severely.

---


68 *Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2*, 197 F.3d 922 (8th Cir. 1999).

69 *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156 (3d Cir. 1995).

70 *Cf. Pickens v. Runyon*, 128 F.3d 1151, 1156–57 (7th Cir. 1997); *Buchholz v. Rockwell International Corp.*, 120 F.3d 146, 148–49 (8th Cir. 1997).


72 *Wilson v. AM General Corp.*, 167 F.3d 1114, 1122 (7th Cir. 1999).

73 *Legault v. Zambarano*, 105 F.3d 24, 26–27 (1st Cir. 1997).

3. **Medical and Psychiatric Examinations Under Rule 35.**

Another discovery issue particularly relevant in employment discrimination cases is a defendant’s right to require the plaintiff to submit to an independent medical or psychiatric evaluation. A defendant generally is entitled to plaintiff’s submission to such an evaluation under Fed. R. Civ. P. 35, if it can demonstrate one or more of the following factors: (1) plaintiff has asserted a specific cause of action for intentional or negligent infliction of emotional distress; (2) plaintiff has alleged a specific mental or psychiatric injury or disorder; (3) plaintiff has claimed unusually severe emotional distress; (4) plaintiff has offered expert testimony in support of the claim for emotional distress damages; or (5) plaintiff concedes that his or her mental condition is “in controversy.” Plaintiffs may avoid such discovery by limiting their claims for emotional distress to smaller “garden variety” damages, such as anyone in their situations would have been expected to feel, but cannot avoid such discovery by claiming substantial injury and simply calling it “garden variety.”

F. **Limitations On Discovery.**

1. **Scope Of Discovery: Burdensome/Irrelevant.**

Discovery of information or documents of an employer that have little or no relevance to the claims of discrimination at issue may not be allowed. In effect, an employment discrimination plaintiff’s discovery sought from his or her employer may be subject to three general areas of limitation: (1) temporal; (2) geographical; and (3) types of claims.

First, a plaintiff may not be entitled to discovery of items sought that are too remote in time from the claimed incidents of discrimination. Instead, a reasonableness approach generally is used, balancing the relevance of the information against the burden of its production. Applying this standard, discovery requests seeking information going back ten years generally have been viewed as overburdensome and irrelevant, while requests going back between three

---


76 See *Owens v. Sprint/United Management Co.*, 221 F.R.D. 657, 659–60 (D. Kan. 2004) (holding that therapists’ records are discoverable, but a Rule 35 mental examination is not appropriate, where plaintiff claims only garden variety emotional distress and thus does not place her mental condition in issue); *E.E.O.C. v. Grief Bros. Corp.*, 218 F.R.D. 59, 63 (W.D. N.Y. 2003) (allegation of “severe” depression and claim for up to $300,000 is claim for more than garden-variety damages, places mental condition in issue, and justifies Rule 35 examination); *Cauley v. Ingram Micro, Inc.*, 216 F.R.D. 241 (W.D. N.Y. 2003) (allegation that plaintiff was hospitalized and placed under care of physician is claim for more than garden-variety damages, places mental condition in issue, and justifies Rule 35 examination).
and five years have been allowed.\textsuperscript{77}

Second, information may be limited in geographic scope. In particular, discovery may not be available of information related to departments, business units or offices of an employer different from the one in which the plaintiff was employed. As with temporal limitations, courts reach different results in different factual settings.\textsuperscript{78}

Third, discovery regarding different types of claims from the ones alleged by a plaintiff likewise have been limited where appropriate. For example, a plaintiff may not be entitled to information regarding an employer’s hiring practices if the plaintiff’s case is predicated on a failure to promote theory.\textsuperscript{79} The salient evaluation, as with discovery requests involving potential temporal limitations, is whether the relevance of the request outweighs the burden of producing the responsive information.

\textsuperscript{77} See \textit{Burks v. Oklahoma Publ’g Co.}, 81 F.3d 975, 981 (10\textsuperscript{th} Cir. 1996) (in individual constructive discharge case, district court was within its discretion to conclude that discovery of information as far back as 10 years would be overburdensome and irrelevant, but “we decline to say that such a request would never be warranted”); \textit{Onwuka v. Federal Express Corp.}, 178 F.R.D. 508, 517-18 (D. Minn. 1997) (plaintiff’s request for records of disciplinary actions taken against other employees over a 10-year period prior to plaintiff’s discipline); \textit{Raddatz v. Standard Register Co.}, 177 F.R.D. 446, 448 (D. Minn. 1997) (time period for plaintiff’s discovery of co-workers’ personnel files limited to four-year period); \textit{Kresefky v. Panasonic Communications & Sys. Co.}, 169 F.R.D. 54, 65, 74 FEP 905, 914 (D.N.J. 1996) (limiting discovery to two years before plaintiff’s discharge notices and two years after, rather than four years prior to RIF as plaintiff requested); \textit{Obiajulu v. Rochester, Dept of Law}, 166 F.R.D. 293, 296 (W.D.N.Y. 1996) (rejecting plaintiff’s request for production of documents for period of time dating back 11 years as unduly burdensome, and instead allowing discovery from three years prior to commencement of plaintiff’s lawsuit forward).

\textsuperscript{78} See \textit{Carman v. McDonnell Douglas Corp.}, 114 F.3d 790, 792 (8\textsuperscript{th} Cir. 1997) (limiting discovery in individual case to division in which plaintiff worked, and finding that “companywide statistics are usually not helpful in establishing pretext in an employment-discrimination case, because those who make employment decisions vary across divisions”); \textit{Gile v. United Airlines, Inc.}, 95 F.3d 492, 299, 5AD 1466, (7\textsuperscript{th} Cir. 1996) (district court committed reversible error in ADA reasonable accommodation case by limiting discovery to job vacancies for same position in same department in which plaintiff had worked and to positions to which she had requested a transfer); \textit{Thornton v. Mercantile Stores Co.}, 180 F.R.D. 437, 440 (M.D. Ala. 1998) (discovery beyond plaintiff’s work unit was appropriate where parent company controlled majority of individual stores’ employment policies and practices, and parent company had authority to overrule employment decisions made by individual stores); \textit{Kresefky v. Panasonic Communications & Sys. Co.}, 169 F.R.D. 54, 65, 74 FEP 905, 914 (D.N.J. 1996) (court’s order limiting discovery primarily to division in which plaintiffs worked but allowing corporate-wide discovery of defendant’s employment and personnel policies and practices “struck the appropriate balance” in between burdensomeness and relevance).

\textsuperscript{79} See \textit{O’Neal v. Riceland Foods}, 684 F.2d 577, 581 (8\textsuperscript{th} Dir. 1982) (plaintiff not entitled to answers to interrogatories regarding employer’s hiring practices where hiring decision not an issue in case).
2. **Privileges.**

   a. **Discovery from the EEOC.**

   An important privilege issue that arises in employment discrimination cases in the discoverability of EEOC files. The EEOC has resisted discovery of its investigative files by claiming the “deliberative process” privilege, albeit with limited success.\(^{80}\) Where the EEOC is the Plaintiff, it is subject to the same discovery standards as any other plaintiff.\(^{81}\)

   b. **Attorney-Client and Work Product Privileges.**

   Some courts in employment discrimination cases have construed narrowly the scope of attorney client and work product privileges. In particular, where the privilege is asserted in sexual harassment cases in which the employer has contended that its investigation of a plaintiff’s claims of sexual harassment is privileged because its counsel performed the investigation and the investigation is placed at issue, courts have found the privilege waived.\(^{82}\) However, courts are reluctant to order discovery of counsel’s advice even if it is contained in defendant’s investigative file.\(^{83}\)

---

\(^{80}\) See, e.g., *Scott v. PPG Indus.*, 142 F.R.D. 291, 293-94, 58 FEP 1211 (N.D. W. Va. 1992) (the deliberative-process privilege bars the employer from asking an EEOC investigator deposition questions and from reviewing EEOC documents concerning impressions and evaluations of its investigation of a class sex discrimination charge). The EEOC is statutorily barred from disclosing its conciliation files without the consent of all parties. 42 U.S.C. § 2000e–5(b).

\(^{81}\) *EEOC v. Citizens bank & Trust Co.*, 117 F.R.D. 366, 44 FEP 425 (D. Md. 1987) (the EEOC’s claim of “deliberative-process” privilege does not preclude the employer from discovery of materials that a private plaintiff would be compelled to make available).


\(^{83}\) *Motley v. Marathon Oil Co.*, 71 F.3d 1547 (10th Cir. 1995) (documents prepared by employer’s in-house attorney were protected by attorney-client privilege even though employer failed to show that documents were prepared for purpose of rendering legal advice), *cert. denied*, 517 U.S. 1190 (1996); *McDonnell Douglas Corp. v. EEOC*, 922 F. Supp. 235, 242-43 (E.D. Mo. 1996) (analyses prepared by employer at request of counsel for purpose of rendering legal advice are protected from disclosure by attorney-client privilege and privilege is not waived by producing analyses to the EEOC, which subpoenaed them for limited purpose); *Harding v. Dana Transp., Inc.*, 914 F. Supp. 1084, 1091, (D.N.J. 1996) (attorney who investigated defendant’s employees did so to further defendant’s representation; therefore, investigation was covered by attorney-client privilege); *Curcio v. Chinn Enters., Inc.*, 1996 WL 84100, 10-11 (N.D. Ill. 1996) (questionnaires completed by managerial employees at sexual harassment training seminar conducted by employer’s attorneys, who reviewed and discussed questionnaires and provided legal advice, were protected by attorney-client privilege); *Burger v. Litton Indus.*, 1995 WL 363741, (S.D. N.Y. 1995) (documents prepared by employer’s counsel for purpose of providing legal advice regarding proposed reduction in workforce were protected by attorney-client privilege even though employer disclosed other related documents that were not privileged.)
State ethics rules are normally applied in these situations. This is an area of law that is developing rapidly, in terms of both the text of the rules and their interpretation. In February 2002, the ABA amended its comment to Model Rule of Professional Conduct 4.2 by deleting the reference to barring *ex parte* contacts with employees whose statements could constitute admissions on behalf of the organization. The comment retains the language barring such contacts with persons whose acts or omissions may be imputed to the organization, and inserted a reference to barring such contacts with persons having the authority to obligate the organization with respect to the matter. It is still too early to see which states will follow this lead. See also Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College, 436 Mass. 347, 764 N.E.2d 825 (Mass. 2002) (overturning a number of lower-court precedents limiting such contacts and setting forth different rules).

c. **Self-Critical Analysis.**

There is conflicting authority on the availability of the self-critical analysis privilege. A number of courts have declined to recognize the privilege altogether,\(^8^4\) while other courts have recognized the privilege and applied it to deny discovery of items within its scope.\(^8^5\)


\(^8^5\) *Troupin v. Metropolitan Life Ins. Co.*, 169 F.R.D. 546, 79 FEP 867, 870-71 (S.D.N.Y. 1996) (refusing to compel production of narrative, evaluative, or analytical portions of report and results or survey prepared by employer regarding imbalances in hiring and promotion of women and people over age 40); *Sheppard v. Consolidated Edison Co.*, 893 F. Supp. 6, 7-8 (E.D.N.Y. 1995) (upholding self-critical analysis privilege and prohibiting discovery of study performed for defendant regarding equal employment opportunity and affirmative action and of survey of employee opinion to extent such documents contain evaluative material).
d. **Patient-Psychotherapist.**

Defendants generally are permitted to obtain documents from a plaintiff’s mental health care professional in employment discrimination cases when the plaintiff seeks emotional distress damages. While the patient-psychotherapist privilege is generally recognized, it may in some cases be waived by an employment discrimination plaintiff who places his or her mental and emotional health “at issue,” by making a claim for emotional distress. The courts are split as to whether the privilege is waived where the plaintiff seeks only garden-variety damages for emotional distress. One Circuit has recognized a privilege for Employee Assistance Program records, analogizing it to psychotherapist-patient privilege.


89 *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 794 (8th Cir.1997).


e. **Rejections of Other Claims of Privilege**

Only one Circuit has addressed the existence of a privilege for communications with an ombuds or ombudsman, and it rejected the privilege. This is in line with Supreme Court authority that, except for well-established privileges such as physician-patient privileges, even highly confidential bodies, such as academic committees making tenure recommendations, are subject to discovery. Even matters that are statutorily privileged under state law are often subject to discovery in Federal court.

3. **Ex Parte Contact with Certain Employees or Ex-Employees.**

Courts continue to be divided on whether plaintiff’s counsel’s contacts with current or
former employees is permissible. While it is generally true that ex parte contact with current managerial employees, on topics that could be imputed to the company, is forbidden, contacts with an employer’s non-managerial employees is generally allowed. Where unconsented ex parte contacts with even a former employee would infringe on defendant’s attorney-client privilege or jeopardize defendant’s attorney’s work product, the contact is generally forbidden.

G. Taking the Case From the Jury.

1. General Considerations.

The Seventh Amendment to the Constitution guarantees the right to trial by jury for suits at common law, which includes suits for common-law damages. In addition, the ADEA and the Equal Pay Act (because it is part of the Fair Labor Standards Act) include a statutory right to trial by jury, at least against defendants other than Federal agencies. No other substantive Federal employment discrimination statute does so. Prior to the enactment of the Civil Rights Act of 1991, only equitable relief — injunctive relief, back pay, prejudgment interest, front pay, restitution of benefits, etc. — were available under Title VII and the ADA. As a result, trials under these statutes were bench trials. Now that common-law damages are available, both the Seventh Amendment and the 1991 Act guarantee the right to jury trial in Title VII and ADA cases where such damages are claimed. The right to jury trial under other statutes depends on whether common-law damages are available and have been demanded.

92 See Hill v. St. Louis Univ., 123 F3d 1114, 1121 (8th Cir. 1997) (upholding sanctions against plaintiff’s counsel for ex parte contact with faculty member with managerial responsibilities); but see Abdallah v. Coca-Cola Co., 186 F.R.D. 672 (N.D. Ga. 1999) (authorizing plaintiff’s counsel to speak with putative class members who initiated contact, including upper-level employees).

93 See Abdallah, 79 FEP at 1413 (communications between plaintiffs’ counsel and defendant’s upper-level employees allowed to extent that such communications focus on upper-level employees’ discrimination claims and do not infringe upon privileged communications); Camden v. Maryland, 910 F. Supp. 1115, 1120 -23 (D. Md. 1996 (improper for plaintiff’s counsel to have ex parte contact with defendant’s former employee where plaintiff’s counsel knew or should have known former employee have been extensively exposed to confidential client information; sanctions include striking evidence and disqualifying plaintiff’s counsel); Jackson v. Motel Multipurpose, Inc., 130 F.3d 999, 1008 n. 19 (11th Cir. 1997) (authorizing plaintiff’s to communicate with employer’s nonsupervisory employees); Carter-Herman v. Philadelphia, 897 F. Supp. 899, 902-04, (E.D. Pa. 1996) (allowing ex parte interviews of nonmanagerial employees).


95 29 U.S.C. § 626(c)(2).


The right to a jury trial does not confer on any litigant the right to take a baseless claim or defense to trial, or the right to sustain a baseless jury verdict. Rule 56, Fed. R. Civil Pro., enables a court to dismiss before trial a meritless case, claim, or defense. Rule 50, Fed. R. Civil Pro., allows a court to grant judgment as a matter of law before or after the verdict, where the evidence at trial has shown that the case, or any claim or defense, was baseless.

Three Supreme Court decisions handed down in 1986 are the foundation of modern summary judgment practice. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986), a price fixing case, stated: “When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the language of the Rule, the nonmoving party must come forward with ‘specific facts showing that there is a genuine issue for trial.’” (Emphasis in original.) The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmovants, but there are limits on the inferences that are permissible. *Id.* at 587–88. If the nonmovants’ claim is implausible, the nonmovants “must come forward with more persuasive evidence to support their claim than would otherwise be necessary.” *Id.* at 587.

*Anderson v. Liberty Lobby*, 477 U.S. 242, 247–48 (1986), a libel case, stated that Rule 56(c) “provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” (Emphases in original.) The Court characterized the materiality requirement: “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Id.* at 248. Disputes over immaterial facts do not count. The dispute must also be genuine, *i.e.*, “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* Where a motion for summary judgment is properly supported, the nonmovant cannot rest on his allegations to get to a jury but must produce probative evidence. The judge is not to weigh the evidence but to decide whether there is a genuine issue for trial. “The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” *Id.* at 252. The Court cautioned that its decision should not be read to authorize trial by affidavit, and that it remained the exclusive province of the jury to make credibility determinations, to weigh the evidence, and to draw legitimate inferences from the facts. *Id.* at 255. Where a case turns on the state of the defendant’s mind, however, the nonmovant may not simply sit back and contend that the jury might disbelieve the movant at trial. Without “significant probative evidence” sufficient to support a jury verdict, summary judgment should be granted. The Court stated that “the plaintiff must present affirmative evidence in order to defeat a properly supported notion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery. We repeat, however, that the plaintiff, to survive the defendant’s motion, need only present evidence from which a jury might return a verdict in his favor.” *Id.* at 256–57.

*Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986), an asbestos case, held that the movant for summary judgment is not obligated to support its motion with affidavits or other evidentiary materials negating the plaintiff’s case or proving the absence of any genuine issues of material fact. It held that summary judgment must be granted “after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the
existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” It stated that “a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” While both sides may rely on the pleadings, depositions, answers to interrogatories, and admissions on file, the Court assumed that each party is relying on the opposing party’s pleadings; the nonmovant is not entitled to rely on “mere pleadings themselves” to defeat summary judgment. The nonmovant is not required to produce evidence “in a form that would be admissible at trial”; Rule 56 “does not require the nonmoving party to depose her own witnesses.” Id. at 324. The Court cautioned that “district courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence.” Id. at 326.

Two recent cases have cautioned against too readily taking cases out of the hands of juries. Hunt v. Cromartie, 526 U.S. 541, 552 (1999), reversed the grant of summary judgment to the plaintiffs challenging an allegedly racially gerrymandered Congressional district because the lower court had drawn inferences in favor of the plaintiffs-appellees when inferences in favor of the North Carolina appellants were also available. The Court held that the decision among competing inferences must be reserved for trial.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), reversed the decision of the Fifth Circuit holding that the ADEA defendant was entitled to the entry of Rule 50 judgment as a matter of law. The Court held that 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.’” Id. at 150 (citations omitted.) It stated:

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. See Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that “evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.” Id., at 300.

530 U.S. at 151. The Court disapproved of the Fifth Circuit’s refusal to consider the evidence of biased remarks made by a decisionmaker, disapproved of its decision to ignore other evidence of the plaintiff, and disapproved of its decision to credit the employer’s evidence more highly than the plaintiff’s evidence. It stated:

Again, the court disregarded critical evidence favorable to petitioner—namely, the evidence supporting petitioner’s prima facie case and undermining respondent’s nondiscriminatory explanation. . . . The court also failed to draw all reasonable inferences in favor of petitioner. For instance, while acknowledging “the potentially damning nature” of Chesnut’s age-related comments, the court discounted them on the ground that they “were not made in the direct context of Reeves’s termination.” . . . And the court discredited petitioner’s evidence that Chesnut was the actual decisionmaker by giving weight to the fact that there was “no evidence to suggest that any of the other decision makers were motivated by age.” . . . Moreover, the other evidence on which the court relied—that Caldwell and Oswalt were also cited for poor recordkeeping, and that respondent employed
many managers over age 50—although relevant, is certainly not dispositive. . . .
In concluding that these circumstances so overwhelmed the evidence favoring petitioner that no rational trier of fact could have found that petitioner was fired because of his age, the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury’s.

*Id.* at 152–53 (citations omitted). The Court emphasized that a court “must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.” *Id.* at 150 (citations omitted). The Court also stated that “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,” and immediately cautioned:

> 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.

*Id.* at 148. The Court emphasized the case-specific nature of the inquiry that has to be made in determining whether judgment as a matter of law—or, by extension, summary judgment—is appropriate in any particular case. “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.” *Id.* at 148–49. 98 “It suffices to say that, because a prima facie case and sufficient evidence to reject the employer’s explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination.” *Id.* at 49.

Many employment discrimination cases are decided on a “totality of the circumstances” test. The Supreme Court recently explained this test in a Fourth Amendment search-and-seizure case, *United States v. Arvizu*, 534 U.S. 266, 122 S. Ct. 744 (2002). The Court rejected the segmenting of evidence when the determination is supposed to be made in light of all the evidence. In *Arvizu*, the Ninth Circuit had considered in isolation each circumstance that led to the stop, and rejected it if the court could conceive of a possible innocent explanation. “The

---

98 Compare *Dammen v. Unimed Med. Ctr.*, 236 F.3d 978 (8th Cir. 2001) (the weakness of plaintiff’s prima facie case coupled with low probative value of its evidence that the explanation for terminating him was false failed to present a submissible case of age discrimination) with *Chuang v. University of California Davis*, 225 F.3d 1115 (9th Cir. 2000) (plaintiffs’ sufficiently strong showing in their prima facie case helped raise a genuine issue of material fact as to pretext).
court appeared to believe that each observation by Stoddard that was by itself readily susceptible
to an innocent explanation was entitled to ‘no weight.’” 122 S. Ct. at 751 (citations omitted.)
The Supreme Court described this approach as a forbidden “divide-and-conquer analysis.” Id.
The Court recognized that its rule meant that appellate precedents in cases differing in some
material facts would have less weight: “To the extent that a totality of the circumstances
approach may render appellate review less circumscribed by precedent than otherwise, it is the
nature of the totality rule.” Id. at 752.

2. Application of Reeves.

The decisions of the courts of appeals following Reeves are still evolving, are numerous,
and vary in some respects by Circuit. In general, however, the courts adhere to the pre-Reeves
doctrine that the phrase “pretext for discrimination” means more than a mere error; it “means
deceit used to cover one’s tracks,” and “means a dishonest explanation, a lie rather than an
oddity or an error.”99 Where such falsity has been found, the courts have generally treated it as
an adequate basis to draw or sustain an inference of discrimination.100 However, where the
pretext evidence merely reflects errors, mistakes, misunderstandings or inconsistencies, it will
not usually be sufficient to avoid summary judgment or support a jury verdict for the plaintiff.101
Evidence sufficient for the factfinder to reject the employer’s legitimate non-discriminatory
reason does not compel judgment for the plaintiff; it is not enough to disbelieve the employer;
the factfinder must believe the plaintiff’s explanation of intentional discrimination.102

Post Reeves there continue to be significant differences in how courts treat allegedly
biased remarks in reviewing grants of summary judgment or of judgments as a matter of law.
Some of the circuits are giving greater probative value to biased remarks, even if not made at the

99  E.g., Kulumani v. Blue Cross Blue Shield Association, 224 F.3d 681, 684–85 (7th Cir. 2000)
(citations omitted).

100  E.g., Blow v. City of San Antonio, 236 F.3d 293, 298 (5th Cir. 2001); Bell v. E.P.A., 232 F.3d
546, 550 (7th Cir. 2000); Casarez v. Burlington Northern/Santa Fe Co., 193 F.3d 334, 337–38
(5th Cir. 1999), reh’g denied, 201 F.3d 383 (5th Cir. 2000); Hudson v. Norris, 227 F.3d 1047
(8th Cir. 2000); Hinson v. Clinch County Board of Education, 231 F.3d 821, 831–32 (11th Cir.
2000).

101  Marcano-Rivera v. Pueblo Intern., Inc., 232 F.3d 245 (1st Cir. 2000)(classification error
without more, was insufficient to show pretext); Thomas v. Sumter Cty. Correctional Ctr., 230
F.3d 1354 (Table), 2000 WL 1294257 (4th Cir., Sept. 14, 2000)(fact that a decision may have
been based on a misunderstanding does not establish pretext); Silvera v. Orange Cty. Sch. Bd.,
2001 WL 273853 (11th Cir., March 20, 2001)(a mistaken belief does not violate Title VII);
Scroggins v. University of Minnesota, 221 F.3d 1042 (8th Cir. 2000)(relevant inquiry is whether
the defendant believed the plaintiff was guilty of the conduct justifying discharge); Evers v.
Alliant Techsystems, Inc., 2001 WL 197900 (8th Cir., March 1, 2001)(it is not the role of the
courts to sit as ‘super personnel departments’ to second guess the wisdom of an employer’s
personnel decision).

same time as the challenged decision or in connection with it while others do not.  There is a split in the circuits as to whether biased remarks made by persons other than the decisionmaker are probative. Some courts have held that if they were made by persons—even co-workers—who exerted influence over the decisions, such as when the decisionmaker acts as their “cat’s paw,” although other courts rejected this concept. The treatment of biased remarks has been taken as evidence of bias in the hearts of decisionmakers, rather than as admissions of illegality that have to be tied closely to the action in question. If the evidence of biased remarks can be linked to the decision at issue, evidence of even very old biased remarks may suffice. Evidence of biased remarks does not necessarily carry the day for the plaintiff, of course. In some cases, for example, where the remarks at issue were made nearly a year before the employment decision at issue and not related to the decision and the evidence of the plaintiff’s misconduct is compelling, proof of biased remarks is not enough to defeat the defendant’s motion for summary judgment or for judgment as a matter of law. Both before and after Reeves, the failure of an official or supervisor of the defendant to object to another person’s biased remark has sometimes been held to indicate acceptance of the biased remark. There is a split in the circuits concerning

103 E.g., Russell v. McKinney Hospital Venture, 235 F.3d 219, 229 (5th Cir. 2000) (“In light of the Supreme Court’s admonition in Reeves, our pre-Reeves jurisprudence regarding so-called ‘stray remarks’ must be viewed cautiously.”); Auguster v. Vermilion Parish School Board, 249 F.3d 400, 404–05 (5th Cir. 2001) (limiting Russell to cases where there is substantial other evidence of pretext); Adams v. Ameritech Services, Inc., 231 F.3d 414, 428 (7th Cir. 2000); Fisher v. Pharmacia & Upjohn, 225 F.3d 915, 923 (8th Cir. 2000); Chuang v. University of California Davis, Board of Trustees, 225 F.3d 1115, 1128–29 (9th Cir. 2000); Straugh v. Delta Airline, Inc., 250 F.3d 23, 36 (1st Cir. 2001) (holding that stray remarks normally are not probative of pretext absent some discernable evidentiary basis for assessing their temporal and contextual relevance).


105 E.g., Chuang v. University of California Davis, Board of Trustees, 225 F.3d 1115, 1128–29 (9th Cir. 2000).


107 Auguster v. Vermilion Parish School Board, 249 F.3d 400, 404–05 (5th Cir. 2001) (sixth-grade teacher showed R-rated movie to students and violated corporal punishment policy as to students); Smith v. Leggett Wire Co., 220 F.3d 752 (6th Cir. 2000) (death threats).

108 Chuang v. University of California Davis, Board of Trustees, 225 F.3d 1115, 1128–29 (9th Cir. 2000) (“For purposes of summary judgment, Dean Williams’s laughing response to this
conceivable but non-record nondiscriminatory explanations for biased remarks.\(^{109}\)

The Supreme Court’s latest discussion of biased remarks occurred in a case involving jury selection, *Miller-El v. Dretke*, __ U.S. __, 125 S. Ct. 2317, 2338–39 (2005). The Court reversed the denial of habeas corpus and held that petitioner had shown racial discrimination in the prosecutor’s peremptory challenges by clear and convincing evidence, relying in part on evidence of discriminatory statements going back to the 1950’s, evidencing a policy of racial discrimination that was not shown to have ended by the time of petitioner’s trial. The Court cited *Reeves v. Sanderson Plumbing Products*, with the parenthetical explanation “in employment discrimination cases, ‘[p]roof 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’"). *Id.* at 2325. Plaintiffs and defendants may disagree as to the extent to which the lower courts will follow *Miller-El* in employment discrimination cases. All sides are likely to agree, however, that the Court’s pronouncements on biased remarks, comparators,\(^{110}\) statistics, and the inference to be drawn from shifting representations of nondiscriminatory reasons\(^{111}\) were made in the context of a strong record suggesting intentional discrimination. It must also be noted that the prosecutor in *Miller-El* tried to change his nondiscriminatory explanations in open court, a situation in which courts are considerably less tolerant of changes and sidesteps.\(^{112}\)

A defendant’s provision of inconsistent explanations for the challenged action can

\(^{109}\) *Compare James v. New York Racing Association*, 233 F.3d 149, 152–53 (2d Cir. 2000) (discounting age-biased remarks because court speculated the remarks might have related to the higher salaries of older workers) with *Chuang v. University of California Davis, Board of Trustees*, 225 F.3d 1115, 1129 (9th Cir. 2000) (“It is not the province of a court to spin such evidence in an employer’s favor when evaluating its motion for summary judgment.”).

\(^{110}\) The Court disapproved of *sua sponte* suggestions of legitimate reasons for striking one juror and allowing a similar juror to serve, stating: “A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals’s and the dissent’s substitution of a reason for eliminating Warren does nothing to satisfy the prosecutors’ burden of stating a racially neutral explanation for their own actions.” *Id.* at 2332.

\(^{111}\) *Miller-El v. Dretke* stated: “It would be difficult to credit the State’s new explanation, which reeks of afterthought.” *Id.* at 2328.

\(^{112}\) *Cf. Vance v. Union Planters Corp.*, 209 F.3d 438, 442 n.4 (5th Cir. 2000) (declining to extend “stray remark” jurisprudence to remarks made on the witness stand.
support a reasonable inference of discrimination. One court relied on a combination of the plaintiff’s superior qualifications, the subjectivity of selection criteria with credibility problems for the defendant, and the spoliation of important records, or other combinations of facts raising suspicion. Evidence that the plaintiff was better-qualified than the person selected can be used to establish pretext if the difference in qualifications is sufficient. Disagreements among supervisors as to a critical fact can also defeat summary judgment.

An employer often articulates more than one nondiscriminatory reason for the challenged action. The courts have generally required the plaintiff to show that each proffered reason is pretextual, particularly where each reason is separate and independent. Reeves itself stated that “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.” In some circumstances, but increasingly after Reeves, the courts have held that a plaintiff’s showing of

113 Byrnie v. Town of Cromwell Board of Education, 243 F.3d 93, 110 (2nd Cir. 2001) (answer to State agency on the charge of discrimination differed from litigation position); EEOC v. Sears Roebuck and Co., 243 F.3d 846, 852–53 (4th Cir. 2001) (representations to the charging party prior to the charge and representations in response to the charge inconsistent with later representations). But see Rowe v. Marley Co., 233 F.2d 825 (4th Cir. 2000) (inconsistent explanations offered by two managers not probative of pretext where only one manager was the true decisionmaker).


115 E.g., Evans v. City of Houston, 246 F.3d 344, 355 (5th Cir. 2001) (possible backdating of demotion, conflict between decisionmaker’s assertion of documentary backup and absence of such backup, lack of any contemporaneous evidence of the plaintiff’s alleged disciplinary problems, and fact that “All of the evidence of disciplinary problems comes from memoranda or depositions written or taken after Evans was demoted and, in some cases, after Evans filed suit” (emphasis in original).

116 Byrnie v. Town of Cromwell Board of Education, 243 F.3d 93, 102–04 (2nd Cir. 2001); Pratt v. City of Houston, 247 F.3d 601, 607 (5th Cir. 2001); Griffis v. City of Norman, 232 F.3d 901 (Table) 2000 WL 1531898 (10th Cir., October 17, 2000); Bogren v. Minnesota, 236 F.3d 399 (8th Cir. 2000)(for comparable-employee evidence to be probative of pretext, the other employees must be similarly situated to the plaintiff in all relevant respects).

117 Gordon v. United Airlines, Inc., 246 F.3d 878, 891–92 (7th Cir. 2001). But see Rowe v. Marley, 233 F.3d 825 (4th Cir. 2000)(inconsistent explanations offered by two managers are not probative of pretext where only one manager was the true decisionmaker).

118 E.g., Roberts v. Separators, Inc., 172 F.3d 448, 452 (7th Cir. 1999); Walker v. Glickman, 2001 WL 194510 (7th Cir., February 27, 2001) (successfully questioning one of the articulated reasons does not defeat summary judgment if at least one reason stands unquestioned).


pretext as to one or more asserted nondiscriminatory reasons would enable the jury properly to disregard other nondiscriminatory reasons for which no such showing had been made. These decisions have most often been handed down in cases in which the employer produced a large number of nondiscriminatory explanations, including some that were at best thinly supported,\textsuperscript{121} or in which the showing of pretext as to some reasons gave the jury reason to doubt “intertwined” reasons, such as those dependent on the credibility of the same official who was discredited on some of the reasons given.\textsuperscript{122}

Finally, the courts have begun to address Reeves’ holding on the evidence to be considered on motions for summary judgment or judgment as a matter of law. One court rejected the defendant’s argument that two of its witnesses were disinterested because they no longer worked for the defendant, because the witnesses were nurses and plaintiffs showed that the defendant “dominated the healthcare market, thus casting doubt upon defendants’ contention that the nurses were ‘disinterested’ witnesses.”\textsuperscript{123} Another court found that the witnesses who were disinterested were those who did not work for either party.\textsuperscript{124} Another disregarded the disputed testimony of the Mayor at the JMOL stage, because he was an interested witness.\textsuperscript{125} However, at the summary judgment stage, the courts have accepted defendants’ managers as witnesses to defendants’ reasons for taking the action in question.\textsuperscript{126}

\textsuperscript{121} Smith v. Chrysler Corp., 155 F.3d 799, 809 (6th Cir. 1998) (“a multitude of suspicious explanations may itself suggest that the employer’s investigatory process was so questionable that any application of the ‘honest belief’ rule is inappropriate.”).

\textsuperscript{122} E.g., Wilson v. AM General Corp., 167 F.3d 1114, 1120 (7th Cir. 1999); Adreani v. First Colonial Bankshares Corp., 154 F.3d 389, 395 (7th Cir. 1998); Hudson v. Norris, 227 F.3d 1047, 1051–52 (8th Cir. 2000); Hampton v. Dillard Department Stores, Inc., 247 F.3d 1091, 1108 (10th Cir. 2001); Tyler v. RE/MAX Mountain States, Inc., 232 F.3d 808, 814 (10th Cir. 2000) (while a plaintiff must generally proffer evidence showing that each of the defendant’s stated justifications is pretextual, there are exceptions “when the plaintiff casts substantial doubt on many of the employer’s multiple reasons”).

\textsuperscript{123} Russell v. McKinney Hospital Venture, 235 F.3d 219, 224–25 (5th Cir. 2000) (at trial plaintiff also demonstrated that she received a very favorable evaluation from her supervisor two months prior to her termination and she was never provided progressive discipline required under the collective bargaining agreement).

\textsuperscript{124} Kinserlow v. CMI Corp., 217 F.3d 1021, 1026–27 (8th Cir. 2000).

\textsuperscript{125} Hill v. City of Scranton, 411 F.3d 118, 129 n.16 (3d Cir. 2005).

\textsuperscript{126} Sandstad v. CB Richard Ellis, Inc., 309 F.3d 893, 898 (5th Cir. 2002), cert. denied, 539 U.S. 926 (2003) (The definition of an interested witness cannot be so broad as to require us to disregard testimony from a company's agents regarding the company's reasons for discharging an employee.”); Traylor v. Brown, 295 F.3d 783, 791 (7th Cir. 2002) (“We do not interpret the quoted language so broadly as to require a court to ignore the uncontroverted testimony of company employees or to conclude, where a proffered reason is established through such testimony, that it is necessarily pretextual. To so hold would essentially prevent any employer from prevailing at the summary judgment stage because an employer will almost always have to rely on the testimony of one of its agents to explain why the agent took the disputed action.”).

The defendant has the burden to support its motion adequately. Where the plaintiff has established a prima facie case and the defendant fails to proffer a nondiscriminatory or nonretaliatory reason for the challenged action, its motion must be denied. Where the local rules require a statement of undisputed facts, a defendant movant may not be able to rely on factual materials presented only in its brief. Where the motion does not establish the absence of issues of material fact, it will be denied. Nevertheless, as the Supreme Court has pointed out above, the defendant is not required to negate the plaintiff’s claim, but merely to show a lack of evidence on an essential element of the claim.

The party opposing summary judgment, usually but not always the plaintiff, has the obligation to demonstrate a genuine issue of material fact. The plaintiff may rely on his or her own knowledge of material facts of which he or she has knowledge.

Where the local rules require a pinpoint, fact-by-fact refutation of the movant’s statement of undisputed facts and the nonmovant fails to do so, the nonmovant can be held to have admitted the unrefuted facts. The nonmovant may not rely on subjective beliefs to show a genuine dispute, and may not defeat summary judgment by conclusory responses. Conclusory statements by an expert are no more help to the nonmovant than conclusory statements by anyone else. Affidavits filed in support of, or in opposition to, summary

127 Richardson v. New York State Department of Correctional Service, 180 F.3d 426, 444–45 n.4 (2d Cir. 1999).

128 Markham v. White, 172 F.3d 486, 490 (7th Cir. 1999) (qualified immunity).

129 Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 694–700 (7th Cir. 1998); Bermudez v. TRC Holdings, Inc., 138 F.3d 1176, 1178 (7th Cir. 1998) (defendant failed to support an essential predicate of its motion); Gonzalez v. Lee County Housing Authority, 161 F.3d 1290, 1305–06 (11th Cir. 1998) (defendant failed to address the plaintiff’s claims).

130 E.g., Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 671 (10th Cir. 1998).

131 E.g., Simas v. First Citizens’ Federal Credit Union, 170 F.3d 37, 50–51 (1st Cir. 1999); Danzer v. Norden Systems, Inc., 151 F.3d 50, 57 (2d Cir. 1998).


judgment must be based on personal knowledge;\textsuperscript{136} tendentious argumentation has no place in affidavits.\textsuperscript{137} An EEOC or deferral agency’s “reasonable cause” finding is not by itself enough to defeat a summary judgment motion.\textsuperscript{138} The nonmovant cannot hold back, presenting materials showing a genuine dispute only on a motion for reconsideration. If the materials were available to the nonmovant at the time the opposition to summary judgment was filed, and if the nonmovant has no legitimate reason for not filing the materials at that time, it is well within the district court’s discretion to decline to consider the materials.\textsuperscript{139}

The courts generally do not consider any portion of an affidavit that conflicts with an earlier sworn statement, unless there is an adequate explanation for the disparity.\textsuperscript{140}

A court may not weigh the facts, or make credibility determinations, or draw competing inferences, in granting a motion for summary judgment.\textsuperscript{141} Where material facts are susceptible to divergent inferences, summary judgment should be denied because inferences should be

\textsuperscript{136} E.g., McGill v. Munoz, 203 F.3d 843, 846 (D.C. Cir. 2000); Causey v. Balog, 162 F.3d 795, 803 (4th Cir. 1998) (form of plaintiff’s interrogatory answers precluded plaintiff’s reliance on them, because they were attested on knowledge, information and belief, and the court could not determine what the plaintiff actually knew); Miller v. American Family Mutual Insurance Co., 203 F.3d 997, 1008 n.9 (7th Cir. 2000).


\textsuperscript{138} Simms v. Oklahoma ex rel. Department of Mental Health and Substance Abuse Services, 165 F.3d 1321, 1331 (10th Cir.), cert. denied, 528 U.S. 815 (1999).

\textsuperscript{139} E.g., Causey v. Balog, 162 F.3d 795, 803 n.5 (4th Cir. 1998); Flannery v. Trans World Airlines, Inc., 160 F.3d 425, 428 (8th Cir. 1998).

\textsuperscript{140} E.g., Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 806–07(1999) (describing practice without endorsing it, but adopting it in analogous situation); Aka v. Washington Hospital Center, 156 F.3d 1284, 1296 n.14 (D.C. Cir. 1998) (en banc) (stating that,"although the courts frown on a party’s attempt to contradict previous testimony at summary judgment, ‘persuasive reasons’ for a correction are ‘more likely to be available where the initial statement took the form of a deposition rather than . . . an affidavit. A deponent may have been confused about what was being asked or have lacked immediate access to material documents’’’); Heil v. Santoro, 147 F.3d 103, 110 (2d Cir. 1998); DeLoach v. Infinity Broadcasting, 164 F.3d 398, 402 (7th Cir. 1999); Adusumilli v. City of Chicago, 164 F.3d 353, 360 (7th Cir. 1998), cert. denied, 528 U.S. 988 (1999); Burrell v. Star Nursery, Inc., 170 F.3d 951, 954 (9th Cir. 1999).

\textsuperscript{141} In addition to the Supreme Court decisions mentioned above, see Greene v. Dalton, 164 F.3d 671, 674 (D.C. Cir. 1999); Rodriguez-Rios v. Cordero, 138 F.3d 22, 25 (1st Cir. 1998); Belfi v. Prendergast, 191 F.3d 129, 137 (2d Cir. 1999); Vital v. Interfaith Medical Center, 168 F.3d 615, 621–22 (2d Cir. 1999); Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 668 (6th Cir. 2000) (inferences must be drawn in the nonmovant’s favor); Johnson v. Zema Systems Corp., 170 F.3d 734, 743 n.2 (7th Cir. 1999),
drawn in the nonmovant’s favor.\footnote{142} However, a district court may make findings based on undisputed evidence, or based on the uncontradicted evidence the plaintiff herself had produced, or draw necessary and unavoidable conclusions from the undisputed evidence.\footnote{143}

Some courts have suggested that juries are much better able than judges to evaluate the facts of at least some sexual harassment cases.\footnote{144}

It is critical that the nonmovant receive adequate notice of a summary-judgment motion, or that the court intends to treat a motion as a motion for summary judgment, so that the plaintiff has a fair opportunity to make the necessary factual showing.\footnote{145} Where the plaintiff is given such notice or where an exception applies, the lower court may grant summary judgment \textit{sua sponte}.\footnote{146}

The courts have cautioned about the difficulty of awarding summary judgment as to questions of intent, but routinely find that some cases are appropriate for summary judgment.\footnote{147}

\footnote{142} \textit{E.g.}, \textit{Coward v. ADT Security Systems, Inc.}, 194 F.3d 155, 158 (D.C. Cir. 1999); \textit{Cline v. Catholic Diocese of Toledo}, 206 F.3d 651, 668 (6th Cir. 2000); \textit{Adams v. Ameritech Servs., Inc.}, 231 F.3d 414 (7th Cir. 2000); \textit{Mills v. Health Care Service Corp.}, 171 F.3d 450, 459–60 (7th Cir. 1999); \textit{Carter v. Chrysler Corp.}, 173 F.3d 693, 700 (8th Cir. 1999).

\footnote{143} \textit{E.g.}, \textit{Feliciano v. State of Rhode Island}, 160 F.3d 780, 784–86 (1st Cir. 1998).

\footnote{144} \textit{Gallagher v. Delaney}, 139 F.3d 338, 342–43, 350 (2d Cir. 1998); \textit{O’Shea v. Yellow Technology Services, Inc.}, 185 F.3d 1093, 1098 (10th Cir. 1999).

\footnote{145} \textit{E.g.}, \textit{Schultz v. Young Men’s Christian Association}, 139 F.3d 286, 290 (1st Cir. 1998); \textit{Aviles v. Cornell Forge Co.}, 183 F.3d 598, 604–05 (7th Cir. 1999).

\footnote{146} \textit{E.g.}, \textit{Ross v. University of Texas at San Antonio}, 139 F.3d 521, 527 (5th Cir. 1998); \textit{Ribando v. United Airlines, Inc.}, 200 F.3d 507, 510 (7th Cir. 1999) (notice unnecessary where the dispute is a dispute of law rather than fact); \textit{Enowmbitang v. Seagate Technology, Inc.}, 148 F.3d 970, 973 (8th Cir. 1998) (notice unnecessary where the plaintiff failed to state a claim).

\footnote{147} \textit{Carlton v. Mystic Transportation, Inc.}, 202 F.3d 129, 134 (2d Cir.), \textit{cert. denied}, 530 U.S. 1261 (2000); \textit{Benningfield v. City of Houston}, 157 F.3d 369, 377 (5th Cir. 1998) (although it had rejected a number of the plaintiff’s First Amendment claims because of the lack of an adverse employment action, the court observed: “Summary judgment should be used ‘most sparingly in . . . First Amendment case[s] . . . involving delicate constitutional rights, complex fact situations, disputed testimony, and questionable credibilities.’” (Citation omitted.)), \textit{cert. denied}, 526 U.S. 1065 (1999). The Seventh Circuit has repeatedly stated that the standards for summary judgment should be applied with added rigor in employment discrimination cases because intent and credibility are crucial issues, and that summary judgment should only be granted where, if the record had been that of a complete trial, the defendant would have been entitled to a directed verdict. \textit{E.g.}, \textit{Bellaver v. Quanex Corp.}, 200 F.3d 485, 491 (7th Cir. 2000) (reversing the grant of summary judgment to the Title VII gender discrimination RIF defendant); \textit{Green v. National Steel Corp.}, 197 F.3d 894, 897 (7th Cir. 1999) (affirming the grant of summary judgment to the ADA defendant).
A summary judgment motion may be filed at any time, not just at the end of discovery. Rule 56(f), Fed. R. Civ. Pro., allows the nonmovant to seek discovery prior to responding to the motion, but requires that a very specific showing be made by affidavit as to why the nonmovant cannot present facts essential to the nonmovant’s position. A grant of summary judgment is ordinarily reversible where the plaintiff has made such a showing and additional discovery has been denied, but will not be reversed for denial of such discovery where the nonmovant has failed to make such a showing. The nonmovant may waive the right to take such discovery if the nonmovant has otherwise been dilatory in seeking discovery.

This subject is treated in much fuller detail in Seymour and Aslin, Equal Employment Law Update, Chapter 34.

4. Rule 50 Judgments as a Matter of Law.

Absent manifest injustice, a post-judgment motion for judgment as a matter of law may be renewed only on grounds that were raised before submission of the case to the jury and appeal has been waived as to any matter not so raised. Similarly, absent manifest injustice, a party generally waives an issue of the sufficiency of evidence for appeal by failing to include it in the party’s post-verdict renewal of its motion for judgment as a matter of law.

The grant of judgment as a matter of law cannot be used as a substitute for the normal procedure followed in granting a remittitur, where the plaintiff is given a choice between accepting the remittitur and the grant of a new trial on damages, because of the Seventh Amendment.

The fact that the jury’s deliberation was brief does not provide a basis for the grant of judgment as a matter of law.

148 E.g., Simas v. First Citizens’ Federal Credit Union, 170 F.3d 37, 45–46 (1st Cir. 1999).
149 E.g., Bauer v. Albemarle Corp., 169 F.3d 962, 968 (5th Cir. 1999); Roark v. City of Hazen, 189 F.3d 758, 762 (8th Cir. 1999) (failure to submit affidavit or explanation).
150 E.g., Stanback v. Best Diversified Products, Inc., 180 F.3d 903, 911 (8th Cir. 1999).
151 E.g., Kirsch v. Fleet Street, Ltd., 148 F.3d 149 (2d Cir. 1998).
152 E.g., Giles v. General Electric Co., 245 F.3d 474, 481–82 (5th Cir. 2001) (“we generally have excused violations of rule 50 only where the trial court had reserved a ruling on an earlier motion for directed verdict (made at the close of the plaintiff’s evidence); the defendant called no more than two witnesses before closing; only a few minutes elapsed between the motion for directed verdict and the conclusion of all the evidence; and the plaintiff introduced no rebuttal evidence.”).
154 Wilburn v. Eastman Kodak Co., 180 F.3d 475, 476 (2d Cir. 1999) (per curiam) (where the jury took only 20 minutes to deliberate in a case entailing complicated issues and voluminous evidence., the court stated: “Brief deliberation, by itself, does not show that the jury failed to
This subject is treated in much fuller detail in Seymourd and Aslin, Equal Employment Law Update, Chapter 43.


Where a jury has been demanded, in Title VII, and ADA cases the jury, not the court, decides claims seeking compensatory damages other than relief traditionally awarded under § 706(g) of Title VII, 42 U.S.C. § 2000e–5(g). The court, not the jury, grants the § 706(g) remedies of injunctive relief, back pay, front pay, and prejudgment interest. In § 1981 and § 1983 cases, the jury ordinarily determines back pay and front pay. In ADEA cases tried by jury as to liability and all other relief, the court generally determines entitlement to front pay as an alternative to the equitable remedy of reinstatement, and there is a split in the Circuits as to whether the amount of front pay is then to be determined by the court or by the jury.

Where a plaintiff’s case presents both jury and nonjury claims and either party has demanded trial by jury, the jury claims must be tried first and the court is bound by the jury’s determination of all common issues.

H. Types of Evidence.

1. Comparators.

One of the most common types of evidence utilized in employment discrimination cases is that regarding “comparators.” By way of example, if a gender discrimination plaintiff can show that a person of a different gender who is “similarly situated” to the plaintiff in all relevant respects was treated materially better, such evidence can be persuasive of discrimination. In contrast, if a defendant can show that “similarly situated” employees of a different gender were treated worse, this evidence can be persuasive of nondiscrimination. Indeed, in holding that the ADEA defendant was not entitled to judgment as a matter of law, the Supreme Court in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 151–52 (2000), relied on the plaintiff’s evidence that a key official treated Reeves more harshly than he treated a younger employee.

An illustrative illustration of the standard for comparisons is provided by Ercegovich v.
Goodyear Tire & Rubber Co., 154 F.3d 344, 352 (6th Cir. 1998): “The plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered ‘similarly-situated;’ rather . . . the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in ‘all of the relevant aspects.’” Where a decision of a single decisionmaker is at issue, the relevant comparison is normally to other decisions made by the same person. Where a decision made under a particular employer policy or under a particular set of conditions is at issue, the relevant comparison is normally to other decisions made under the same policy or same set of conditions. Often, a relevant comparison will involve a number of factors that should be similar between the plaintiff and the comparator. Numerous other Circuits have adopted analogous standards.

However, exact correlations between the plaintiff and the comparator are not necessary. For example, in a promotion case in which the defendant explained that the black

159 Emphasis in original; citation omitted.

160 See Shumway v. United Parcel Serv., Inc., 118 F.3d 60, 64 (2d Cir. 1997) (stating comparables “must be similarly situated in all material respects”; alleged violators of no-fraternization policy were not comparables since they had different supervisors); Perkins v. Brigham & Women's Hosp., 78 F.3d 747, 751 (1st Cir. 1996) (finding treatment of clinical supervisor not comparable since his misconduct was markedly less serious and he did not have a history of repeated disciplinary actions); Lanear v. Safeway Grocery, 843 F.2d 298, 301 (8th Cir. 1988) (adopting the “similarly situated in all relevant respects” standard, including comparable seriousness).

161 See Pollis v. New. Sch. for Soc. Research, 132 F.3d 115, 122 (2d Cir. 1997) (finding alleged comparables “so different . . . that the comparisons are virtually meaningless”); Smith v. Wal-Mart Stores, 891 F.2d 1177, 1180 (5th Cir. 1990) (holding that the situations must be “nearly identical” to allow comparables evidence (quoting Davin v. Delta Air Lines, Inc., 678 F.2d 567, 570 (5th Cir. 1982)); Jones v. Gerwens, 874 F.2d 1534, 1541-42 (11th Cir. 1989) (finding that differential treatment by other supervisors is irrelevant); Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989) (holding that “[e]xact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared with apples.”)

162 Carey v. Mount Desert Island Hospital, 156 F.3d 31, 38 (1st Cir. 1998); Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 352–53 (6th Cir. 1998). A defendant cannot avoid comparisons, particularly at the summary-judgment stage, by assigning persons to unique job categories, because they can still be compared to others at the same level, or by changing job titles or making minor changes in duties, or by drawing distinctions between two types of conduct that are covered by the same gross misconduct policy. See Johnson v. Zema Systems Corp., 170 F.3d 734, 743-44 (7th Cir. 1999) (holding that “[a]n employer cannot insulate itself from claims of racial discrimination simply by providing different job titles to each of its employees . . . .”); Skalka v. Fernald Environmental Restoration Management Corp., 178 F.3d 414, 421–22 (6th Cir.), cert. denied sub nom. Conover v. Fernald Environmental Restoration Management Corp., 530 U.S. 1242 (1999) (same); Stalter v. Wal-Mart Stores, Inc. 195 F.3d 285, 289 (7th Cir. 1999) (holding that an employer cannot avoid comparisons by drawing distinctions between types of conduct covered by the same policy). See also the Supreme Court’s recent ruling in a case involving racial discrimination in jury selection by a prosecutor which may also
plaintiff had not been promoted to GS–15 because of a need to downsize its GS–14 and GS–15 workforce, but that its promotion of three whites to GS–15 was justified by the fact that they were already serving in “acting” GS–15 positions, the court held that at the early summary judgment stage the plaintiff could fairly use the whites as comparators despite their “acting” status. In a layoff case, one court allowed the use of both recalls and new hires as comparators. Obviously, the utility of a comparison is greatly increased when the plaintiff can show that the same decisionmaker made or approved the disparate decisions.

Some differences between the plaintiff and the comparator are, however, too great to allow a fair comparison. For example, probationary State troopers cannot be compared to nonprobationary State troopers for purposes of claims of disparate treatment in discipline, where the nonprobationary troopers have a collectively bargained grievance system that does not apply to nonprobationary troopers. A plaintiff with multiple serious disciplinary infractions of different types cannot fairly compare herself to a person with only one disciplinary infraction, or infractions of only one type. In a discipline case, the plaintiffs generally need to show that the charges against them and their comparator were of comparable seriousness and involved the same supervisor and standards. A plaintiff cannot fairly compare herself to another based on factors she subjectively considers more important than those on which the defendant actually relied. In a promotional or pay discrimination case, a plaintiff with limited job responsibilities cannot fairly compare herself to persons with the same job title or at the same pay grade who have substantially greater responsibilities.

provide support for this issue, Miller-El v. Dretke, ___ U.S. __, 125 S. Ct. 2317, 2329 n.6 (2005), reversed the denial of habeas corpus and held that petitioner had shown racial discrimination in the prosecutor’s peremptory challenges by clear and convincing evidence. The Court examined the degree of similarity among the comparators, found it acceptable although there were dissimilarities, and stated: “None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. . . . A per se rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave Batson inoperable; potential jurors are not products of a set of cookie cutters.”

165 Hollins v. Atlantic Co., Inc., 188 F.3d 652, 660 (6th Cir. 1999).
166 Bogren v. Minnesota, 236 F.3d 399, 405 (8th Cir. 2000).
This subject is treated in much fuller detail in Seymour and Aslin, Equal Employment Law Update, Chapter 15. Prima facie cases and proof of pretext are covered in 243 pages of detail in Chapter 14.

2. Statistics.

Statistical evidence can serve a critical purpose in employment cases where the existence of discrimination is in dispute. As expressed by the Supreme Court, “[s]tatistics showing racial or ethnic imbalance are probative . . . because such imbalance is often a telltale sign of purposeful discrimination . . . . In many cases, the only available avenue of proof is the use of racial statistics . . . .” International Brotherhood of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977) (citations and internal quotations omitted). However, the Court has cautioned that statistics are not irrefutable and may be rebutted. Id. at 340. In fact, the usefulness of statistical evidence depends on the surrounding facts and circumstances. Id. Moreover, the courts have also stressed that statistics alone generally cannot establish an individual case of discrimination.171 Additionally, as stated by the Seventh Circuit, “[s]tatistical evidence which fails to properly take into account nondiscriminatory explanations does not permit an inference of discrimination.”172

Statistical evidence can be useful in discrimination cases involving both disparate treatment and disparate impact. In a disparate impact case, the plaintiff must identify a specific employment practice and then prove, by a preponderance of the evidence, that the practice caused an adverse impact on the protected class to which the plaintiff belongs; no proof of a discriminatory motive is required.173 One way in which a plaintiff can satisfy this burden is by offering statistical evidence of disparities that are sufficiently substantial to raise an inference of causation.174

Statistical evidence is also useful in a disparate treatment action alleging a “pattern or practice” of unlawful, intentional discrimination against an entire protected class.175 In “pattern

---

171 See, e.g., Smith v. Xerox Corp., 196 F.3d 358, 371 (2d Cir. 1999) (ruling that plaintiffs’ statistical evidence “only showed that chance was most likely not responsible for the perceived difference in treatment of the older (or male) workers; this methodology could not, by itself, support a conclusion that discrimination must have been the cause for the disparity”); Adams v. Ameritech Services, Inc., 231 F.3d 414, 423 (7th Cir. 2001) (stating that “statistical evidence can be very useful to prove discrimination . . . but it will likely not be sufficient in itself”).

172 Radue v. Kimberly-Clark Corp., 219 F.3d 612, 616-17 (7th Cir. 2000). See also Xerox, 196 F.3d at 371 (granting summary judgment to the employer where plaintiffs’ statistical evidence failed to account for non-discriminatory explanations for the fact that older (or male) workers were more likely to be terminated).


174 Smith v. Xerox Corp., 196 F.3d 358 (2d Cir. 1999).

or practice” cases, the plaintiff must prove that discrimination is the employer’s “standard operating procedure — the regular rather than the unusual practice.” This burden can be satisfied by offering statistical evidence of a disparity sufficiently significant to establish a legitimate inference of discrimination.

Thus, when statistical evidence is introduced in either a disparate impact or a disparate treatment case, a similar question is raised: at what point does evidence of a disparity become “sufficiently significant” to establish an inference of discrimination? The method generally employed by the courts in measuring the significance of a particular statistical disparity involves a calculation of “the standard deviation as a measure of predicted fluctuations from the expected value of a sample.” Hazelwood, 433 U.S. at 309 n.14. As the Supreme Court stated, “‘[a]s a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations’” then an inference of discrimination could be raised. Id. (quoting Castaneda v. Partida, 430 U.S. 482, 496-97 n.17 (1977)).

The Supreme Court has provided some guidance on assessing the reliability of proffered statistics. In Dothard v. Rawlinson, 433 U.S. 321, 329-30 (1977), a disparate impact case, the Court rejected the defendant’s argument that local Census statistics, rather than national ones, must be utilized to prove that a defendant’s height and weight restrictions had a disparate impact on females, stating that there was no reason to suppose that the height and weight characteristics of local men and women would differ markedly from the general population. Id. at 331. The Court continued:

The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement’s grossly discriminatory impact. If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own.

Id. Bazemore v. Friday, 478 U.S. 385, 400-01 (1986), held that, while “the omission of variables


177 See Ottaviani v. State Univ. of New York at New Paltz, 875 F.2d 365, 371 (2d Cir. 1989).

178 The two-tailed probabilities associated with particular numbers of standard deviations are set forth in Table 26.1, “Normal Probability Function and Derivatives.” in MILTON ABRAMOWITZ AND IRENE STEGUN, HANDBOOK OF MATHEMATICAL FUNCTIONS (Dover Publications, 1965), at 972. A probability level of .05 (meaning that one would see this or a greater disparity by chance one time in twenty) corresponds to 1.96 standard deviations. A probability level of .01 (meaning that one would see this or a greater disparity by chance one time in a hundred) corresponds to 2.58 standard deviations. Three standard deviations corresponds to a probability level of .0027, or 27 times in ten thousand.

179 In Castaneda, the Court stated that one method of proving a prima facie case of disparate impact discrimination is to compare the results of random selection from the general population with the observed results through standard-deviation analysis. Id. at 495-97.
from a regression analysis may render the analysis less probative than it otherwise might be,” but not “‘unacceptable as evidence of discrimination.’” The Court stated that a Title VII plaintiff “need not prove discrimination with scientific certainty,” but cautioned in note 10 that there may be “some regressions so incomplete as to be inadmissible as irrelevant.” In *Hazelwood*, the Court applied standard-deviation analysis to a Title VII case alleging racial discrimination in the hiring of teachers. In discussing an objection by the defendant to the government’s heavy reliance on Census statistics, the Court agreed that data on applicant flow “would, of course, be very relevant.” *Id.* at 308 n.13. The Court also discussed the importance of taking any special qualifications into account. The truck driving skill in *Teamsters* “is one that many persons possess or can fairly readily acquire.” The Court continued, in the same note 13:

When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.

*Wards Cove Packing Co., Inc.* v. *Atonio*, 490 U.S. 642, 650–51 (1989), is the Court’s leading case on the importance of considering qualifications when performing statistical analyses of discrimination. The Court rejected plaintiff’s statistics comparing the high proportion of minorities in the “cannery” jobs to the low proportion of minorities in the “noncannery” jobs, which were at issue because many of the “noncannery” jobs were skilled and many of the “cannery” jobs were unskilled.

It is such a comparison—between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs—that generally forms the proper basis for the initial inquiry in a disparate-impact case. Alternatively, in cases where such labor market statistics will be difficult if not impossible to ascertain, we have recognized that certain other statistics—such as measures indicating the racial composition of “otherwise-qualified applicants” for at-issue jobs—are equally probative for this purpose.

The employees in the unskilled noncannery jobs did not reflect either the pool of qualified job applicants or the qualified population in the labor force. The Court continued:

Measuring alleged discrimination in the selection of accountants, managers, boat captains, electricians, doctors, and engineers—and the long list of other “skilled” noncannery positions found to exist by the District Court, . . . —by comparing the number of nonwhites occupying these jobs to the number of nonwhites filling cannery worker positions is nonsensical. If the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners’ fault),7 petitioners’ selection methods or employment practices cannot be said to have had a “disparate impact” on nonwhites.

7 In fact, where “figures for the general population might . . . accurately reflect the pool of qualified job applicants,” . . . we have even permitted plaintiffs to rest their prima facie cases on such statistics as well.
Id. at 651–52 (footnote omitted; internal citations omitted). The Court also held that, in a disparate-impact case, the plaintiff has the burden of identifying the particular practice that caused the disparate impact and proving the causal relationship. Id. at 660–61.

Enactment of the Civil Rights Act of 1991 did not change the requirements of Wards Cove that the plaintiff identify the particular employment practice which caused the disparate impact and that the plaintiff prove the causal relationship, “except that if the complaining party can demonstrate to the court that the elements of the respondent’s decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.” New § 703(k)(1)(B)(i) of Title VII, 42 U.S.C. § 2000e–2(k)(1)(B)(i).

Statistical evidence is offered by both plaintiffs and defendants. Where the plaintiff is challenging a particular selection requirement, the proper analysis is between those otherwise-qualified persons who meet or who fail to meet the requirement; the challenged requirement cannot be subsumed into the definition of “otherwise qualified.” Where selection for the jobs in question require particular unchallenged qualifications not likely to be possessed by the general population, a statistical analysis of selections should take the qualifications into account.

The statistical analysis of one side may be completely undone by more relevant statistics offered by the other side.

To be probative, a statistical analysis must be based upon meaningful data. Where the underlying data are meaningless, a party does not meet the threshold requirement of probative value that requires the opponent to respond. Sloppiness and bias on the part of the expert offering the statistics will also make them inadmissible. However, mere “armchair” objections by the opposing party, pointing out that other factors or analyses might produce different results but not showing that taking them into account would alter the result, will not make an otherwise meaningful analysis nonprobative.

---

180 But see Bazemore v. Friday, 478 U.S. 385, 398 (1986) (holding that plaintiffs’ proffered regression analysis was statistically significant even though they incorporated salary figures reflecting discrimination that occurred prior to the passage of Title VII).


182 E.g., Boston Police Superior Officers Federation v. City of Boston, 147 F.3d 13, 21 (1st Cir. 1998); Swanson v. Leggett & Platt, Inc., 154 F.3d 730, 734 (7th Cir. 1998); Fisher v. Wayne Dalton Corp., 139 F.3d 1137, 1140–41, 76 FEP Cases 946 (7th Cir. 1998); McNamara v. City of Chicago, 138 F.3d 1219, 1223 (7th Cir.), cert. denied, 525 U.S. 981 (1998).


186 E.g., EEOC v. Joint Apprenticeship Committee of Joint Industry Board of Electrical Industry,
A statistical showing of a disparity is much more probative if it is not based on small numbers.\textsuperscript{187} Numerous cases address the question of the number of employees that will allow a probative analysis.\textsuperscript{188} Such a showing is also much more probative if the party offering the statistics shows that the disparity is not likely to have resulted from chance, and the failure to make such a showing may in some circumstances destroy any probative value of the disparity.\textsuperscript{189}

The EEOC, Justice Department, Labor Department, and others have promulgated the \textsc{Uniform Guidelines on Employee Selection Procedures}. Sec. 4(D) of the Uniform Guidelines, 29 C.F.R. § 1607.4(D), states:

A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user’s actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user’s evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not

\begin{itemize}
\item A 186 F.3d 110, 119–20 (2d Cir. 1999).
\item \textsuperscript{187} \textit{E.g.}, \textit{Shorette v. Rite Aid of Maine, Inc.}, 155 F.3d 8, 16 (1st Cir. 1998); \textit{Vaughan v. MetraHealth Companies, Inc.}, 145 F.3d 197, 203 (4th Cir. 1998); \textit{Scott v. Parkview Memorial Hospital}, 175 F.3d 523, 525 (7th Cir. 1999).
\item \textsuperscript{189} \textit{Anderson v. Zubieta}, 180 F.3d 329, 335 (D.C. Cir. 1999); \textit{Cruz-Ramos v. Puerto Rico Sun Oil Co.}, 202 F.3d 381, 385 (1st Cir. 2000); \textit{Smith v. Xerox Corp.}, 196 F.3d 358, 365–66 (2d Cir. 1999); \textit{Bennett v. Total Minatome Corp.}, 138 F.3d 1053, 1061–62 (5th Cir. 1998); \textit{Watkins v. Sverdrup Technology, Inc.}, 153 F.3d 1308, 1315 (11th Cir. 1998).
\end{itemize}
maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group’s representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

The courts have sometimes used the four-fifths rule as an alternative to a showing of statistical significance.\footnote{190}

Simple statistical comparisons, without any evidence of statistical significance or of a violation of the four-fifths rule, can be highly probative where the disparities are stark,\footnote{191} or when other evidence points in the same direction.\footnote{192}

This subject is treated in much fuller detail in SEYMOUR AND ASLIN, EQUAL EMPLOYMENT LAW UPDATE, Chapter 16. Prima facie cases and proof of pretext are covered in 243 pages of detail in Chapter 14.

3. **Bona Fide Occupational Qualifications.**

Title VII and the ADEA each contain a provision creating an affirmative defense for employers that make facial distinctions based on a bona fide occupational qualification (“BFOQ”).

\footnote{190}{\textit{E.g.}, \textbf{Boston Police Superior Officers Federation v. City of Boston}, 147 F.3d 13, 21 (1st Cir. 1998) (useful benchmark); \textbf{Smith v. Xerox Corp.}, 196 F.3d 358, 365–66 (2d Cir. 1999) (“there is no one test that always answers the question,” and proper test must be determined on a case-by-case basis); \textbf{EEOC v. Joint Apprenticeship Committee of Joint Industry Board of Electrical Industry}, 186 F.3d 110, 118–19 (2d Cir. 1999) (rule of thumb that does not bind the courts, but that does provide useful guidance, but which should not be applied to the “fail ratio” where few people fail to meet the challenged criteria, “because such a small sample would tend to produce inherently unreliable results.”).}


Sec. 703(e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(e), states that employers, labor unions, employment agencies, etc., do not violate Title VII if they take an employment action with respect to any individual “on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.” There is no BFOQ for race or color.

The key case construing the BFOQ defense under Title VII is *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). It involved the legality of the defendant’s practice of excluding women, who were pregnant or who were capable of bearing children, from jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, etc. The Court held that the policy was facially discriminatory against fertile women, as opposed to fertile men, and held that a facially discriminatory policy can only be justified if the practice is a BFOQ. *Id.* at 198–200. The Court held that disparate-impact analysis is not appropriate for such practices. In addition, “[t]he business necessity standard is more lenient for the employer than the statutory BFOQ defense,” *Id.* at 198. The Court held that Congress imposed significant restrictions on the BFOQ defense.193

Sec. 4(f)(1) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(f)(1), states that employers, labor unions and employment agencies may lawfully take employment actions otherwise forbidden by the Act “where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.”

---

193 The Court stated at 201:

The wording of the BFOQ defense contains several terms of restriction that indicate that the exception reaches only special situations. The statute thus limits the situations in which discrimination is permissible to “certain instances” where sex discrimination is “reasonably necessary” to the “normal operation” of the “particular” business. Each one of these terms—certain, normal, particular—prevents the use of general subjective standards and favors an objective, verifiable requirement. But the most telling term is “occupational”; this indicates that these objective, verifiable requirements must concern job-related skills and aptitudes.
The key case construing the BFOQ defense under the ADEA is *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 416–17 (1985). The airline asserted the defense, contending that it was based on safety considerations, when plaintiffs challenged its rule requiring flight engineers to retire at the age of 60. The Court adopted the two-part test set forth in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976) as the governing test when a defendant seeks to justify an explicit age criterion as a BFOQ, based on safety grounds. The first part of the test is whether the qualification is so peripheral to the central mission of the employer’s business that no age discrimination can be “reasonably necessary to the normal operation of the particular business.” An objective test is required. The second part of the test requires a determination whether the age qualifications in question are “something more than ‘convenient’ or ‘reasonable’; they must be ‘reasonably necessary . . . to the particular business,’ and this is only so when the employer is compelled to rely on age as a proxy for the safety-related job qualifications validated in the first inquiry.” 472 U.S. at 414. The Court quoted the language of *Tamiami* stating that the employer could prevail by showing that it had a factual basis for believing “‘that all or substantially all [persons . . . over the age qualifications] would be unable to perform safely and efficiently the duties of the job involved.’” *Id.* at 413. The employer could also prevail by showing that it was not feasible to deal with applicants or employees on an individualized basis. *Id.* at 414. Quoting *Tamiami* again, the Court stated: “One method by which the employer can carry this burden is to establish that some members of the discriminated-against class possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the applicant’s membership in the class.” *Id.* at 415. Partly because half of the pilots in the United States fly for airlines without a rule similar to the defendant’s, it could not meet this burden. The Court rejected the defendant’s argument that the jury should have been instructed to defer to the defendant’s judgment. “The BFOQ standard adopted in the statute is one of “reasonable necessity,” not reasonableness.” *Id.* at 419. The Court affirmed judgment for the plaintiffs.


The probative strength, or even the admissibility, of allegedly biased remarks or other evidence of bias depends on many factors, including: (1) the lack of ambiguity in the statement or other evidence; (2) the intensity of any bias shown by the statement or other evidence; (3) the time elapsed between the statement or other occurrence and the challenged action; (4) the context in which the statement was made or the incident occurred; (5) its relationship to the employment decisions at issue; (6) the reference, if any, to the plaintiffs; (7) the frequency with which such statements or other events happened, (8) whether the statements or other indications of bias came from management officials with direct or indirect power over the challenged actions, and (9) the employer’s response to the statements or other incidents in question.\(^{194}\)

\(^{194}\) *Auguster v. Vermillion Parish School Bd.*, 249 F.3d 400, 405 (5th Cir. 2001) (where the plaintiff has not produced substantial evidence of pretext for each nondiscriminatory reason, for comments to provide sufficient evidence of discrimination they must be related to the protected class of persons of which the plaintiff is a member, proximate in time to the employment action, made by a person with authority over the employment action at issue, and related to the employment action at issue); *Straughn v. Delta Air Lines, Inc.*, 2001 WL 521360 (1st Cir. 2001) (holding that “so-called ‘stray remarks’ may permit a jury reasonably to determine that an employer was motivated by a discriminatory intent,” but that while they “may be material to the pretext inquiry, their probativeness is circumscribed if they were made in a situation temporally remote from the date of the employment decision,” or were unrelated to the employment
Many rules governing such evidence are founded in common sense. A statement may be too vague or innocent to be credible evidence of bias. It may have happened too long ago to support any conclusion about the present motivation of the decisionmaker. The declarant may have had a provable change of heart between his declaration of bias and the challenged action. A statement may have been made by someone other than the decisionmaker, and its probative value may depend on the influence the declarant exercised with respect to the decisionmaker. An inference must be drawn whether the evidence in question can fairly be taken to reflect the motivation of the decisionmaker. If so, the statement is “direct evidence” of discrimination illustrating the adage that “truth will out”; if not, the statement is a “stray remark” or “isolated event.” This determination can affect the admissibility of the statement or other evidence. Because prior to the 1991 amendments, Title VII cases were not tried to a jury, courts were less likely to exclude stray comments under Rule 403.

The purpose for which the statement is offered may also affect the decision whether it is “direct evidence” or a “stray remark.” Judicial standards are stricter if the effect of categorizing the remark as “direct” means that mixed-motives analysis will apply and the risk of nonpersuasion is shifted to the defendant. If the remark is merely offered as additional evidence of discrimination in an inferential case, helping the plaintiff to establish a prima facie case or helping the plaintiff prove pretext, the judicial standards are less strict. E.g., Hoffman v. MCA, Inc., 144 F.3d 1117, 1124 (7th Cir. 1998). A statement or occurrence that is a “stray remark” of no probative value for purposes of triggering mixed-motives analysis may be admissible and probative in an inferential case. E.g., Ross v. Rhodes Furniture, Inc., 146 F.3d 1286, 1291 (11th Cir. 1998). Ambiguity in a potentially biased statement may defeat its use as “direct evidence” for purposes of triggering mixed-motives analysis, but on summary judgment must be interpreted in the light most favorable to the nonmovant, and may defeat summary judgment. Fernandes v. Costa Brothers Masonry, Inc., 199 F.3d 572, 588–89 (1st Cir. 1999).

See the discussion of evidence of biased remarks in the section on Reeves above. Prior to Reeves, some courts had imposed strict restrictions on the probative value of biased remarks, effectively requiring that they constitute admissions of wrongdoing as to the challenged employment decision. Reeves took a different approach, and seems to have considered such remarks as revealing bias in the heart of the decisionmaker that is expected to affect the decisions made. Proof of a change of heart could be used by a defendant to limit or negate the effect of
earlier biased remarks.

The subject of biased remarks is treated in much fuller detail in *SEYMOUR AND ASLIN, EQUAL EMPLOYMENT LAW UPDATE*, Chapter 17. *Prima facie* cases and proof of pretext are covered in 243 pages of detail in Chapter 14.

5. **Mixed-Motive Cases.**

Sec. 107 of the Civil Rights Act of 1991 inserted a new § 703(m) in Title VII, 42 U.S.C. § 2000e–2(m), providing that a defendant violates the law if race, color, religion, sex, or national origin “was a motivating factor” for a challenged employment practice, “even though other factors also motivated the practice.” Sec. 107 also amended § 706(g) of Title VII, 42 U.S.C. § 2000e–5(g), to provide that an employer which acted with “mixed motives” and which carries its burden of proving that it would have made the same decision even in the absence of discrimination, has a defense to individualized relief but not to liability. Such a defendant is liable for general injunctive relief if the plaintiff has standing to seek it, entry of a declaratory judgment, and attorney’s fees, but cannot be required to provide any other individual relief to the plaintiff on that claim.

Because § 107 of the Civil Rights Act did not mention retaliation claims, some courts have held that it does not apply to such claims.¹⁹⁶

*Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148, 91 FEP Cases 1569 (2003), unanimously held that any requirement of “direct evidence” in Justice O’Connor’s concurrence in *Price Waterhouse* was overturned by the Civil Rights Act of 1991, which requires simply that plaintiff show that the prohibited factor was “a motivating factor.” This can be done by circumstantial evidence. The Court stated: “In order to obtain an instruction under §2000e–2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for any employment practice.’”

A case litigated as a “mixed motives” case may survive a defendant’s motion for summary judgment more readily than a case litigated under the inferential model, because the case can go to trial on the evidence of improper motivation even if the defendant also has some legitimate reasons for the challenged action. By the same token, the jury in a mixed-motives case can find for the defendant on the ultimate issue even if plaintiff shows evidence of an unlawful motive.

¹⁹⁵ A plaintiff in an individual action has standing to seek injunctive relief only if there is a reasonable likelihood that he or she will personally be able to benefit from the relief. Thus, a plaintiff whose connection with the workforce has been severed without any firm expectation of return, and who is not seeking reinstatement, does not have standing to seek injunctive relief altering the conditions of employment.

Sec. 703(m) of the Civil Rights Act of 1991 does not explicitly apply to retaliation cases, ADEA cases, First Amendment retaliation cases, or whistleblower cases. These cases may be governed by the rule of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). There, the Court held that a Title VII plaintiff could prevail in a case in which the employer had lawful as well as unlawful motives for its actions, if the employer could not prove that it would have taken the same action if it had been motivated solely by lawful considerations. The plurality described the Court’s holding:

We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff’s gender into account.

*Id.* at 258. Such proof is to be by a preponderance of the evidence, and the defendant is not liable if it meets its burden. *Id.* at 252–53. The plurality stated that in most cases the defendant should be able to meet its burden by “some objective evidence,” but it “may not . . . prevail . . . by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision.” *Id.* at 252. Moreover, it “must show that its legitimate reason, standing alone, would have induced it to make the same decision.” *Id.*

Under *Price Waterhouse*, mixed-motive analysis is available only when the plaintiff proves that discrimination “played a motivating part in an employment decision.” *Id.* at 258. The Court found that this requirement was satisfied by the circumstantial evidence of discrimination presented by the plaintiff, because this was enough to show “that the employer actually relied on her gender in making its decision.” *Id.* at 251. The plurality summarized the evidence, *id.* at 251: “On the contrary, Hopkins proved that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board’s decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations.”

The plurality did not refer explicitly to “direct evidence,” but the concept of strong evidence seems embedded in its holding that the plaintiff must show that an impermissible motive played a “motivating part in an adverse employment decision,” *id.* at 250, 252, 258.


Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a “substantial factor” or to put it in other words, that it was a “motivating factor” in the Board’s decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board

---

197 However, one court has held that § 107 of the 1991 Civil Rights Act applies to ADEA cases, at least as to the lack of a heightened evidence requirement to trigger mixed-motives analysis. *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 311–12 (5th Cir. 2004).
had shown by a preponderance of the evidence that it would have reached the same decision as to respondent’s reemployment even in the absence of the protected conduct.

*Price Waterhouse* has been applied to many types of non-Title VII claims. ¹⁹⁸

There are decisions allowing both sides to invoke the mixed-motives theory, ¹⁹⁹ although plaintiffs are increasingly challenging defendant’s invocation of the theory, on the ground that plaintiffs should have the ability to shape their cases. ²⁰⁰ A defendant that does not unfairly surprise the plaintiff can invoke the theory, without admitting an unlawful motive, to show that it would have taken the same action for permissible reasons. ²⁰¹ Alternatively, even where the plaintiff invokes the theory, the courts can skip the issue of the sufficiency of the evidence and determine on summary judgment that the defendant has met its burden. ²⁰²

Even prior to *Desert Palace v. Costa*, the courts had generally held that a plaintiff can invoke the theory based on some types of circumstantial evidence, ²⁰³ the first is “suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn”; the second is “a showing that other, similarly-situated, non-pregnant employees received systematically better treatment”; the third is “evidence that the plaintiff was qualified for the job in question but passed over in favor of a person not having the forbidden characteristic and that the employer’s stated reason for its decision is ‘unworthy of belief, a mere pretext for discrimination.’”); ²⁰⁴ *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1017 (8th Cir. 1999) (“Direct evidence is evidence of conduct or statements by persons involved in the decisionmaking process that is sufficient for a factfinder to find that a discriminatory attitude was more likely than not a motivating factor in the employer’s decision. . . . Such evidence might include proof of an admission that gender was the reason for an action, discriminatory references to the particular employee in a work context, or stated hostility to

---


¹⁹⁹ E.g., *Donovan v. Milk Marketing Inc.*, 243 F.3d 584, 586–87 (2d Cir. 2001); *Pulliam v. Tallapoosa County Jail*, 185 F.3d 1182, 1185 (11th Cir. 1999).

²⁰⁰ The authors have not yet found any examples of decisions accepting this argument, and there are a number of decisions allowing defendants to invoke mixed-motives analysis.

²⁰¹ *Pulliam v. Tallapoosa County Jail*, 185 F.3d 1182, 1185–87 (11th Cir. 1999).


²⁰³ *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 162 (2d Cir. 1998) (adequate circumstantial evidence, such as remarks by the decisionmaker showing a discriminatory animus, sufficient); *Bellaver v. Quanex Corp.*, 200 F.3d 485, 492 (7th Cir. 2000) (direct or circumstantial evidence); *Marshall v. American Hospital Association*, 157 F.3d 520, 525 (7th Cir. 1998) (three types of circumstantial evidence can constitute “direct evidence” for purposes of mixed-motives analysis;
women being in the workplace at all.”). but there is not yet a uniform approach. The Fourth Circuit has held that the evidence in a mixed-motives case must bear directly on the challenged decision. Thus, the statement of the chief of the campus police that he would never send a female campus police officer to the Police Academy did not entitle the plaintiff to a mixed-motives verdict because the chief made the statement with respect to a different plaintiff female campus police officer. The Seventh Circuit has held that comparative evidence is enough. A single biased remark may be sufficient.

The decision whether there is enough evidence to support a mixed-motives instruction is for the court, after reviewing the evidence. At the summary-judgment stage, the evidence may not be sufficiently developed for this determination. Finally, when the mixed-motives theory is applicable, the defendant has the burden of persuasion that it was actually motivated by its asserted nondiscriminatory reason.

This subject is treated in much fuller detail in SEYMOUR AND ASLIN, EQUAL EMPLOYMENT LAW UPDATE, Chapter 18. Prima facie cases and proof of pretext are covered in 243 pages of detail in Chapter 14.

---

204 Fernandes v. Costa Brothers Masonry, Inc., 199 F.3d 572, 580, 81 FEP Cases 1149 (1st Cir. 1999) (surveyed the law and described three basic positions, but did not reach the question); Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1135–36 (8th Cir.) (en banc), cert. denied, 528 U.S. 818 (1999) (circumstantial evidence not enough).


206 Bellaver v. Quanex Corp., 200 F.3d 485, 492 (7th Cir. 2000).

207 Browning v. President Riverboat Casino-Missouri, Inc., 139 F.3d 631, 634–35 (8th Cir. 1998) (“that white boy better learn who he’s messing with”).


210 McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 360 (1995); Price Waterhouse v. Hopkins, 490 U. S. 228, 252 (1989) (plurality opinion) (employer’s legitimate reason for discharge in mixed-motive case will not suffice “if that reason did not motivate it at the time of the decision”); id., at 260-261 (White, J., concurring in judgment); id., at 261 (O’Connor, J., concurring in judgment); Garcia v. City of Houston, 201 F.3d 672, 676 (5th Cir. 2000) (“In order to prove a mixed-motive defense the employer should be able to present some objective proof that the same decision would have been made. . . . The legitimate reason must have been present at the time the decision was made. . . . It is not enough for the employer to demonstrate that the same decision would have been justified, but instead the employer must show that its legitimate reason standing alone would have produced the same decision.” (Emphasis in original.).)
6. **Other Circumstantial Evidence**

A large variety of types of circumstantial evidence are used to support or oppose discrimination and retaliation claims.

Plaintiffs rely on evidence that the defendant manipulated its own standards or procedures, or failed to follow them, in order to bring about the challenged result.\(^{211}\) Evidence that the defendant created a false “paper trail” or engaged in a cover-up has been treated as highly probative evidence of pretext and discrimination.\(^{212}\) However, the mere fact that the defendant did not use formal written procedures is not evidence of discrimination.\(^{213}\) Plaintiffs often rely on evidence of a discriminatory atmosphere in the workplace, including evidence of demands for sexual favors, to show that women were treated as second-class employees and were not promoted similarly to men.\(^{214}\)

In retaliation cases, plaintiffs often attempt to prove a causal relationship between the defendant’s learning of the plaintiff’s engaging in a protected activity, such as filing a charge of discrimination, and its taking of an adverse employment action against the plaintiff by pointing to the shortness of time between the two events. *Clark County School District v. Breeden*, 532 U.S. 268 (2001) (*per curiam*), held that there was no evidence of a causal link between the defendant’s learning of the plaintiff’s EEOC charge and her transfer four months later. "Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality.” The Court also stated:

The cases that accept mere temporal proximity between an employer’s knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be “very close,” O’Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (C.A.10 2001). See e.g., Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (C.A.10 1997) (3-month period insufficient); Hughes v. Derwinski, 967 F.2d 1168, 1174-1175 (C.A.7 1992) (4-month period insufficient). Action taken (as here) 20 months later suggests, by itself, no causality at all.

Defendants rely on evidence of the lack of a discriminatory atmosphere or discriminatory

---

211 *E.g.*, *Norville v. Staten Island University Hospital*, 196 F.3d 89, 97 (2d Cir. 1999); *Hopp v. City of Pittsburgh*, 194 F.3d 434, 437–40 (3d Cir. 1999); *Rutherford v. Harris County*, 197 F.3d 173, 181 (5th Cir. 1999); *Dodoo v. Seagate Technology, Inc.*, 235 F.3d 522, 526–27 (10th Cir. 2000).

212 *E.g.*, *Casarez v. Burlington Northern/Santa Fe Co.*, 193 F.3d 334, 337–38 (5th Cir. 1999), *reh’g denied*, 201 F.3d 383 (5th Cir. 2000).


214 *E.g.*, *Robinson v. Runyon*, 149 F.3d 507, 512–15 (6th Cir. 1998); *Johnson v. Zema Systems Corp.*, 170 F.3d 734, 744 (7th Cir. 1999); *Anderson v. Reno*, 190 F.3d 930, 937 (9th Cir. 1999).
corporate culture.\textsuperscript{215}

Courts sometimes give some incremental weight to the demographic characteristics of the decisionmakers,\textsuperscript{216} but other courts resist such arguments.\textsuperscript{217}

This subject is treated in much fuller detail in \textit{SEYMOUR AND ASLIN, EQUAL EMPLOYMENT LAW UPDATE}, Chapter 19. \textit{Prima facie} cases and proof of pretext are covered in 243 pages of detail in Chapter 14.

7. \textbf{Other Occurrences of Similar Conduct.}

Evidence of other occurrences of similar conduct, whether or not the plaintiff was aware of them at the time,\textsuperscript{218} may be extremely helpful in establishing that a pattern of discrimination existed,\textsuperscript{219} or in establishing that the defendant had notice that a particular supervisor or co-worker was sexually harassing women or engaging in discrimination,\textsuperscript{220} or in establishing that the defendant’s complaint procedure or remedial actions were inadequate, or in establishing that the defendant engaged in a reckless disregard of the plaintiff’s rights.

At the same time, evidence of unrelated incidents or of incidents involving unrelated employees, is generally excluded.\textsuperscript{221} Evidence not involving violations of law is also often excluded.\textsuperscript{222}

\textsuperscript{215} \textit{E.g.}, Dockins \textit{v. Benchmark Communications}, 176 F.3d 745, 749–50 (4th Cir. 1999); Hopkins \textit{v. Electronic Data Systems Corp.}, 196 F.3d 655, 663–64 (6th Cir. 1999).

\textsuperscript{216} \textit{E.g.}, Dominguez-Cruz \textit{v. Suttle Caribe, Inc.}, 202 F.3d 424, 431 (1st Cir. 2000) (in reversing summary judgment for the ADEA defendant, court relied in part on the fact that one of the decisionmakers was twelve years younger than the plaintiff, and that the second was two years younger); \textit{Smith v. The Berry Co.}, 165 F.3d 390, 396 (5th Cir.), \textit{modified in other respects}, 198 F.3d 150 (5th Cir. 1999) (many of the employees complaining about the female plaintiff’s behavior and performance were female).

\textsuperscript{217} \textit{E.g.}, Danzer \textit{v. Norden Systems, Inc.}, 151 F.3d 50, 55 (2d Cir. 1998).

\textsuperscript{218} \textit{E.g.}, Jackson \textit{v. Quanex Corp.}, 191 F.3d 647, 659–61 (6th Cir. 1999).


\textsuperscript{221} \textit{E.g.}, Baltazar \textit{v. Holmes}, 162 F.3d 368, 375–76 (5th Cir. 1998); Stopka \textit{v. Alliance of American Insurers}, 141 F.3d 681, 686–88 (7th Cir. 1998).

\textsuperscript{222} \textit{Cowan v. Prudential Insurance Co. of America}, 141 F.3d 751, 757 (7th Cir. 1998); Kline \textit{v. City of Kansas City Fire Department}, 175 F.3d 660, 668 (8th Cir. 1999), \textit{cert. denied}, 528 U.S. 1155 (2000); Curtis \textit{v. Oklahoma City Public Schools Board of Education}, 147 F.3d 1200, 1217–18 (10th Cir. 1998).
This and other evidentiary subjects are treated in much fuller detail in Seymour and Aslin, Equal Employment Law Update, Chapters 37 and 39. Prima facie cases and proof of pretext are covered in 243 pages of detail in Chapter 14.

8. **Expert Evidence.**

For decades statistical experts have been testifying in employment discrimination cases, in order to provide or rebut evidence that minorities or women were disproportionately affected by the employer’s decision-making. Expert economists or labor statisticians have also long been used in employment cases to testify about the value of the wages and benefits plaintiffs would have been likely to earn had they not lost the job or promotion at issue in the case. Outplacement specialists and labor economists have testified about the likely difficulty or ease plaintiffs would face in finding alternate employment and about the availability of jobs for which the plaintiff is qualified in his or her geographic location.

Since the passage of the Civil Rights Act of 1991, virtually all employment discrimination cases have been tried to juries, and courts have been required to rule on the admissibility of other types of expert testimony. Psychologists or psychiatrists are sometimes called to testify about the plaintiff’s alleged emotional distress or pain and suffering. These witnesses may be the treating health care provider or an expert hired by the plaintiff or the defendant to assess the treatment records and render opinions about the nature, cause, and prognosis for plaintiff’s condition.

Other experts have been proffered to testify on liability issues, for example, experts in stereotyping, the adequacy of sexual harassment investigations, and the role of repressed memory in harassment cases. Document examiners and other types of experts often found in criminal cases have found their way into employment litigation as well. Unlike in the products liability area, the viability of the entire cause of action rarely turns on expert testimony in employment cases.

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), held that Federal Rule of Evidence 702 governs the inquiry into the admissibility of expert opinions, and that the district courts have a “gatekeeper” function of screening proposed expert opinions to assure that they rest on a reliable foundation and that they are relevant to the issues in the case at hand. The Court set forth several criteria for the district courts to consider in making this determination. Reliability is established if expert testimony involves “scientific knowledge,” implying a grounding in the methods and procedures of science, and knowledge must be based on more than subjective belief or unsupported speculation. Relevance is established if the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; this requires a fit between scientific knowledge and a disputed issue.

Some factors that the Court held must be considered in determining reliability and “fit” are whether the theory or technique can be or has been tested, whether it has been subject to peer review and publication, its known or potential rate of error, and whether it is “generally accepted” among peers. Rule 403 must also be considered; it permits the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. If a proposed expert witness or his or her
opinions are challenged with respect to whether they meet the *Daubert* standard, the district court will hold a hearing outside the presence of the jury at which the experts testify and their qualifications and expertise are probed by the opposing party.

In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court held that *Daubert* applies—with respect to the gatekeeping function, relevance, and reliability—to non-scientific expert testimony. In its opinion, the Court observed that the language of Rule 702 makes no distinction between “scientific” knowledge and “technical” or “other specialized” knowledge. “The Rule makes clear that any such knowledge might become the subject of expert testimony,” the Court said. “Hence, as a matter of language, the Rule applies its reliability standard to all ‘scientific,’ ‘technical,’ or ‘other specialized’ matters within its scope.” *Id.* at 147. The Court further explained that its *Daubert* gatekeeping determination also was based on FED. R. EVID. 702 and 703, which grant expert witnesses testimonial latitude unavailable to other witnesses on the assumption that the experts’ opinion will have a reliable basis in the knowledge and experience of the experts’ discipline. “The Rules grant that latitude to all experts, not just ‘scientific’ ones.” *Id.* at 148.

Conclusory expert opinions are inadmissible,223 but experts who have established an adequate basis for their opinions are not required to use every basis of information and answer every question.224 It is not an abuse of discretion to exclude the testimony of an expert who is partisan, has relied on information of questionable accuracy, and whose work is full of errors.225 Nor is it an abuse of discretion to exclude the testimony of an expert who is partisan and who merely looked at information supporting one side.226 Expert testimony as to whether a party is telling the truth is inadmissible.227 However, it is an abuse of discretion to exclude expert psychological and psychiatric testimony on causation in sexual harassment damages proceedings, because of the court’s belief that such testimony would have little value.228

This subject is treated in much fuller detail in Seymour and Aslin, Equal Employment Law Update, Chapter 40.

---

223 Ross v. University of Texas at San Antonio, 139 F.3d 521, 525–26 (5th Cir. 1998); Broussard v. University of California, 192 F.3d 1252 (9th Cir. 1999).

224 McMillan v. Massachusetts Society for Prevention of Cruelty to Animals, 140 F.3d 288, 303 (1st Cir. 1998), cert. denied, 525 U.S. 1104 (1999); Vollmert v. Wisconsin Department of Transportation, 197 F.3d 293 (7th Cir. 1999).


9. **EEOC Investigative Files and Determinations**

While the findings of the EEOC or of a deferral agency fall within the “public records” exception to the hearsay rule, the findings may still be excluded on the ground that their probative value is outweighed by the danger of unfair prejudice or confusion. The Ninth Circuit has held that admission of a final agency decision on the merits creates a greater risk of unfair prejudice than admission of finding of probable cause or of insufficient facts to continue an investigation, and has held that the exclusion of a finding of probable cause was prejudicial error. The Eleventh Circuit has held that the determinations of the EEOC or of a deferral agency are generally admissible in bench trials but pose a danger of unfair prejudice if admitted in jury trials.

The admission of a opposing party’s representations to the EEOC or a deferral agency stands on a different footing because they may constitute admissions or impeachment. However, no materials submitted as part of conciliation are admissible.

This and other evidentiary subjects are treated in much fuller detail in SeymouR AND ASLIN, EQUAL EMPLOYMENT LAW UPDATE, Chapters 37 and 39.

10. **Rule 412, F. R. Evid.**

Rule 412 applies to cases involving alleged sexual misconduct. The general rule is that is bars evidence “offered to prove that any alleged victim engaged in other sexual behavior,” or “offered to prove any alleged victim’s sexual predisposition.” Rule 412(a). Rule 412(b)(2) provides an exception in civil litigation “if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.” It further states that “evidence of an alleged victim’s reputation is admissible only if it has been placed in controversy by the alleged victim.” Rule 412(c) establishes the procedure for determining admissibility. This requires the party intending to use the evidence to submit a written motion under seal 14 days before trial, or at such later time as the court allows for good cause, “specifically describing the evidence and stating the purpose for which it is offered,” and serves it on all parties as well as the alleged victim or the alleged victim’s guardian or representative. The court is required to conduct a hearing in camera “and afford the victim and parties a right to attend and be heard.”

---


231 Heyne v. Caruso, 69 F.3d 1475, 1483–84, 1482 (9th Cir. 1995).


233 Lindsey v. Prive Corp., 161 F.3d 886, 894–95 (5th Cir. 1998).
It is within the discretion of the trial court to allow some testimony and exclude other testimony, striking a “balance between the danger of undue prejudice and the need to present the jury with relevant evidence, particularly in light of Rule 412’s special standard of admissibility.” The Second Circuit has held that Rule 412 applies to sexual harassment cases, and that questions as to the plaintiff’s viewing of pornography should not have been allowed. The Eighth Circuit has held that the lower court did not abuse its discretion by excluding evidence of sexual behavior outside the workplace, of which the defendant was unaware at the times of its actions. The Eleventh Circuit has held that Rule 412 applies to comments by the court on the plaintiff’s sexual history.

This and other evidentiary subjects are treated in much fuller detail in SEYMOUR AND ASLIN, EQUAL EMPLOYMENT LAW UPDATE, Chapters 37 and 39.

11. **Rule 415, F. R. Evid.**

Rule 415(a) states that, in a case for relief from a party’s “alleged commission of conduct constituting an offense of sexual assault or child molestation,” evidence of similar conduct “is admissible and may be considered as provided in Rule 413 and Rule 414.” Rule 415(b) provides that a party intending to use evidence under the rule “shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony” at least fifteen days before the scheduled date of trial or at such later time as the court allows for good cause.

There is little published appellate authority on the application of the rule in civil cases, and very limited published district-court authority in employment litigation. Some courts have held that evidence covered by Rule 415 is subject to the Rule 403 balancing test. A Magistrate Judge has held that Rule 415 can be applied in a Title VII case involving alleged unconsented sexual touchings, to the extent that the defendant was aware of the prior incidents before the alleged actions involved in the lawsuit. A district judge has held that Rule 415 does

---


237 *Davis v. DeKalb County School District*, 233 F.3d 1367, 1375 n.13 (11th Cir. 2000).

238 *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1267–70 (9th Cir. 2000) (Rule 415 subordinated to balancing test of Rule 403; court upheld evidence of prior conduct in child molestation case)


not apply to sexual harassment cases not involving sexual assaults or child molestation.\textsuperscript{241} One court in a sexual harassment case has upheld the exclusion, under the balancing test, of evidence that one of the defendants had engaged in uncharged acts of child molestation.\textsuperscript{242}

This and other evidentiary subjects are treated in much fuller detail in SEYMOUR AND ASLIN, \textit{EQUAL EMPLOYMENT LAW UPDATE}, Chapters 37 and 39.

\textbf{I. Types of Relief.}

1. \textbf{Injunctive Relief.}

Injunctive relief may be granted to provide a more complete remedy to the plaintiff\textsuperscript{243} or to prevent future violations where there is a likelihood of such violations.\textsuperscript{244} However, an injunction should be tailored so as to minimize the burden on third parties.\textsuperscript{245} Where the plaintiff’s circumstances change, some or all of his or her claim for injunctive relief may become moot.\textsuperscript{246} Some courts have applied standing requirements to requests for injunctive relief.\textsuperscript{247}

Where a group of persons were affected by discrimination in promotions and it would be difficult to identify the persons who would have been promoted in the absence of discrimination, a court may take a “classwide” approach, with a \textit{pro rata} number of promotions, but may not order more promotions than would have occurred in the absence of discrimination.\textsuperscript{248} One Circuit has held that classwide injunctive relief is not available in a private lawsuit unless class certification has been granted.\textsuperscript{249}

\begin{itemize}
\item \textsuperscript{243} \textit{Bruso v. United Airlines, Inc.}, 239 F.3d 848 (7th Cir. 2001), reversed the refusal to expunge the personnel records of the retaliation plaintiff, because the lower court’s expressed disinclination to “meddle” in the defendant’s personnel affairs was not an adequate reason for denying such relief.
\item \textsuperscript{244} The mere possibility of future violations has been held inadequate to support injunctive relief. \textit{EEOC v. Wal-Mart Stores}, 187 F.3d 1241, 1250–51 (10th Cir. 1999).
\item \textsuperscript{245} \textit{E.g.}, \textit{United States v. City of Hialeah}, 140 F.3d 968, 971–90 (11th Cir. 1998) (employees outside the protected class); \textit{City of New York v. Local 28, Sheet Metal Workers’ International Association}, 170 F.3d 279, 285 (2d Cir. 1999) (Rule 19 parties).
\item \textsuperscript{246} \textit{Campbell v. Arkansas Department of Correction}, 155 F.3d 950 (8th Cir. 1998).
\item \textsuperscript{247} \textit{E.g.}, \textit{Armstrong v. Turner Industries, Inc.}, 141 F.3d 554, 563 (5th Cir. 1998).
\item \textsuperscript{248} \textit{United States v. City of Miami}, 195 F.3d 1292, 1300–02, 81 FEP Cases 397 (11th Cir. 1999), \textit{cert. denied sub nom. Fraternal Order of Police v. United States}, 531 U.S. 815 (2000).
\item \textsuperscript{249} \textit{Lowery v. Circuit City Stores, Inc.}, 158 F.3d 742, 766–67 (4th Cir. 1998), \textit{vacated and remanded on other grounds}, 527 U.S. 1031 (1999).
\end{itemize}
In *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), the Supreme Court set forth a new “flexible standard” for the modification of consent decrees in institutional-reform litigation. The Court stated that modification of a consent decree is appropriate, *inter alia*, “when enforcement of the decree without modification would be detrimental to the public interest.” *Id.* at 384. “Once a court has determined that changed circumstances warrant a modification of a consent decree, the focus should be on whether the proposed modification is tailored to resolve the problem created by the change in circumstances. A court should do no more, for a consent decree is a final judgment that may be reopened only to the extent that equity requires.” *Id.* at 391–92.

This subject is treated in much fuller detail in SEYMOUR AND ASLIN, EQUAL EMPLOYMENT LAW UPDATE, Chapter 44.

2. **Back Pay.**

*Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975), stated that, “given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.” The employer’s good faith is not an acceptable reason for the denial of back pay.

An “unemployed or underemployed” Title VII claimant is required to mitigate damages. “Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied. Consequently, an employer charged with unlawful discrimination often can toll the accrual of backpay liability by unconditionally offering the claimant the job he sought, and thereby providing him with an opportunity to minimize damages.”

Because an undocumented alien cannot lawfully satisfy the duty to mitigate, the Supreme Court has held that such an alien may not receive an award of back pay under the National Labor Relations Act. The Court emphasized that the worker had committed fraud in obtaining his job, had never sought to regularize his immigration status, and that the back pay was for work not performed. The rationale of the decision would apply equally to back pay and front pay awards under the employment discrimination statutes, as well as to the doubling of back pay as liquidated damages in age discrimination cases where such a remedy would otherwise be appropriate, but would not necessarily apply to pay discrimination cases for work already performed, to damages remedies, or to persons seeking to come into compliance with the immigration laws.

---


252 Some courts have held that *Hoffman Plastics* does not affect a plaintiff’s right under FLSA or State wage and hour law to obtain back pay or overtime compensation for work actually
One of the most common formulations of the elements of back pay states: “Finally, the ingredients of back pay should include more than ‘straight salary.’ Interest, overtime, shift differentials, and fringe benefits such as vacation and sick pay are among the items which should be included in back pay. Adjustment to the pension plan for members of the class who retired during this time should also be considered on remand.”

There is a split among the Circuits as to whether the receipt of unemployment compensation, Food Stamps, welfare assistance and similar payments are “collateral benefits” that are not included within interim earnings and thus do not reduce back pay awards, or are instead interim earnings.

Evidence of employee wrongdoing, or of other problems such as a misrepresentation on the employee’s application for employment, that did not affect the employment actions at issue because the employer first learned of them after the decisions were taken, cannot affect the determination of liability but can be taken into account in determining the remedy. McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995). The effect of such evidence on relief is to be determined on a case-by-case basis, bearing in mind both the importance of the statutory goals and the importance of legitimate employer prerogatives. The Court, for example, that reinstatement and front pay are not appropriate remedies where the misconduct or other problem would ordinarily result in the employee’s discharge. Id. at 361–62. The Court held that defendants seeking to use this defense “must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.” Id. at 362–63. Where this showing has been made, back pay should ordinarily awarded through the date of defendant’s discovery of the problem. The Court stated that the trial court “can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party.” Id. at 362. Finally, the Court cautioned against abusive discovery hunting for such infractions: “The concern that employers might as a routine matter undertake extensive discovery into an employer’s background or performance on the job to resist claims under the Act is not an insubstantial one, but we think the authority of the courts to award attorney’s fees, mandated under the statute, 29 U.S.C. §§ 216(b), 626(b), and in appropriate cases to invoke the provisions of Rule 11 of the Federal Rules of Civil Procedure will deter most abuses.” Id. at 363.


253 Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 263 (5th Cir. 1974).


255 Flowers v. Komatsu Mining Systems, Inc., 165 F.3d 554, 558 (7th Cir. 1999) (one factor is that the employer funded the Social Security disability benefits).
McKennon dealt with misconduct during employment, but the rule also applies to misconduct in the hiring process. The rule has been applied to a broad range of employment cases. The rule applies only where the evidence is discovered after the termination date and thus could not have been a basis for the termination decision. In at least one case, the parties litigated the question of plaintiff’s termination date, with plaintiff arguing for an earlier date predating defendant’s discovery of serious misconduct, but the court held that the later date applied, enabling defendant to use the misconduct as one of its reasons for firing plaintiff, and thus as a factual defense to liability. Because the employer has the burden of showing it would have terminated the employee for the wrongdoing, statements of employer policies, such as statements that employees will be fired for false statements on the form, is not enough to establish the defense; the employer’s actual practices are determinative. Defendants may rely on information obtained in the discovery process. At least one court has affirmed a protective order, barring defendant from using the discovery process to find out the immigration status of the plaintiffs.

These subjects are treated in much fuller detail in Seymour and Aslin, Equal Employment Law Update, Chapters 45 and 52.

3. Prejudgment Interest.

*West Virginia v. United States*, 479 U.S. 305, 310 (1987), stated: “Prejudgment interest is an element of complete compensation,” and explained in footnote 2: “Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress.” The Court has also stated that “Title VII authorizes interest awards as a normal incident of suits against private parties.”

---


259 *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1047 (7th Cir. 1999); *O’Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 759 (9th Cir. 1996); *Welch v. Liberty Machine Works*, 23 F.3d 1403, 1404–06 (8th Cir. 1994).


The decision to award prejudgment interest is generally treated as a matter of the district court’s discretion. One court has held that the failure to award prejudgment interest is generally an abuse of discretion where an award for lost wages is made, and some courts have held that such an award is “usually appropriate,” but some courts have denied prejudgment interest where the plaintiff has received a large aggregate award.

There is a split among the Circuits on the question whether prejudgment interest should be awarded in an ADEA case in which liquidated damages are awarded.

This subject is treated in much fuller detail in Seymour and Aslin, Equal Employment Law Update, Chapter 47.

4. Front Pay.

Pollard v. E.I. du Pont De Nemours & Company, 532 U.S. 843, 853-54, 121 S. Ct. 1946, 1952 (2001), held that § 706(g) of Title VII authorizes front pay awards through the subsequent reinstatement of the employee, as well as front pay awards that are made in lieu of reinstatement.

The courts have generally held that reinstatement is the preferred remedy, but may not be available in some cases because of the level of ill feelings that have arisen between the parties, or for other reasons. The Eleventh Circuit has stated that the presence of “some hostility” at the level frequently seen in litigation should not ordinarily bar reinstatement, but did not order reinstatement in the case before it. One court has held that front pay may be denied where the plaintiff failed to show mitigation. Front pay may also be denied where the plaintiff was nondiscriminatorily laid off before the start of the front-pay period, or was not harmed because the defendant rescinded its discriminatory act before it was to have been put into effect.


265 E.g., Criado v. IBM Corp., 145 F.3d 437, 446 (1st Cir. 1998).

266 See Shea v. Galaxie Lumber & Construction Co., Ltd., 152 F.3d 729, 733–34 (7th Cir. 1998), and cases there cited.

267 E.g., Criado v. IBM Corp., 145 F.3d 437, 440, 446 (1st Cir. 1998); Cowan v. Strafford R–VI School District, 140 F.3d 1153, 1160 (8th Cir. 1998); Denesha v. Farmers Insurance Exchange, 161 F.3d 491, 501–02 & n.8 (8th Cir. 1998), cert. denied, 526 U.S. 1115 (1999).


269 Excel Corp. v. Bosley, 165 F.3d 635, 639–40 (8th Cir. 1999).

270 Dalal v. Alliant Techsystems, Inc., 182 F.3d 757, 760 n.2 (10th Cir. 1999).

271 Nance v. Maxwell Federal Credit Union (MAX), 186 F.3d 1338, 1341–42 (11th Cir. 1999).
The decision to award front pay rather than order reinstatement is within the discretion of the district court. The split in the Circuits on whether the amount of an ADEA award of front pay should be determined by the district court or by the jury, after the trial court has determined that front pay is appropriate, is described above at p. .

The length of the period for which front pay is awarded depends heavily on the facts of the case. An unusually lengthy period of front pay may be limited as too speculative. The award may be reduced because of the plaintiff’s lack of diligence in seeking alternative employment. 272

The “after-acquired evidence” defense, explained in the discussion of back pay above, also applies to front pay and reinstatement.

This subject is treated in much fuller detail in SEYMOUR AND ASLIN, EQUAL EMPLOYMENT LAW UPDATE, Chapter 46.

5. Liquidated Damages.

The ADEA and the Equal Pay Act.

Liquidated damages under the ADEA and the Equal Pay Act consist of a doubling of back pay.

Liquidated damages are mandated under the Equal Pay Act, as part of the FLSA, unless “the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation . . . .” 29 U.S.C. § 260. Where such a showing is made, the district court has the discretion to award partial liquidated damages or to deny them altogether. If the plaintiff shows that the violation was willful, the limitations period is increased from two to three years.

One tier of liability under the ADEA occurs when the plaintiff shows that there was a violation. The second tier of liability occurs when the plaintiff proves that the violation is willful. Liquidated damages, and a three-year limitations period rather than the usual two years, are available for a willful violation of the ADEA.

The Supreme Court has held that willfulness is shown if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA. There is no requirement that the conduct be “outrageous,” nor is it enough that the employer simply knew the ADEA was in the picture. As an example, the Court mentioned that there can be liability but not a willful violation if the employer thinks an exemption from the ADEA is applicable, such as a bona fide occupational qualification. The Court added that “we continue to believe the

‘knowledge or reckless disregard’ standard will create two-tiers of liability across the range of ADEA cases.”

The Second Circuit has held that a knowing violation is necessarily a willful violation, and that the “reckless disregard” standard is relevant only where actual knowledge cannot be shown. The Sixth Circuit has held that an employer’s knowledge that employees were targeted for a reduction in force through irregular procedures, combined with knowledge that the RIF possibly affected older employees to a greater extent than younger employees and its failure to investigate and remedy the situation, could reasonably lead a jury to find that the violation was willful.

If a jury does not make an award of liquidated damages, its verdict will be reversed only if the plaintiff’s proof was so one-sided and of such overwhelming effect as to compel a finding of willfulness as a matter of law.

Most Circuits have held that front pay, which is an equitable remedy, is not doubled for purposes of liquidated damages.

b. The Family and Medical Leave Act.

Under the FMLA liquidated damages are recoverable unless the employer proves to the satisfaction of the court that the act or omission was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of the Act. 29 U.S.C. § 2617(a)(1)(A)(iii). The word “willful” appears in the statute only in connection with the period of limitations.

The Fifth Circuit has held that the “willfulness” standard of the FLSA has no bearing on the good-faith defense under the FMLA, and that liquidated damages can be recovered even if the defendant acted in good faith.

---


274 McGinty v. State of New York, 193 F.3d 64, 69 (2d Cir. 1999) (action not moot when defendant paid amounts wrongfully withheld, because claim for liquidated damages remained).


276 EEOC v. Massey Yardley Chrysler Plymouth, Inc., 117 F.3d 1244 (11th Cir. 1997).


278 Nero v. Industrial Molding Corp., 167 F.3d 921, 929 (5th Cir. 1999).

The Civil Rights Act of 1991 expands the remedies available under Title VII and makes compensatory and punitive damages available in federal discrimination actions where the defendant has engaged in an intentional violation of Title VII. 42 U.S.C. § 1981a(a)(1). The same remedies are available under Title I of the Americans with Disabilities Act. 42 U.S.C. § 1981a(a)(2). The damages provision of the Civil Rights Act of 1991 does not apply retroactively.279

The 1991 Act places caps on the total compensatory and punitive damages that may be awarded in favor of each plaintiff, based on the number of employees employed by the employer. 42 U.S.C. § 1981a(b)(3). These caps are as follows: for employers of 15–100 employees, up to $50,000; 100–200 employees, $100,000; 201–500 employees, $200,000; and over 500 employees, $300,000. The caps do not apply to back pay and other relief traditionally awarded under § 706(g) of Title VII, 42 U.S.C. § 2000e–5(g). In race discrimination cases in which the plaintiff has a viable cause of action under 42 U.S.C. § 1981, the caps do not apply. However, § 1981a provides for damages only where the plaintiff “cannot recover” under 42 U.S.C. § 1981. The Eighth Circuit has held that the caps on damages are constitutional.280

Sec. 1981a prohibits mentioning the caps to the jury, and counsel’s violation of this rule can be prejudicial, requiring a retrial of compensatory and punitive damages.281

Compensatory damages under the 1991 Act are for “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.” 42 U.S.C. § 1981a(b)(3). Front pay is not subject to the caps.282

Most Circuits have not yet construed the condition of § 1981a damages that the plaintiff be “unable to recover” under § 1981. The Ninth Circuit has held that a plaintiff may seek common-law damages under both statutes, and if the plaintiff is awarded damages under § 1981 he or she will then be ineligible for the award under § 1981a.283 The Tenth Circuit has held that a plaintiff may base a Title VII and § 1981 claim on the same facts, and an unallocated jury award will not be overturned unless there is some indication in the instructions or otherwise that the jury awarded a double recovery.284

279 Landgraf v. USI Film Products, 511 U.S. 244 (1994).
280 Madison v. IBP, Inc., 257 F.3d 780, 804 (8th Cir. 2001).
283 Pavon v. Swift Transportation Co., Inc., 192 F.3d 902, 910 (9th Cir. 1999).
284 Roberts v. Roadway Express, Inc., 149 F.3d 1098, 1110 (10th Cir. 1998).
Some courts have construed the caps as applicable to each claimant, not to each claim. Thus, a plaintiff with both a discrimination claim and a retaliation claim, or a Title VII claim and an ADA claim, is entitled to an aggregate of one cap for all covered claims.\textsuperscript{285}

Some courts have held that, where the jury awards damages generally for both capped and uncapped claims, the court may allocate the damages award to maximize plaintiffs’ recovery, subject to the overall requirement that the award be reasonable, as a means of fulfilling the Congressional policy that other remedies not be curtailed.\textsuperscript{286}

7. Compensatory Damages.

While the standards for the proof and permissible amount of compensatory damages vary among the Circuits, it is clear that a plaintiff must prove an injury to receive more than nominal damages,\textsuperscript{287} and must make a factual showing adequate to meet the standards of the Circuit in question.\textsuperscript{288}

While a plaintiff’s personal testimony can support an award of compensatory damages for emotional distress if it is sufficiently concrete and specific,\textsuperscript{289} uncorroborated testimony that

\textsuperscript{285} Hudson v. Reno, 130 F.3d 1193, 1199–1201 (6th Cir. 1997), cert. denied, 525 U.S. 822 (1998); Smith v. Chicago School Reform Board of Trustees, 165 F.3d 1142, 1149–50 (7th Cir. 1999); Madison v. IBP, Inc., 257 F.3d 780, 805 (8th Cir. 2001); Baty v. Willamette Industries, Inc., 172 F.3d 1232, 1245–46 (10th Cir. 1999).

\textsuperscript{286} Gagliardo v. Connaught Laboratories, Inc., 311 F.3d 565, 570–71 (3rd Cir. 2002), affirmed the judgment on a jury verdict for the ADA plaintiff in the amount of $2.3 million in compensatory and punitive damages, unapportioned as between the State and Federal claims. Plaintiff had a virtually identical claim under Pennsylvania law, which allows uncapped compensatory damages but not punitive damages. The court affirmed the allocation of the punitive damages to the ADA claim, its reduction to $300,000, and the allocation of all $450,000 in economic damages, and all $1.55 million in compensatory damages for emotional distress to the State-law claim. Accord, Martini v. Federal National Mortgage Ass’n, 178 F.3d 1336, 1349–50 (D.C. Cir. 1999), cert. dismissed, 528 U.S. 1147 (2000); Madison v. IBP, Inc., 257 F.3d 780, 801–05 (8th Cir. 2001), vacated, 536 U.S. 919 (2002), on remand, Madison v. IBP, Inc., 330 F.3d 1051 (8th Cir. 2003); Passantino v. Johnson & Johnson Consumer Products, Inc., 212 F.3d 493 (9th Cir. 2000).

\textsuperscript{287} E.g., Schultz v. Young Men’s Christian Association, 139 F.3d 286 (1st Cir. 1998); Armstrong v. Turner Industries, Inc., 141 F.3d 554, 560–62, 8 AD Cases 118 (5th Cir. 1998); Dill v. City of Edmond, Oklahoma, 155 F.3d 1193 (10th Cir. 1998).

\textsuperscript{288} Kelly v. City of Oakland, 198 F.3d 779, 785 (9th Cir. 1999); Atchley v. Nordam Group, Inc., 180 F.3d 1143 (10th Cir. 1999).

\textsuperscript{289} Brady v. Fort Bend County, 145 F.3d 691 (5th Cir. 1998), cert. denied, 525 U.S. 1105 (1999); Moore v. KUKA Welding Systems & Robot Corp., 171 F.3d 1073 (6th Cir. 1999); Kelly v. City of Oakland, 198 F.3d 779 (9th Cir. 1999); Dodoo v. Seagate Technology, Inc., 235 F.3d 522, 532 (10th Cir. 2000); Atchley v. Nordam Group, Inc., 180 F.3d 1143 (10th Cir. 1999); Ferrill v. Parker Group, Inc., 168 F.3d 468 (11th Cir. 1999).
is vague and conclusory will not support an award for emotional distress.\textsuperscript{290} The jury is not required to accept the plaintiff’s evidence of emotional distress, even if the plaintiff has presented the testimony of an expert psychologist.\textsuperscript{291}

Where compensatory damages are sought for future health insurance premiums and future medical expenses, the plaintiff’s failure to mitigate by seeking other employment bars an award of such damages.\textsuperscript{292}

This subject is treated in much fuller detail in\textsc{Seymour and Aslin, Equal Employment Law Update}, Chapters 48 and 51. Compensatory damages may also be awarded against State or local government officials in their personal capacities\textsuperscript{293} where the officials are not entitled to either absolute or qualified immunity,\textsuperscript{294} for intentional violations of 42 U.S.C. §§ 1981,\textsuperscript{295} 1983, and 1985.

\textsuperscript{290} \textit{Brady v. Fort Bend County,} 145 F.3d 691 (5th Cir. 1998), \textit{cert. denied,} 525 U.S. 1105 (1999); \textit{Dill v. City of Edmond, Oklahoma,} 155 F.3d 1193 (10th Cir. 1998).

\textsuperscript{291} \textit{Bruso v. United Airlines, Inc.}, 239 F.3d 848, 856–57 (7th Cir. 2001).

\textsuperscript{292} \textit{Greenway v. Buffalo Hilton Hotel,} 143 F.3d 47 (2d Cir. 1998).


\textsuperscript{295} The Fifth Circuit has held that a § 1981 claim must be joined with a § 1983 claim when damages are sought against a State or local governmental official. \textit{Oden v. Oktibbeha County,} 246 F.3d 458 (5th Cir. 2001), \textit{petition for cert. filed,} 70 USLW 3026 (U.S., June 25, 2001) (No. 00–1927).
8. Punitive Damages.

Punitive damages are available against private companies, and against State or local governmental officials in their personal capacities where the officials are not entitled to either absolute or qualified immunity, for intentional violations of 42 U.S.C. §§ 1981, 1983, and 1985. See the discussion immediately above. The Civil Rights Act of 1991 provides for punitive damages against private respondents for intentional violations of Title VII, the ADA, and the Federal-employee provisions of the Civil Rights Act of 1991. There is a split in the Circuits on the question whether common-law damages, including punitive damages, are available for retaliation in violation of a 1977 amendment to the Fair Labor Standards Act, for asserting rights under the FLSA, the Equal Pay Act, or the ADEA.

In *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), the Supreme Court settled one controversy regarding the award of punitive damages under 42 U.S.C. § 1981a, and replaced it with another. First, the Court held that punitive damages under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, are available even in the absence of particularly “egregious” facts. In doing so, the Court repudiated the view previously held by several circuits. The Court’s explanation was largely textual; § 1981a(b)(1) provides that the complaining party may recover punitive damages “if [he or she] demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” 42 U.S.C. § 1981a. According to the Court, the terms “malice” and “reckless indifference” refer to the actor’s state of mind, its awareness that it may be acting in violation of federal law. Absent peculiar circumstances, where the employer intentionally selects an employee for adverse action because of that individual’s protected characteristics, it will do so with, at a minimum, a “reckless indifference” to the employee’s statutory rights. The standard will not be met, however, where the employer is unaware of the relevant federal prohibition or acts with the

---


297 Individuals in their personal capacities are not respondents under these statutes.

298 There is an exception where the case involves reasonable accommodation, and where the defendant “demonstrates good faith efforts, in consultation with the person with a disability,” to provide a reasonable accommodation. 42 U.S.C. § 1981a(a)(3).

299 Punitive damages were held available in *Soto v. Adams Elevator Equipment Co.*, 941 F.2d 543, 551 (7th Cir. 1991) (Equal Pay Act); *Moskowitz v. Trustees of Purdue University*, 5 F.3d 279, 283 (7th Cir., 1993) (ADEA); *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1226 (7th Cir. 1995) (FLSA). *Moore v. Freeman*, 355 F.3d 558, 563–64 (6th Cir. 2004), agreed that § 216(b) authorizes recovery of damages for emotional distress in FLSA retaliation cases. *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 932–39 (11th Cir. 2000), cert. denied, 532 U.S. 975 (2001), held that punitive damages are not allowed by § 216(b) but stated in *dicta* that some additional compensatory relief is available in retaliation cases, such as reinstatement or front pay. *Id.* at 937. *Bailey v. Gulf Coast Transp., Inc.*, 280 F.3d 1333 (11th Cir. 2002), held that injunctive relief is available under the 1977 amendment to § 216(b), although injunctive relief is generally barred to private plaintiffs suing under the FLSA.
distinct belief that its discrimination is lawful, e.g., where the plaintiff’s theory is novel or the employer reasonably believes that a statutory exception to liability applies. Egregious acts may be evidence supporting an inference of the requisite “evil motive,” and may affect the quantum of damages imposed, but proof of such acts is not necessary in every case in which punitive damages are sought.

The Court went on to address a second, and equally important question in cases where punitive damages are sought: whether an employer may avoid punitive damages liability for the discriminatory behavior of its agent. The Court noted that common law agency principles limit vicarious liability for punitive awards to situations in which 1) the principal authorized the doing of the act and the manner in which it is done; 2) the agent was unfit and the principal was reckless in employing him; 3) the agent was employed in a managerial capacity and was acting in the scope of employment at the time of the conduct giving rise to the punitive damage claim; or 4) the principal or a managerial agent ratified or approved the act. Sidestepping the difficult, fact-specific issues about what “managerial capacity” might mean, the Court explicitly modified the common law rule on “scope of employment” to hold that “an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions were contrary to the employer’s ‘good-faith efforts to comply with Title VII.’” The goal of the statute is prophylactic, the Court reasoned, and dissuading employers from preventing discrimination, which application of the common law rule might do, is directly contrary to the purposes underlying Title VII.

Pre-Act conduct is relevant to the award. An employer’s fear that the discharge of a harassing co-worker would be overturned in arbitration is irrelevant to liability but relevant to the imposition of punitive damages, and the exclusion of this evidence on the punitive-damages claim prejudiced the defendant.

There are a substantial number of decisions explicating the recklessness and malice requirement. Punitive damages are available even if the defendant’s intention was not to harm

---

300 EEOC v. Indiana Bell Telephone Co., Inc., 256 F.3d 516, 519–20 (7th Cir. 2001) (en banc) (relying on such evidence); Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1186 n.11, 80 FEP Cases 1062 (10th Cir. 1999).

301 EEOC v. Indiana Bell Telephone Co., Inc., 256 F.3d 516, 519–20 (7th Cir. 2001) (en banc) (remanded for new trial on punitive damages only).

302 Romano v. U-Haul International, 233 F.3d 655, 668–74 (1st Cir. 2000) (affirmed verdict of $15,000 in compensatory damages and $285,000 in punitive damages where gender discrimination was blatant and manager said he would deny his biased statement if there were a lawsuit); Lowery v. Circuit City Stores, Inc., 206 F.3d 431, 445–46 (4th Cir.), cert. denied, 531 U.S. 822 (2000) (punitive damages allowed where there was concealment of internal reports critical of the company’s performance, and failure to take remedial actions in response to the reports); Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278 (5th Cir. 1999) (damages available); Bruso v. United Airlines, Inc., 239 F.3d 848 (7th Cir. 2001) (damages available in light of distortion of internal investigation so as to attack plaintiff unduly, and denial of plaintiff’s internal appeals of demotion); Gile v. United Airlines, Inc., 213 F.3d 365, 375–76 (7th Cir. 2000), reh’g and reh’g en banc denied (July 21, 2000) (establishing “chowderhead” defense
The requisite notice to the defendant for purposes of vicarious liability for punitive damages may be provided by the complaints of another victim.

An employer is not vicariously liable in punitive damages for intentional discrimination by a supervisor who claimed responsibility for the challenged decision where another official actually made the decision independently, without relying on any input from the discriminatory official, and without any knowledge of the discrimination. A district manager was held high enough to qualify as a managerial agent because he had supervisory authority over the plaintiff and over departments at six stores, and where he fired the plaintiff on his own authority. An airline was held vicariously liable for punitive damages because of the actions of its manager of cabin service at an airport, its general manager at the airport, and its senior litigation counsel who was responsible for preparing materials and training employees on sexual harassment, and who had final decisionmaking authority over the plaintiff’s internal appeals. The Tenth Circuit has held that a defendant is directly liable in punitive damages rather than just vicariously liable, and that no affirmative defense is available, when the wrongful acts are those of a Human Resources Manager or other official responsible for acting on behalf of the defendant with respect to situations involving discrimination or harassment.

The court explained that “vicarious to punitive damages); Otting v. J.C. Penney Co., 223 F.3d 704, 711–12 (8th Cir. 2000) (damages available where employer knowingly refused to accommodate plaintiff); Dhyne v. Meiners Thriftyway, Inc., 184 F.3d 983, 988 (8th Cir. 1999) (excessive delay in responding to plaintiff’s uncorroborated complaint against a harassing co-worker, followed by effective action, not enough to support punitive damages); Blackmon v. Pinkerton Security & Investigative Services, 182 F.3d 629, 635–36 (8th Cir. 1999) (damages available in light of distortion of internal investigation so as to attack plaintiff unduly, failure to act on repeated complaints, and retaliation); Doodo v. Seagate Technology, Inc., 235 F.3d 522, 532 (10th Cir. 2000) (affirmed judgment for $455,000 where evidence allowed a finding that the Human Resource Manager lied about the bases of his personnel decisions and manipulated the plaintiff’s promotional opportunities to his detriment; direct liability case); Deters v. Equifax Credit Information Services, Inc., 202 F.3d 1262, 1270 (10th Cir. 2000) (punitive damages available where highly ranked manager, responsible for responding to claims of discrimination, failed to act on complaints; direct liability case); Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1187 (10th Cir. 1999) (damages available where management failed to keep harasser away from plaintiff).

EEOC v. W&O, Inc., 213 F.3d 600, 611–12 (11th Cir. 2000) (PDA defendants could not defend against punitive damages because they thought it was “not right” that pregnant employees would wait on tables and carry heavy trays).

E.g., Deters v. Equifax Credit Information Services, Inc., 202 F.3d 1262, 1271 (10th Cir. 2000).


Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278, 285 (5th Cir. 1999)

Bruso v. United Airlines, Inc., 239 F.3d 848, 860 (7th Cir. 2001).

liability applies to situations in which a supervisor perpetrates harassment himself, whereas a theory of direct liability is more appropriate where an employer fails to respond adequately to harassment of which a management-level employee knew or should have known.”

Merely having a written antidiscrimination policy is not enough to establish a defense to punitive damages of having made a good-faith attempt to comply with the law. An open-door policy is not enough, particularly where there is evidence that a top official harbors a biased attitude, or where a supervisor made no response to a co-worker’s biased statement. Half-hearted responses to complaints are not enough; adequate enforcement of adequate policies is essential to establish the defense.

Several Circuits have held that a plaintiff who has been awarded no compensatory damages, but has been awarded back pay, may receive punitive damages. One Circuit has held that a plaintiff may receive punitive damages even where he or she has not been awarded either compensatory damages or back pay. One Circuit has held that an award of punitive damages in the absence of an award of compensatory damages or back pay is permissible, if at all, only where the evidence shows that the plaintiff has been harmed, and is not available where the violation is purely technical. Other Circuits have held that either an award of actual damages or a finding of a violation of constitutional rights, is required in order to sustain an award of punitive damages.

The permissible amount of a punitive-damage award is a question that continues to

309 Deters v. Equifax Credit Information Services, Inc., 202 F.3d 1262, 1270 n.3 (10th Cir. 2000).
310 E.g., Romano v. U-Haul International, 233 F.3d 655, 668–74 (1st Cir. 2000); Bruso v. United Airlines, Inc., 239 F.3d 848, 858 (7th Cir. 2001).
312 Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278 (5th Cir. 1999).
314 Cadena v. Pacesetter Corp., 224 F.3d 1203, 1210 (10th Cir. 2000).
315 EEOC v. W&O, Inc., 213 F.3d 600, 615 (11th Cir. 2000), and cases there cited.
316 Timm v. Progressive Steel Treating, Inc., 137 F.3d 1008, 1010 (7th Cir.1998) (special circumstances may have led to denial of back pay).
317 Griffin v. Steeltek, Inc., 261 F.3d 1026, 12 AD Cases 248 (10th Cir. 2001) (asking questions prohibited by the ADA, where no back pay or compensatory damages were awarded).
318 E.g., Louisiana Acorn Fair Housing v. LeBlanc, 211 F.3d 298, 303 (5th Cir. 2000) (Fair Housing Act), and cases there cited.
occupy the courts. *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), reversed in a 6-3 decision the award of $145 million in punitive damages for bad-faith failure to defend an accident claim, where plaintiffs’ post-remittitur award for compensatory was only $1 million. The Court held that the award was excessive and violated the Due Process Clause. The Court elaborated on the three standards it had set forth in *BMW v. Gore*, 517 U.S. 559 (1996). The first factor is the degree of reprehensibility of the defendant’s conduct. The Court found that defendant’s alteration of records to make its insureds appear less culpable, and its false pretrial assurances to its insureds that their assets would be safe if the case went to trial (contrasting with its post-trial statement that they should put their house up for sale), and the evidence of a pattern of such conduct, justified an award of punitive damages even after taking into account the amount of the compensatory damages. *Id.* at 1521.

However, this is only economic harm. The Court took sharp exception to plaintiffs’ reliance on evidence that this conduct was part of a nationwide pattern, and that this case was an occasion to punish State Farm for the nationwide pattern, particularly in light of the fact that “much of the out-of-state conduct was lawful where it occurred.” *Id.* at 1522. The second *Gore* factor is the ratio between harm or potential harm to the plaintiff and the punitive damages award. The Court refused to apply a bright-line rule, but stated:

> Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 . . . or, in this case, of 145 to 1.

*Id.* at 1524 (citations omitted). The Court stated that there may be exceptions justifying higher awards:

> Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." *Ibid.*; see also *ibid.* (positing that a higher ratio might be necessary where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine"). The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

The Court held that the defendant’s wealth does not justify deviation from these standards. *Id.* at 1524–25. The third *Gore* standard is the relationship between the punitive damages award and civil penalties authorized or imposed in comparable cases. The Court stated that a criminal penalty shows that the state regards the conduct as serious, but that it has less utility in determining the amount of the award. *Id.* at 1526.

Some courts have held that an award of punitive damages is presumptively reasonable when it is within the caps on damages in the 1991 Civil Rights Act, and have also held that the
ratio between compensatory and punitive damages is not very important in civil rights cases because of the strong national policy of ending employment discrimination.\textsuperscript{319} Not all courts agree.\textsuperscript{320}

This subject is treated in much fuller detail in \textsc{Seymour and Aslin, Equal Employment Law Update}, Chapters 49 and 51.

9. **Taxes on Monetary Relief.**

Awards of back pay, front pay, liquidated damages, and prejudgment interest are taxable. Awards of compensatory and punitive damages are taxable unless the case involves personal injury or sickness. \textsc{26 U.S.C. § 104(a)(2)}. The question of what qualifies as “personal injury or sickness” within the meaning of this section is complex. The application of payroll taxes to awards of back and front pay in different contexts is also complex, and is outside the scope of this paper.

\textit{Commissioner v. Banks,} ___ U.S. __, 125 S. Ct. 826, 160 L. Ed. 2d 859 (2005), held that, when a client’s recovery constitutes gross income, the client must pay income tax on the part of the recovery paid directly to the attorney as a contingent fee for services performed in obtaining the taxable income, under a contingent fee arrangement. The Court did not specifically address the issue of the tax effect of a court-awarded fee. It is important to keep in mind that this rule does not apply to the fees that generated nontaxable income or other nontaxable relief, such as an injunction.

Section 703 of the \textsc{American Jobs Creation Act}, Pub. L. No. 108–357, 118 Stat. 1418, 1546–48, signed into law on October 22, 2004, eliminates the double tax on attorneys' fees. Section 703 of allows plaintiffs an above-the-line deduction for attorneys' fees and costs paid by or on behalf of the plaintiff in specific employment and discrimination cases.

This creates an above-the-line deduction for attorneys’ fees and costs. It is not subject to the \textsc{Alternative Minimum Tax} or the 2%-of-adjusted-gross-income exclusion. The client must report the fees in order to be able to take advantage of the Act.

The bill applies to a wide variety of civil rights and employment statutes, including Title VII, the \textsc{ADA}, the \textsc{ADEA}, the \textsc{NLRA}, the \textsc{FLSA}, the \textsc{Rehab Act}, sec. 510 of \textsc{ERISA}, Title IX, the \textsc{Employee Polygraph Protection Act}, \textsc{WARN}, the \textsc{FMLA}, \textsc{USERRA}, secs 1981, 1983, and

\textsuperscript{319} \textit{Romano v. U-Haul International}, 233 F.3d 655, 668–74 (1st Cir. 2000), affirmed the award on a jury verdict of $15,000 in compensatory damages and $285,000 in punitive damages. \textit{Deters v. Equifax Credit Information Services, Inc.}, 202 F.3d 1262 (10th Cir. 2000), upheld the judgment on a jury verdict for the Title VII sexual harassment plaintiff of $5,000 in compensatory damages and $295,000 in punitive damages. \textit{Accord, EEOC v. W&O, Inc.}, 213 F.3d 600, 615 (11th Cir. 2000).

\textsuperscript{320} \textit{Rubinstein v. Administrators of Tulane Educational Fund}, 218 F.3d 392, 407–09 (5th Cir. 2000), \textit{cert. denied}, 532 U.S. 937 (2001), held that an award of $75,000 in punitive damages was excessive when compared with an award of only $2,500 in compensatory damages, and offered the plaintiff remittitur of the punitive award to $25,000 or a new trial.
1985, the Fair Housing Act of 1968, Federal whistleblower claims, and a catch-all: “Any provision of Federal, State, or local law, or common law claims permitted under Federal, state, or local law—(i) providing for the enforcement of civil rights, or (ii) regulating any aspect of the employment relationship . . . .”

It is doubly prospective: “The amendments made by this section shall apply to fees and costs paid after the date of enactment of this Act with respect to any judgment or settlement occurring after such date.”

This subject is treated in detail in SEYMOUR AND ASLIN, EQUAL EMPLOYMENT LAW UPDATE, Chapter 54.

J. Attorneys’ Fees.

This subject is treated in much fuller detail in SEYMOUR AND ASLIN, EQUAL EMPLOYMENT LAW UPDATE, Chapter 55.

1. Entitlement to Fees.

A prevailing plaintiff “should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.” Absent agreement of the parties, obtaining relief pursuant to a court order, or approval of a settlement, that changes the legal relationship of the parties is an essential requirement for “prevailing party” status and thus for entitlement to fees under the wording of 42 U.S.C. § 1988, which applies to § 1981 and § 1983 cases and parallels the wording of many fee-award provisions.

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), discussed the “dual standard” for fee awards to prevailing plaintiffs and to prevailing defendants, under which “a prevailing plaintiff ordinarily is to be awarded attorney’s fees in all but special circumstances,” id. at 417, but a prevailing defendant can receive an award of its attorneys’ fees only in limited circumstances. The Court stated:

In sum, a district court may in its discretion award attorney’s fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.

In applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could


discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one’s belief that he has been the victim of discrimination, no matter how meritorious one’s claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

*Id.* at 421–22.

A plaintiff in a fee-shifting case who receives only nominal relief is not necessarily entitled to fees.323

2. **The Lodestar.**

_Hensley v. Eckerhart_, 461 U.S. 424, 433 (1983), established the basic guidelines for resolving the amount of a fee award to a prevailing plaintiff. These guidelines are often referenced in fee decisions:

The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer’s services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.

The Court cautioned that hours not reasonably spent should be excluded from the fee award. *Id.* at 434. It is important that the party seeking fees exercise “billing judgment.” *Id.* The Court continued with the methodology to be followed:

The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the “results obtained.” This factor is particularly crucial where a plaintiff is deemed “prevailing” even though he succeeded on only some of his claims for relief. In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants—often an institution and its officers, as in this case—counsel’s work on one claim will be

---

unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been “expended in pursuit of the ultimate result achieved.” . . . The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.

It may well be that cases involving such unrelated claims are unlikely to arise with great frequency. Many civil rights cases will present only a single claim. In other cases the plaintiff’s claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel’s time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Id. at 434–35 (footnote omitted). The Court continued:

Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. . . . Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court’s rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff’s claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

Id. at 435–36 (footnote omitted). The Court observed that this principle “is particularly important in complex civil rights litigation involving numerous challenges to institutional practices or conditions” because the legal effort is large and the degree of success can vary greatly. Id. at 436. The Court stated that there “is no precise rule or formula for making these determinations,” id. at 436, and that the district court “necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.” Id. at 437. Perhaps the most often quoted, but least often realized, language of Hensley is its statement: “A request for attorney’s fees should not result in a second major litigation.” Id.
a. **Reasonable Hours.**

The time spent by former attorneys or by multiple timekeepers is compensable if there has been no duplication of effort,\(^\text{324}\) but duplicative or redundant time is not compensable.\(^\text{325}\) Paralegal and law clerk time are compensable if such time is separately billed in the local legal market.\(^\text{326}\) The time spent on fee litigation is compensable.\(^\text{327}\)

Only time reasonably spent is compensable,\(^\text{328}\) and a fee claim should be backed up by contemporaneous records sufficiently detailed to permit opposing counsel and the court to engage in a meaningful review of the time.\(^\text{329}\)

b. **Reasonable Hourly Rates.**

The Supreme Court has held that “‘reasonable fees’ under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel.”\(^\text{330}\) The Court has also held that an award of attorney’s fees should ordinarily include “an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise.”\(^\text{331}\)

---


\(^\text{327}\) *E.g.*, *Weyant v. Ost*, 198 F.3d 311, 316 (2d Cir. 1999); *Quaratino v. Tiffany & Co.*, 166 F.3d 422, 426–27 (2d Cir. 1999); *Jenkins v. State of Missouri*, 170 F.3d 846, 849 (8th Cir. 1999).

\(^\text{328}\) *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 550–51 (7th Cir. 1999); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1048 (7th Cir. 1999); *Miller v. Artistic Cleaners*, 153 F.3d 781, 783–85 (7th Cir. 1998); *Keslar v. Bartu*, 201 F.3d 1016, 1017–18 (8th Cir. 2000); *Ellis v. University of Kansas Medical Center*, 163 F.3d 1186, 1202–03 (10th Cir. 1998).


c. **Billing Judgment.**

A fee claim should show that the counsel seeking fees exercised billing judgment, and is claiming only the time that would properly be billed to a fee-paying client. Where fee-seeking counsel have not exercised billing judgment, courts can award fees substantially lower than the fees claimed.\(^{332}\)

3. **Enhancements to, and Deductions from, the Lodestar.**

The Supreme Court held in an environmental case that no adjustment to the lodestar should be made to compensate counsel for the risk of not being paid if the plaintiff did not prevail.\(^{333}\) This ruling has been generally applied in employment cases. The Eighth Circuit has applied the ruling in striking down a $25 bonus in counsel’s hourly rate to compensate them for the risk of not prevailing.\(^ {334}\) In an ERISA common-fund case, by contrast, the Seventh Circuit has held that the use of a multiplier for the risk of not prevailing was mandatory.\(^ {335}\)

The Supreme Court has rejected a rule of proportionality between the fee to be awarded in a civil rights case and the monetary relief obtained, in a § 1983 case in which it accepted the lower court’s determination that the successful and unsuccessful claims had a substantial common core of facts.\(^ {336}\) Where the unsuccessful claims are distinct from the successful claims, substantial reductions may be made in the award.\(^ {337}\) Where the unsuccessful claims share a common core of fact, however there are sometimes no reductions or only limited reductions in the lodestar.\(^ {338}\)

---

\(^{332}\) *Hopwood v. State of Texas*, 236 F.3d 256, 279 n.89 (5th Cir. 2000); *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 548–49 (7th Cir. 1999); *Keslar v. Bartu*, 201 F.3d 1016, 1017–18 (8th Cir. 2000).


\(^{334}\) *Forshee v. Waterloo Industries, Inc.*, 178 F.3d 527, 531–32 (8th Cir. 1999).

\(^{335}\) *Cook v. Niedert*, 142 F.3d 1004 (7th Cir. 1998).


\(^{337}\) *E.g., Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 172–73 (2d Cir. 1998) ($89,475 awarded on $329,431 claim).

\(^{338}\) *E.g., Failla v. City of Passaic*, 146 F.3d 149, 160 n.15 (3d Cir. 1998); *Brodziak v. Runyon*, 145 F.3d 194, 197 (4th Cir. 1998).

Please indicate your position in the court:
- □ Appellate judge
- □ Staff attorney
- □ District judge
- □ Law clerk
- □ Bankruptcy judge
- □ Other __________________________
- □ Magistrate judge

1. How would you describe the length of the program? (please circle one)
   
   1 = Too short  2 = Just right  3 = 4 = 5 = 6 = 7 = Too long

2. How would you rate the program as an overview of evolving employment law?
   
   1 = Poor  2 = Average  3 = 4 = 5 = 6 = 7 = Excellent

3. What is your overall evaluation of the program faculty?
   
   1 = Poor  2 = Average  3 = 4 = 5 = 6 = 7 = Excellent

4. What is your overall evaluation of the program?
   
   1 = Poor  2 = Average  3 = 4 = 5 = 6 = 7 = Excellent

5. If you have suggestions for improving the program, please list them here (additional comments on a separate sheet are welcome):

6. If you have suggestions of topics for future FJTN programs, please list them here:

7. Did you watch the program when it was broadcast on the FJTN or later via videotape?
   
   □ broadcast  □ videotape

Please fax completed form to the Federal Judicial Center at 202-502-4299. No cover sheet is required. Thank you.

*Basics of Employment Law for Law Clerks*

*a Federal Judicial Television Network broadcast from the Federal Judicial Center*