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EMPLOYMENT DISCRIMINATION LAW UPDATE

By

Paul Grossman*

This is a supplement to Lindemann, Grossman & Weirich, Employment Discrimination Law (5th ed. 2013), and the 2015 Supplement put out by the ABA Section of Labor and Employment Law (Debra A. Millenson, Richard J. Gonzalez, and Laurie E. Leader, Executive Editors). It is organized by book chapters. The 2015 Supplement includes Court of Appeals decisions through 2013 and Supreme Court cases through June 30, 2015. With a few exceptions, this update begins with cases decided after January 1, 2014. It focuses almost exclusively on Court of Appeals and Supreme Court decisions.

Disparate Treatment (Ch. 2)

Summary Judgment Standards

Mayes v. WinCo Holdings, Inc., 846 F.3d 1274, 129 FEP 1565 (9th Cir. 2017) — Summary judgment reversed — female freight crew supervisor fired for taking stale cake and sharing it with crew — female general manager had expressed her belief that a man “would be better” in the position after she replaced plaintiff — she also stated she didn’t like that “girl” as crew leader — evidence that sharing stale cakes was common in combination with direct evidence warrants trial.
Tennial v. United Parcel Serv., Inc., 840 F.3d 292, 129 FEP 1145 (6th Cir. 2016) – Summary judgment in race/age demotion case – Black manager who failed to meet goals in performance improvement plan demoted to a supervisor – decision-maker used the “N” word in referencing another UPS employee – district president used the word “boys” in reference to plaintiff’s black co-workers – neither of the alleged comments was directed at plaintiff nor was the “N” word used in his presence – too great a jump to infer that the decision-making supervisor’s use of the “N” word in relation to an unrelated employee meant that his decision to demote plaintiff was due to a similar racial animus – “boy” can be discriminatory based on context, tone, and local custom – no indication that executive’s animus, if any, trickled down and influenced the decision-makers – direct evidence claim fails – circumstantial evidence fails because alleged comparators are not comparable – the alleged comparables were not demoted, were not “similarly situated in all relevant respects” – comparator one did not have similar experience and disciplinary history – comparator two did not have a comparable record of performance deficiencies – no record of performance deficiencies by comparator three – comparator four did not have comparable performance failures and in two years exceeded her performance goals – age claims dismissed on same basis as race claim.

Williams v. Office of Chief Judge of Cook Cnty., 839 F.3d 617, 129 FEP 1119 (7th Cir. 2016) – Black employee injured on job was receiving temporary total disability benefits – told to let employer know when she was able to return – plaintiff received an independent medical examination from the Cook County Medical Office determining that she was returning to work in December, 2010 – no one noticed this until June, 2011 – employer sent letter directing plaintiff to return to work on August 2 – plaintiff went to medical office for evaluation on August 1 and was approved to return to work but her personal physician disagreed and provided a note that she was not able to return to work – her attorney provided the County attorney with a letter from the physician stating she would be allowed to return to work on September 3 – plaintiff did not keep the employer informed of her new return to work date and was sent a termination letter based on her failure to communicate any intent to return to work – plaintiff claimed retaliation for a race discrimination complaint and race discrimination – summary judgment affirmed – 7th Circuit has discarded direct and indirect methods of proof – “There is simply not enough evidence for a reasonable factfinder to rule in favor of Williams,”
839 F.3d at 626 – comparator not similarly situated since comparator kept employer aware of all return to work facts.

Ortiz v. Werner Enters., Inc., 834 F.3d 760, 129 FEP 803, (7th Cir. 2016) – Summary judgment reversed – plaintiff subjected to barrage of ethnic slurs – discharged for engaging in conduct tolerated by non-Hispanic brokers – trial court erred in treating “direct” and “indirect” evidence as separate methods of proof requiring their own elements and in requiring that to avoid summary judgment employee demonstrate a “convincing mosaic” of discrimination – this is not the legal test – after-acquired evidence of misuse of company internet by sending and receiving sexually explicit messages cannot retroactively justify discharge but if uniformly enforced might reduce damages – panel of Posner, Easterbrook, and Hamilton – the sole question that matters is whether a reasonable jury can conclude that plaintiff would have kept his job if he had a different ethnicity but everything else was the same – even though this court has in the past used “convincing mosaic” as a legal requirement, that was clear error and these cases are overruled – the direct and indirect framework does nothing to simplify the analysis of the basic question of causation – District Courts must stop separating “direct” from “indirect” evidence – inconsistent cases ruled – McNell Douglas v. Green is sometimes referred to as an indirect means of proving discrimination – it does not matter what the case is called as a shorthand – what is important is that evidence not be put into different piles and labeled “direct” and “indirect.” Applying the correct test, a reasonable jury could infer that the decisionmakers didn’t much like Hispanics and fired him for using techniques that were tolerated when practiced by other brokers – a jury could also go the other way – but given the conflict, a trial is necessary.

O'Donnell v. Cleveland, 838 F.3d 718, 129 FEP 957 (6th Cir. 2016), reh’g, en banc denied 2016 U.S. App. LEXIS 20723 (6th Cir. Oct. 28, 2016), pet. for cert. filed Dec. 21, 2016 – Twelve white and one Hispanic police officers were involved in a shooting of two black drivers – they alleged they were placed on restricted duty for much longer than comparably situated black police officers who were involved in shootings – summary judgment for Cleveland – submitting a spreadsheet of relative discipline insufficient to establish that the situations were comparable.
Cherry v. Siemens Healthcare Diagnostics, Inc., 829 F.3d 974, 129 FEP 615 (8th Cir. 2016) – Allegedly biased supervisor gave plaintiff bad performance evaluations in years 2010 and 2011. Unbiased decisionmaker chose plaintiff for layoff based on low evaluations – Plaintiff claimed that “cat’s paw” theory applicable – theory not applicable – supervisor was not using unbiased decisionmaker as dupe because supervisor did not know layoff coming when gave evaluations – summary judgment for employer affirmed.

Rogers v. Pearland Indep. School Dist., 827 F.3d 403, 129 FEP 429 (5th Cir. 2016), cert. denied 2017 WL 160472, ___ U.S. ___ (Jan. 17, 2017) – Job applicant rejected because lied about three different criminal drug convictions – disparate treatment claim fails on summary judgment because alleged comparator not comparable – alleged comparator lied but only about one drug conviction – disparate impact claim fails because undisputed facts establish that convictions are not an automatic bar to employment and the record shows that the school district recently hired several employees with felony convictions – 2:1 decision – dissent contended that “[t]he majority’s application of the ‘nearly identical circumstances’ test to establish a ‘similarly situated comparator’ . . . is so strenuous that it effectively immunizes employers from disparate treatment claims unless the plaintiff is able to show that he shares identical traits with the alleged comparator,” 827 F.3d at 410.


Jones v. City of St. Louis, 825 F.3d 476, 129 FEP 313 (8th Cir. 2016) – Summary judgment affirmed – claim that paid medical leave allegedly caused by illegal racial stress was an adverse employment action because it depleted his accrued medical leave rejected – to the contrary allowing plaintiff to go on paid medical leave at his request provided him with “a favorable employment benefit” – therefore, no adverse action – claim that
poor overall performance rating was racially biased rejected because alleged comparables were not similarly situated.

*Johnson v. Perez,* 823 F.3d 701, 129 FEP 237 (D.C. Cir. 2016) – Summary judgment affirmed despite testimony of co-workers that Black temp terminated for poor performance and argumentative demeanor performed well on his joint projects with them and behaved well – testimony did not come from supervisors – temporary employee primarily worked alone and supervisors gave consistent explanations for discharge.

*Blackwell v. Alliant Techsystems, Inc.*, 822 F.3d 431, 129 FEP 141 (8th Cir. 2016), *reh'g and reh'g en banc denied* (Aug 15, 2016) – Summary judgment affirmed – black female protected age worker discharged for elbowing co-worker in back – alleged comparators had not committed act of physical violence – delay between incident and discharge of one month explained by employer’s desire to conduct full investigation – claim of retaliation fails despite contention that she was discharged the same day she sent an email to the company investigator – mere coincidence – employee had already been suspended for the event, Human Resources had completed its investigation, and had recommended discharge two weeks earlier.

*Chaib v. Geo Grp., Inc.*, 819 F.3d 337, 128 FEP 1809 (7th Cir. 2016) – Summary judgment affirmed on sex, race and national origin discrimination claims – employer concluded plaintiff was exaggerating the extent of her work related injuries and improperly extending her paid medical leave – racist comments by supervisor and co-workers insufficient to establish pretext since they were not decision makers – failed to show lack of an honest belief since there was video evidence of her driving and running errands while claiming to be unable to perform such tasks together with opinion of examining neurologist that she was malingering.
*Bagwe v. Sedgwick Claims Mgmt. Servs., Inc.*, 811 F.3d 866, 128 FEP 1253 (7th Cir. 2016), *cert. denied* 137 S. Ct. 82 (Oct. 3, 2016) – Summary judgment affirmed in race discrimination case – operations manager terminated because of poor interpersonal and leadership skills which allegedly lowered morale in the office – no inference of discrimination even though she met company goals – company had received numerous complaints about inability to work with others and had placed her on a performance improvement plan because of such concerns – pay allegation that she was paid less than her white colleagues rejected because of lack of evidence about whether they were subject to the same standards, had the same supervisors, or had comparable experience and qualifications.

*Smith v. Chicago Transit Auth.*, 806 F.3d 900, 128 FEP 584 (7th Cir. 2015) – Summary judgment affirmed on black employee’s claim that sexual harassment discharge constituted disparate treatment because white comparators treated more favorably – Plaintiff failed to present sufficient information regarding proposed comparators to determine whether they report to the same supervisor, what the comparator allegedly did, whether there was an investigation, and what if any discipline was imposed.

*Flowers v. Troup Cnty., Ga. Sch. Dist.*, 803 F.3d 1327, 128 FEP 212 (11th Cir. 2015) – summary judgment affirmed against black high school football coach fired for recruiting violations – plaintiff was first black head football coach in the county since it was desegregated – multiple letters to school district from neighboring district questioned eligibility of certain students as to whether they lived in the proper school district – while investigation may have been “ham-handed,” and one could reasonably conclude that the school superintendent “had it in for Flowers from the beginning,” there was no evidence that the investigation of recruiting violations was a pretext for discrimination – alleged comparative evidence of two white head football coaches at other schools in the county who were disciplined for recruiting violations rejected – the facts as to the “intensity and frequency” of the violations were totally different – “The obvious differences between Flowers’s circumstances and those of his purported comparators are hardly the stuff of an apples-to-apples comparison,” 803 F.3d at 1341.
Woods v. City of Berwyn, 803 F.3d 865, 128 FEP 129 (7th Cir. 2015) – Summary judgment affirmed despite cat’s paw contention – firefighter told co-worker he wanted to kill his fellow firefighters and their superiors – fire chief investigated and recommended termination – three member panel of Board of Fire Commissioners conducted evidentiary hearing with plaintiff represented by council – cat’s paw argument rejected – even assuming chief wanted to terminate plaintiff based on age and physical limitations, Commission conducted independent investigation – in Staub, the Court noted “there are acts that can change the subordinate’s discriminatory animus from a proximate cause to a cause that is too remote to support cat’s paw liability,” 803 F.3d at 870 – chain of causation can be broken if the unbiased decision-maker conducts a meaningful and independent investigation – “To hold otherwise would be to rule that whenever a discriminatory subordinate makes an allegation or institutes a charge and the plaintiff-employee is fired, there are no steps the ultimate decision-maker could ever take to break that chain of proximate causation. That cannot be so.” Id. Even though the allegedly biased superior recommended termination, “the Board’s formal and adversarial procedures and the evidence that the Board relied on to support its decision to terminate . . . broke the chain of causation.” Id. “[The biased superior] might have instituted the action, but once the Board began its hearing, it determined that the ‘adverse employment action was, apart from the supervisor’s recommendation, entirely justified.’” Staub v. Proctor Hosp., 562 U.S. 411, 421 (2011).” Id. at 871.

Burley v. National Passenger Rail Corp., 801 F.3d 290, 128 FEP 1 (D.C. Cir. 2015) – African American train engineer fired when he ran his engine past the stop signal and caused a derailment – he contended that a racial motivation could be inferred because (1) the punishment was disproportionate for a first offense; and (2) he could show that the investigation was flawed – there was a hearing that concluded that the charges had been proven – an internal appeal was denied, but an external appeal concluded Burley had committed the violation but reinstated him without back pay – the Locomotive Engineer Review Board found a lack of substantial evidence that a warning signal was properly displayed and overturned the suspension of his engineering certificate – summary judgment affirmed – Amtrak’s final decision maker was not aware of Burley’s race – plaintiff contended that his supervisor, who did the initial investigation, was biased, and thus it was a cat’s paw case – but he had no evidence that his immediate supervisor was motivated by race – even
though the Locomotive Engineer Review Board’s assessment indicated that a jury might conclude that no warning notice was properly displayed, that, without more, is not a ground “on which a reasonable jury could conclude that [the supervisor] was so far off base as to suggest he acted with a racial motive,” 801 F.3d at 298 – while a jury can conclude that the investigation included “an error so obvious it must have been intentional,” 801 F.3d at 300 – plaintiff’s contention that Amtrak disciplined him significantly more harshly than white employees is rebutted by the fact that the decision maker who decided on the level of discipline did not know his race – “we find no basis in the record upon which a reasonable factfinder could conclude that whatever investigative flaws or unfairness Barley may have suffered . . . were so unexplained or otherwise striking as to suggest that Amtrak was motivated by Burley’s race to discipline him,” 801 F.3d at 302.

_Miller v. St. Joseph Cnty., 788 F.3d 714, 127 FEP 448 (7th Cir. 2015)_ – Summary judgment against police officer who claimed unpleasant assignment to sort guns in police department’s property room constituted racial discrimination – Posner Opinion – “Someone” had to do that job – no change in pay or benefits – summary judgment because of a lack of evidence tying multiple adverse employment decisions to race – Posner joined Judge Diane Wood in advocating abandonment of the cumbersome direct and indirect method of proving discrimination – to defeat summary judgment a plaintiff should be required to show membership in a protected class, an adverse employment action, and that a jury reasonably could find that the adverse action was taken because of protected status and not for a non-discriminatory reason.

_Thomas v. Johnson, 788 F.3d 177, 127 FEP 335 (5th Cir. 2015)_ – Provisionary border patrol agent terminated for lack of candor – was found to have lied about events of possible misconduct relating to others – lack of candor is a legitimate basis for termination.
Mintz v. Caterpillar Inc., 788 F.3d 673, 127 FEP 317 (7th Cir. 2015) – Summary judgment in race disparate treatment case affirmed – no *prima facie* case since employee not meeting employer’s legitimate expectations – employer expected zero errors of a particular type, and plaintiff, an engineer, had many errors – he admitted his record was “bad” – thus he did not “raise a genuine issue of fact as to whether he was meeting Caterpillar’s legitimate expectations,” 788 F.3d at 680 – Moreover, even if he could meet that burden, he has not identified any other employee with a similar record whom Caterpillar treated more favorably – plaintiff argument that Caterpillar’s expectations were unreasonable rejected – “A federal court does not sit as a ‘super personnel department,’ second-guessing an employer’s legitimate concerns about an employee’s performance,” id.

Washington v. American Airlines, Inc., 781 F.3d 979, 126 FEP 1057 (8th Cir. 2015) – Five whites and one black applied for a machinist position, which required satisfactory completion of an examination – four of the whites, who passed, were not comparable, because they were tested by a different examiner – the examiner who flunked the plaintiff also flunked the white applicant he tested – this negated any racial motivation.

Simpson v. Beaver Dam Cmty. Hosps., Inc., 780 F.3d 784, 126 FEP 648 (7th Cir. 2015) – Summary judgment affirmed against black physician denied staff privileges – comments by member of credentials committee about plaintiff’s disruptive behavior and being a “bad actor,” and that plaintiff might be a “better fit” elsewhere, are not, under the facts of this case, indicative of racial discrimination – it was undisputed that plaintiff was put on academic probation while in residency, that there were two uninsured medical malpractice claims against him, and that the credentials committee received a negative reference from a staff member at one of plaintiff’s former employers – “[R]ather than refuting the facts that underlie the [hospital’]s concerns, [plaintiff] simply argues that the concerns should not have mattered[,]” 780 F.3d at 798-99 – “That is his view, but the Credentials Committee is entitled to its own view, provided it is not based on an impermissible animus such as race. And the record does not raise a reasonable inference that it was[,]” id. at 799
Estate of Bassatt v. Sch. Dist. No. 1, 775 F.3d 1233, 125 FEP 1171 (10th Cir. 2014) – Hispanic student teacher terminated for masturbating in school parking lot – Hispanic supervisor was decisionmaker – plaintiff had previously complained of discrimination – Administrative Agency found retaliation – not binding since not reviewed by a court – summary judgment for School District – “the relevant inquiry is whether [the Hispanic decisionmaker] subjectively, but honestly, believed that [the employee] had engaged in the misconduct,” 775 F.3d at 1241 – in addition, “Sanchez is Latino, and we conclude that this undermines any suggestion of pretext,” id. – decisionmaker was a founding member of a group that advocates for Latinos in education.

Moody v. Vozel, 771 F.3d 1093, 125 FEP 261 (8th Cir. 2014), cert. denied, 135 S. Ct. 2814 (2015) – White male employee discharged for sexual harassment – irrelevant if co-worker’s statement was motivated by racial animus since co-worker is not decisionmaker and no link between statement and employer’s decision to terminate – no evidence employer believed harassment allegations were false – other employees who engaged in harassment and were not terminated were not similarly situated.

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

Lobato v. N.M. Env’t Dep’t, Envtl. Health Div., 733 F.3d 1283, 120 FEP 989 (10th Cir. 2013) – No cat’s paw liability – supervisor called Hispanic plaintiff “f***ing Mexican” – reliance on Staub – plaintiff contends that Staub has announced a categorical rule that if a biased supervisor’s animus in any way leads to an adverse employment decision, it is the proximate cause even if there is an independent investigation – “Staub does not go this far,” 733 F.3d at 1294 – Staub explained that a necessary element of a claim is the decisionmaker’s uncritical “reliance” on facts provided by a
biased supervisor – “If there is no such reliance – that is to say, if the employer independently verifies the facts and does not rely on the biased source – then there is no subordinate bias liability,” id. – *Staub* recognized the problem that a biased supervisor will frequently initiate an investigation but the decision will be made independently by others – in *Staub* the court explained “the supervisor’s biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor’s recommendation, entirely justified,” id. (emphasis in original) – “In short, an employer is not liable under a subordinate bias theory if the employer did not rely on any facts from the biased subordinate in ultimately deciding to take an adverse employment action—even if the biased subordinate first alerted the employer to the plaintiff’s misconduct,” 733 F.3d at 1295 – in *Staub* there was a claim of falsification and the HR Rep did not follow up – here there is no evidence the decisionmakers relied upon the biased supervisor’s version of the facts – “Because there is no genuine dispute that [the employer] decided to dismiss [the plaintiff] after conducting an independent investigation without relying on facts from [the biased supervisor], we conclude this theory of Title VII liability fails,” id. at 1296 – summary judgment affirmed.

**Ross v. Jefferson Cnty. Dep’t of Health**, 701 F.3d 655, 116 FEP 930, 27 A.D. Cas. 1 (11th Cir. 2012) – Summary judgment properly granted on black employee’s race discrimination claim since she waived her complaint of racial discrimination when she was asked whether she “felt like her termination had anything to do with her race” and she responded “no.” 701 F.3d at 661 (alterations omitted).

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

*Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 128 FEP 1334 (11th Cir. 2016) – Mixed-motive burden of proof – a plaintiff asserting a mixed-motive claim need only produce evidence sufficient to show that one of plaintiff’s protected characteristics was “a” motivating factor for the challenged adverse employment action – this is all that is necessary to survive summary judgment – the *McDonnell Douglas* burden-shifting framework is inapplicable since it assumes a single “true reason” – reasonable jury could conclude that sexist comments by three of the school board members who decided not to renew female school superintendent’s contract established that illegal bias played a role.

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

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

_Rapold v. Baxter Int’l, Inc.,_ 718 F.3d 602 (7th Cir. 2013), _cert. denied_, 134 S. Ct. 525 (2013) – Federal District Court properly denied plaintiff’s request for a mixed-motive instruction – plaintiff alleged an adverse employment action because of his national origin – the employer asserted that it acted because of the plaintiff’s misconduct which included yelling and screaming at co-workers – no evidence of mixed-motive – each party contended there was a single motive – refusal to give a mixed-motive instruction is reviewed for abuse of discretion – “the question of when a mixed-motive instruction is appropriate has engendered considerable confusion,” 718 F.3d at 609 – several Circuits now provide a mixed motive instruction in all Title VII cases – the District Court agreed with the employer that under the evidence the mixed-motive instruction was inappropriate – plaintiff need not concede at trial the legitimacy of the employer-stated reason to seek a mixed-motive instruction – the rule in question is not whether the plaintiff concedes that there is a legitimate reason “but whether the case overall is one where either the plaintiff or the
defendant’s evidence lends itself to coexisting dual causes for an adverse employment action,” 718 F.3d at 611 – it is important to remember that a case will not always be easily identified as either “pretext” or “mixed-motive” – at some point in the proceedings the District Court must decide.

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

*Jones v. City of Boston*, 845 F.3d 28, 129 FEP 1420 (1st Cir. 2016) – Summary judgment in favor of City on drug hair test disparate impact claim reversed – the employer established job relatedness and business necessity – abstention from drug use is an important element of police behavior – however, a reasonable jury could find that the plaintiff’s proposed alternative, follow-up urinalysis tests for officers who tested positive for drug use, and case has to be remanded to be tried on that theory.

*Lopez v. City of Lawrence*, 823 F.3d 102, 129 FEP 182 (1st Cir. 2016), *pet. for cert. docketed ___ U.S. ___* (Dec. 16, 2016) – Police officer promotion tests developed by state agency with an instruction to create a selection took that “fairly test[s] the knowledge, skills and abilities which can be practically and reliably measured and which are actually required,” 823 F.3d at 107 – test had an adverse impact – after an 18-day bench trial the trial court determined that the test had an adverse impact but that it was a valid selection tool and that Plaintiffs failed to prove there was an alternative selection tool that was as valid that would have resulted in more minority promotions – historical purpose of exams was that there was blatant segregation in public employment including the Boston Police Department and the exams were seen as a way to move away from racism and nepotism. The exams in question had two components – job knowledge multiple choice written examination scored on a 100 point scale, and an education and experience rating also scored on a 100 point scale. The written examination accounted for 80 percent and the education experience, the remaining 20 percent – a score of 70 was needed to be considered for promotion – the subject matter on the exams can be traced back to a 1991 validation study by the state agency responsible for the exam – that study surveyed police officers in 34 jurisdictions nationwide through a questionnaire that sought to ascertain the kinds of knowledge, skills, and abilities that are critical – they made a list of knowledge and traits and distributed that to high-ranking police officers.
who were asked to rank those traits – the municipalities were provided with a list of test takers who passed, ranked in order of their test scores – they were selected in strict rank order – this meant that all of those who were promoted scored well above the minimum being acceptable – the issue of whether the test is “job related . . . and consistent with business necessity” is whether or not it is valid – whether it materially enhances the employer’s ability to pick individuals who are more likely to perform better – here, Boston sought to demonstrate content validity – the questions are a representative sample of job behaviors – the Federal Uniform Selection Guidelines are not inflexible and binding legal standards that must be rigorously applied – in *Ricci*, the Supreme Court’s most recent disparate impact decision, the court found New Haven’s firefighter promotional exam job related without mentioning the guidelines – even on their own terms, the guidelines poorly serve the controlling role assigned them by plaintiffs in this case – they provide no quantitative measure for drawing the line between representative and non-representative samples of job performance – Boston relied on the expert testimony of Dr. James Outtz, an industrial organizational psychologist who had 20 years of experience – he opined that the exams identified critical skills actually used by police sergeants – Outtz opined that the written question and answer portion of the exam standing alone did not pass muster but when considered with the education and experience component it did – the plaintiffs relied on their own expert, Dr. James Wiesen – the Judge concluded that Outtz was correct – the question of whether a test has been validated is primarily a factual question which is reviewed for clear error – our affirmance of the trial court finds for support the absence of any quantitative measure of “representativeness” provided in the law – the plaintiffs and the United States as amicus relied on our analogy in our earlier *Beecher* case that knowledge of baseball vocabulary possessed by a potential recruit for the Red Sox who could not bat, pitch, or catch would be irrelevant – but here knowledge of the law on behalf of a sergeant is critical to the job – the more accurate baseball analogy would be the hiring of a coach who must have an extensive knowledge of the rules that must be followed by those being managed – plaintiffs attacked the selection based on rank order – plaintiffs contend that this requires a higher level of validity than use of an exam that is minimally valid – the guidelines are inconsistent on the point – some courts seem to require more scrutiny of the validation evidence when it is used in rank order – the district court here required a separate demonstration that there is a relationship between higher scores and better job performance – but there is no showing that an increased number of
Black or Hispanic applicants likely would have been selected under an alternative approach – rank ordering furthers the city’s interests in eliminating patronage and intentional racism – the record contains detailed professionally buttressed findings that persons who perform better under the test are likely to perform better on the job – that is sufficient – the plaintiffs clearly failed to come up with an alternative which would be equally valid with a lesser impact – Decision was 2 to 1 with Judge Torruella in dissent.

_Abril-Rivera v. Johnson_, 795 F.3d 245 (1st Cir. 2015) – Title VII in 42 U.S.C. § 2000e-2(h) (the “safe harbor” provision) provides in relevant part that “[n]otwithstanding any other provision . . . ., it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment . . . to employees who work in different locations, provided that such differences are not the result of an intention to discriminate . . . .” – In this case employees at a FEMA facility in Puerto Rico were put on a rotational schedule when their facility was undergoing safety related repairs and then were laid off when the facility was closed – they filed a disparate impact national origin claim – the U.S. Court of Appeals 2-1 held that the above quoted provision required proof of intent, therefore barring an adverse impact claim – the dissent relied on the fact that the employer did not raise the safe harbor defense below – the majority agreed that normally this is required, but there are exceptions and found that Circuit Courts may raise issues on their own when certain conditions are met – the majority analyzed six conditions, and found that four of them were met and allowed consideration of the safe harbor defense.

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

*Johnson v. City of Memphis*, 770 F.3d 464, 124 FEP 1741 (6th Cir. 2014) – Police promotional process—equally-weighted test components: an investigative logic test; a job knowledge test; an application of knowledge test; a grammar and clarity test; and a video-based practical test – trial court found test job related, but ruled for plaintiffs because there were less discriminatory alternatives – court of appeal affirmed finding on job relatedness, but reversed the district court’s finding on available alternatives with a lesser impact – trial court accepted plaintiffs’ “broad suggestions [of] alternative testing modalities” as satisfying their Step-Three burden – Title VII requires that plaintiffs prove the availability of equally valid less discriminatory measures, and here the district court did not find equal validity – trial court essentially believed city should have used procedures that eliminated impact in 1996, but those procedures were comprised by security flaws – furthermore, the 1996 simulation required multiple actors to portray a two-hour law enforcement scenario that took nearly three months to evaluate more than 400 applicants – the court should have considered the city’s legitimate interests in test security and practicability in considering the plaintiffs’ alternatives – district court erred by relying solely on the past success of the 1996 process in determining that the 2002 process should have incorporated a large simulation – these legal errors improperly shifted the plaintiffs’ evidentiary burden to the city – appellate court rules as a matter of law that the plaintiffs’ purported showing of equally valid, less discriminatory alternatives is inadequate, and does not even present a triable issue – one
of the alternatives allows for subjectivity, which opens the door to random results and real or perceived bias – basically, the plaintiff’s Step-Three showing was no more than “broad suggestions” which is insufficient – plaintiffs’ attack on job validity rejected in an extremely detailed opinion relying on the city’s extensive job analysis.

_EEOC v. Kaplan Higher Educ. Corp._, 748 F.3d 749, 122 FEP 509 (6th Cir. 2014) – Federal district court properly found that EEOC’s expert attempting to show disparate impact of credit checks “flunked” all _Daubert_ reliability tests – expert attempted to determine the applicant’s race by looking at DMV photos – no way to show that this has been tested or to show error rates – expert’s race raters just eyeballed DMV photos to determine race – EEOC itself runs credit checks on applicants for 84 of the agency’s 97 positions – EEOC’s assertion was that Kaplan’s use of credit checks causes it to screen out more African-American applicants than white applicants pleading disparate impact – EEOC relied solely on its statistical expert – we rely primarily on _Daubert_ factors requiring that a technique for reliability be able to be tested and furthermore, that the court can consider the known or potential rate of error – the EEOC wholly failed to provide evidence to support either of these factors – another factor is whether the theory has been subjected to peer review – no evidence supported this factor – “The EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself.” 748 F.3d at 754 – the district court’s dismissal of the case was affirmed.

_Adams v. City of Indianapolis_, 742 F.3d 720, 121 FEP 948 (7th Cir. 2014), _cert denied_, 135 S. Ct. 286 (2014) – Judgment on the pleadings in disparate impact case challenging promotion procedure affirmed – no right to amend – District Court wrong in relying on lack of facially neutrally employment policy since disparate impact claims may be based on any employment policy, not just facially neutral – allegations of intentional discrimination do not defeat disparate impact claims – the judgment on the pleadings proper because the amended complaint fails to state a plausible claim through disparate impact – the amended complaint must satisfy the _Twombly/Iqbal_ plausibility standard – but the amended complaint alludes to disparate impact in wholly conclusory terms – words like “disproportionate” “impermissible impact” are legal conclusions, not facts
– “There are no allegations about the number of applicants and the racial makeup of the applicant pool as compared to the candidates promoted or as compared to the police or fire department as a whole,” 742 F.3d at 733
– “There are no factual allegations tending to show a causal link between the challenged testing protocols and a statistically significant racial imbalance . . . .” id. – no abuse of discretion in denying plaintiff’s second motion for leave to amend – summary judgment granted in disparate treatment claims – better scores on the test is a legitimate non-discriminatory reason.

Race and Color (Ch. 6)

Cole v. Bd. of Trust. of N. Ill. Univ., 838 F.3d 888, 129 FEP 949 (7th Cir. 2016) – Summary judgment properly granted on hostile work environment claim – black employee downplayed noose incident anonymously placed in workspace – basic allegation was that department was rife with improper practices, favoritism, unauthorized commodity orders, and the like – record does not indicate any instances of hostility beyond noose incident connected to race and no evidence supervisor involved in race incident – University reasonably reported noose incident to University police.

EEOC v. Catastrophe Mgmt. Solutions, ___ F.3d ___, ___ FEP ___, 2016 WL 7210059 (11th Cir. Dec. 13, 2016) – EEOC disparate treatment race claim based on employer’s rescission of job offer to black applicant who refused to remove dreadlocks pursuant to company grooming policy properly dismissed – EEOC conflates the distinct Title VII theories of disparate treatment, the sole basis on which the case has been filed, and disparate impact, the theory it has disclaimed in this case – Title VII enacted to protect immutable inherited physical characteristics of race, not grooming – EEOC compliance manual linking grooming practices to race is not persuasive in light of overwhelming case law and EEOC’s own administrative decision declaring different employer’s dreadlocks ban outside scope of federal discrimination law – Section 12(b)(6) dismissal affirmed since the proposed amended complaint does not set out a plausible claim of race discrimination – EEOC contention that Young v. United Parcel Srvc. Inc., 135 Sup. Ct. 1338 (2015) supports its use of disparate impact arguments in this action rejected – Young does not work a dramatic shift in disparate treatment jurisprudence – Young indicated in a
pregnancy context that a plaintiff could prove that their employer’s preferred reasons are pretextual but providing evidence that the policies impose a significant burden on pregnant workers and that the employer’s legitimate non-discriminatory reasons are not sufficiently strong enough to justify the burden – Young still requires intentional discrimination – we do not read Young to stand for the proposition that an employer’s neutral policy can engender disparate treatment liability merely because it has an unintended adverse effect on members of a protected group – as a general matter Title VII protects persons in covered categories with respect to their immutable characteristics, but not their cultural practices – “We recognize that the distinction between immutable and mutable characteristics of race can sometimes be a fine line (and difficult) one, but it is a line courts have drawn. So, for example, discrimination on the basis of black hair texture (an immutable characteristic) is prohibited by Title VII, while adverse action on the basis of black hair style (a mutable choice) is not.” 2016 WL 7210059, at *9 (citations omitted) – the EEOC’s admission that the employer’s grooming policy is race neutral but nevertheless contending that it constitutes disparate treatment race discrimination is logically inconsistent: “The Compliance Manual also runs headlong into a wall of contrary caselaw. In the words of a leading treatise, ‘[c]ourts generally have upheld facially neutral policies regarding mutable characteristics, such as facial hair, despite claims that the policy has an adverse impact on members of a particular race or infringes on the expression of cultural pride and identification.’ BARBARA LINDEMANN & PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 6-5 (5TH ED. 2012).” 2016 WL 7210059, at *11. “As far as we can tell, every court to have considered the issue has rejected the argument that Title VII protects hair styles culturally associated with race.” Id. “We would be remiss if we did not acknowledge that, in the last several decades, there have been some calls for courts to interpret Title VII more expansively by eliminating the biological conception of ‘race’ and encompassing cultural characteristics associated with race. But even those calling for such an interpretive change have different visions (however subtle) about how ‘race’ should be defined.” 2016 WL 7210059, at *12 – With respect to the mutable/immutable distinction, “It may not be a bad idea to try to resolve through the democratic process what ‘race’ means (or should mean) in Title VII.” 2016 WL 7210059, at *13.
Jordan v. Turner Indus. Grp., LLC, 642 Fed. App’x 420, 128 FEP 1825 (5th Cir. 2016) – Summary judgment on claim by “lead man” laborer who asserted that employer failed to take any action to enforce its discrimination policy after rope resembling hangman’s noose was found at job site – claimed improper discharge – summary judgment since reduction in force included a total of 116 employees as job wound down was reason for discharge, and plaintiff failed to show that “lead men” were laid off last.

Ayissi-Etoh v. Fannie Mae, 712 F.3d 572, 117 FEP 1551 (D.C. Cir. 2013) – Summary judgment in racial hostile environment case reversed – a single incident of the employer’s vice-president using the “n” word when he yelled at the employee to get out of his office “might well have been sufficient” by itself for a jury to find harassment severe or pervasive enough, according to two members of the three-member panel – “[P]erhaps no single act can more quickly alter the conditions of employment’ than ‘the use of an unambiguously racial epithet such as [the “n” word] by a supervisor[,]’” 712 F.3d at 577 (citation omitted) – the concurring member of the panel would have found that the single use of the “n” word was sufficient in and of itself to establish a hostile environment claim – although “cases in which a single incident can create a hostile work environment are rare. . . . [n]o other word in the English language so powerfully or instantly calls to mind our country’s long and brutal struggle to overcome racism[,]” id. at 579-80 (Kavanaugh, J., concurring).

National Origin and Citizenship (Ch. 7)

Village of Freeport v. Barrella, 814 F.3d 594, 128 FEP 1345 (2d Cir. 2016) – Reverse discrimination case – white candidate for police chief alleged that Cuban-born Hispanic chosen for racial reasons – does not matter that successful candidate self-identified himself as “white” – Hispanic ethnicity constitutes race as a matter of law – defendant not entitled to judgment as a matter of law – jury verdict for plaintiff set aside for unrelated reasons and new trial ordered.
Religion (Ch. 9)

*EEOC v. Abercrombie & Fitch Stores, Inc.*, ___ U.S. ___, 135 S. Ct. 2028, 2015 WL 2464053 (2015) – Abercrombie has a “look” policy that prohibits “caps” – it refused to hire Elauf, a practicing Muslim who wears a headscarf for religious reasons – the assistant manager informed the district manager “that she believed Elauf wore her headscarf because of her faith.” [The district manager stated] that “Elauf’s headscarf would violate the Look Policy, as would all other headwear, religious or otherwise . . . .” 135 S. Ct. at 2031. The Tenth Circuit directed summary judgment on the ground that Elauf did not inform Abercrombie of her need for a religious accommodation – the Supreme Court rejected this view, stating “an applicant need only show that his need for an accommodation was a motivating factor in the employer’s decision,” 135 S. Ct. at 2032 – Title VII does not impose a knowledge requirement, although some anti-discrimination statutes do – “an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed,” 135 S. Ct. at 2033 – imposing a knowledge requirement would be to usurp the legislative function – however, “While a knowledge requirement cannot be added to the motive requirement, it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice – *i.e.*, he cannot discriminate ‘because of’ a ‘religious practice’ unless he knows or suspects it to be a religious practice. That issue is not presented in this case . . . . It seems to us inappropriate to resolve this unargued point by way of dictum, as the concurrence would do.” Id. at n.3.

*Yeager v. FirstEnergy Generation Corp.*, 777 F.3d 362, 125 FEP 1685 (6th Cir. 2015) – Employee for religious reasons refused to provide social security number – employer legitimately refused to hire him – regardless of employee’s beliefs federal statute and internal revenue code requires employers to collect and provide social security numbers of their employees, and accommodation for religion does not extend that far.
Community-based organizations that have contracts with state to provide care to developmentally disabled persons can be required to accompany such persons to church services even if such church service is in contradiction to the employee’s own religious beliefs and practices.

Employer required all technical support employees to work a weekend to install computers – Plaintiff claimed she was unable to work that Sunday morning because of a previous religious commitment – at her Pastor’s request she needed to attend a special church service to feed the community – the employer denied her request on the ground that it wasn’t based on a religious belief or practice – summary judgment for the employer was reversed 2-1 – the two judge majority found that the District Court erred because it improperly focused on “the nature of the activity itself” (feeding the poor) instead of addressing the sincerity of religious belief – the dissenting opinion found that the majority’s conclusion departed from other circuits which have held that the courts must consider both whether the belief was religious in nature and whether it is sincerely held – the dissent also found that there would be undue hardship to have a technically sophisticated supervisor absent at a crucial time.

In original opinion, Fifth Circuit reversed jury award to plaintiff who was discharged for refusing to pray the Rosary with a patient – Supreme Court granted review and remanded for reconsideration in light of EEOC v. Abercrombie & Fitch Stores, 135 S. Ct. 2028 (2015) – Fifth Circuit reaffirms – plaintiff claimed she was discharged for exercising her religious beliefs – jury had no legally sufficient basis to find religious discrimination because claimant put forth no evidence that her employer was aware of her religious beliefs before her discharge – “We simply cannot find evidence that, before her discharge, Nobach ever advised anyone involved in her discharge that praying the Rosary was against her religion.” 799 F.3d at 378 – if there was evidence that the employer knew that she was motivated by religious belief the jury would have been entitled to rule in her favor – post discharge knowledge not material.
Sex (Ch. 10)

Young v. United Parcel Service, Inc., ___ U.S. ___, 135 S. Ct. 1338, 126 FEP 765 (2015) – Pregnancy Discrimination Act requires that employers treat “women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work” – UPS accommodated many but not all workers with all non-pregnancy related disabilities with light duty work – claim was only disparate treatment – not disparate impact – UPS limited light duty work to (1) workers injured on the job; (2) workers with ADA covered disabilities; and (3) workers who lost their Department of Transportation (DOT) certifications – court rejects plaintiff’s claim that if the employer accommodates any subset of workers with disabling conditions, it must accommodate pregnant workers – Congress did not intend “most favored nation” status so that if the employer accommodated anybody it had to accommodate all pregnant workers – disparate treatment law normally allows an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes does harm those members, as long as the employer has a legitimate and non-discriminatory, non-pretextual reason for doing so – 2014 EEOC Guidelines adopted after certiorari was granted rejected – guidelines lack timing, consistency and thoroughness of consideration which is necessary to give it “power to persuade” – pregnant worker can establish a prima facie case by showing that employer did accommodate others “similar in their ability or inability to work” – the employer can then defend by relying on legitimate, non-discriminatory reasons for offering accommodation to some but not others – expense would not normally suffice – assuming a legitimate non-discriminatory reason, “the plaintiff may reach a jury . . . by providing sufficient evidence that the employer’s policies impose a significant burden on pregnant workers, and that the employer’s ‘legitimate, non-discriminatory’ reasons are not sufficiently strong to justify the burden, but rather – when considered along with the burden imposed, give rise to an inference of intentional discrimination[,]”135 S. Ct. at 1343 – “The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers[,]” 135 S. Ct. at 1355 – “This approach, though limited to the Pregnancy Discrimination Act context, is consistent with our longstanding rule that a plaintiff can use circumstantial proof to rebut an
employer’s apparently legitimate non-discriminatory reasons . . . .” – “[T]he continued focus on whether the plaintiff has introduced sufficient evidence to give rise to an inference of *intentional* discrimination avoids confusing the disparate-treatment and disparate-impact doctrines,” *id.* (emphasis in original) – “We do not determine whether Young created a genuine issue of material fact . . . . We leave a final determination of that question with the Fourth Circuit . . . .” 135 S. Ct. at 1356 – five Justices, including Chief Justice Roberts, joined in the Opinion of the Court – Justice Alito concurred in Judgment – he was bothered by the fact that employees who lost their DOT certification were accommodated, even when the loss was for misconduct such as drunk driving or off the job injuries – “It does not appear that respondent has provided any plausible justification for treating these drivers more favorably than drivers who are pregnant[,]” – 135 S. Ct. at 1360 – the three Justice dissent (Scalia, Thomas and Kennedy) contended that the majority conflated disparate impact with disparate treatment – “Where do the ‘significant burden’ and ‘sufficiently strong justification’ requirements come from? Inventiveness posing as scholarship – which gives us an interpretation which is as dubious in principle as it is senseless in practice[,]” 135 S. Ct. at 1361 – the Court “proceeds to bungle the dichotomy between claims of disparate treatment and claims of disparate impact,” 135 S. Ct. at 1365 – but “plaintiffs in disparate-treatment cases can get compensatory and punitive damages as well as equitable relief, but plaintiffs in disparate impact cases can get equitable relief only[,]” *id.* – Court does claim that the new test is somehow limited to pregnancy discrimination – “Today’s decision can thus only serve one purpose: allowing claims that belong under Title VII’s disparate impact provisions to be brought under its disparate-treatment provisions instead[,]” 135 S. Ct. at 1366.

*Ernst v. City of Chicago*, 837 F.3d 788, 129 FEP 968 (7th Cir. 2016) – Summary judgment in favor of city reversed with respect to physical abilities test that allegedly has disparate impact on female paramedic candidates – test was neither reliable nor properly validated under federal law to ensure that it actually measured skills needed to perform the paramedic job – prior to the year 2000, there was no physical skills requirement for paramedics – Deborah Gephardt, the president of Human Performance Systems, led the test creation – she tested volunteer paramedics – 98% of male applicants passed the test, but only 60% of female applicants – plaintiffs had all worked as licensed paramedics with other public fire departments and in their daily work they moved patients
and did so safely despite having failed the Chicago examination – the lawsuit had two parts – they alleged in the disparate treatment part that the strength test was designed to keep women out – on disparate impact, they argued that improper methods were used to establish the test – in the disparate treatment case, the magistrate had rejected a “but for” test, but the trial court reinstated it – this was error – the jury asked for clarification of “but for,” the court refused, and the jury held for the defense – on the disparate impact case, the court concluded that the validation study satisfied the city’s burden – “but for” was in error in a case of this type where the allegation was that Chicago created a new standard operating procedure – the jury should have been instructed that the only question was whether Chicago was motivated by anti-female bias – with respect to disparate impact, the purported validity study was a criterion related validity study – job performance ratings were solicited from supervisors and peers this was one set of criteria – in addition, work samples which were supposed to represent on-the-job skills were another set of criteria – there are two types of criterion based validity studies – predictive or concurrent – an example of predictive is college entrance examinations – here Gephardt chose to conduct a concurrent validity study – volunteers’ physical skills in Chicago were unusually high compared to other paramedics in other cities – she therefore lowered the physical scores by using another physical test of New York City paramedics – she then obtained ratings of the job performance of the volunteers – based on supervisor and peer ratings, volunteer female paramedics performance was very close to volunteer male paramedics’ performance – though women performed far less well than men on strength tests which would appear to invalidate the physical skills test – therefore the supervisor and peer ratings were set aside – Gephardt then set aside the job performance ratings against which to validate the skills test – Gephardt found three physical tests valid – stair climb, arm endurance, and leg lift – in order to do a study with volunteers, the volunteers have to be representative of the relative rate labor market – next, the skills tested must be the primary focus of skills or knowledge required on the job – seeking volunteers presents an obvious concern – the strongest employees are the most likely to volunteer – it is admitted that they did not represent the skill set in the general population of Chicago paramedics – next, since the study was concurrent, the test had to focus on primary skills learned on the job with respect to liability, there was only a 50/50 chance the strength tests were reliable – finally there was a serious question as to whether the work samples were a valid measure of job skills – in this case at least two out of the three strength tests are not valid – “Thus, the plaintiffs should have
prevailed on their Title VII disparate-impact claims,” 837 F.3d at 805 – the disparate treatment claims are reversed for a new trial – the disparate impact summary judgment is reversed with instructions to enter judgment for the plaintiffs.

*Legge v. Ulster Cnty.*, 820 F.3d 67, 129 FEP 37 (2d Cir. 2016) – Employer limited light-duty jobs to persons injured on the job – plaintiff sued for pregnancy discrimination, relying on *Young v. UPS* – District Court which granted judgment as a matter of law at the close of plaintiff’s case reversed – under *Young*, jury was entitled to consider whether the county’s policy was motivated by discriminatory intent – employer gave legitimate non-discriminatory reason – state law requires that corrections officers injured on the job continue to receive pay – there were some statements indicating employer believed that pregnant women should not risk injury – reasonable jury could find that defendant’s explanation (compliance with state law) is pre-textual – also plaintiff could proceed under the *Young v. UPS* framework – a reasonable jury could conclude that defendant imposed a significant burden on pregnant employees – during the relevant timeframe only one corrections officer became pregnant – the plaintiff – so there was a 100% denial of light duty to pregnant workers – defendant suggests that these figures show that pregnant employees were not significantly burdened since only one of its 176 correction officers were affected – “But under *Young*, the focus is on how many pregnant employees were denied accommodations in relation to the total number of pregnant employees, not how many were denied accommodations in relation to all employees, pregnant or not.” 820 F.3d at 76. A reasonable jury could conclude that defendant’s reasons were not sufficiently strong when considered in relation to the burden.

*Jackson v. VHS Detroit Receiving Hosp., Inc.*, 814 F.3d 769, 128 FEP 1425 (6th Cir. 2016) – Summary judgment reversed in sex discrimination case despite fact that all decision-makers were female – long service mental health technician discharged for participation in releasing wrong patient – males who did the same thing were not discharged – plaintiff was only female technician – inference that hospital preferred males due to perception that they were more capable of physically handling unruly patients.
Fairchild v. All American Check Cashing, Inc., 811 F.3d 776, 128 FEP 1109 (5th Cir. 2016), op. withdrawn and superseded on reh'g 815 F.3d 959 (5th Cir. Mar. 18, 2016) – Judgment for defense at close of discharged pregnant employee’s case proper – evidence that manager at different location told her that pregnancy was related to her discharge properly excluded as hearsay since that manager was not decision-maker – two month gap between employer learning of pregnancy and discharge insufficient to establish pretext – performance-related issues preceded knowledge of pregnancy.

Bauer v. Lynch, 812 F.3d 340, 128 FEP 978 (4th Cir. 2016), cert. denied 137 S.Ct. 372 (Oct. 31, 2016) – FBI requires 30 push-ups for male trainees, but only 12 for female trainees – district court granted summary judgment for male trainee who could only do 29 push-ups – reversed – the push-ups requirement was set at one standard deviation below the mean result for each sex determined by a study. Plaintiff did exceptionally well on all aspects of the test except push-ups – the issue was whether the FBI’s use of gender norm standards was facially discriminatory – the government contended that because men and women have innate physiological differences that lead to different performance outcomes, the test’s gender norm standards actually require the same level of overall fitness – the government relied on the U.S. Supreme Court’s case of United States v. Virginia (“VMI”), 518 U.S. 515 (1996), in which the Supreme Court ruled that Virginia had violated the Equal Protection Law by excluding women from its military academy but noted that women’s admission would require “physical training programs for female cadets” – “Men and women simply are not physiologically the same for purposes of physical fitness programs. The Supreme Court recognized as much . . . in the VMI . . . .”, 812 F.3d at 350 – “[E]qually fit men and women demonstrate their fitness differently,” 812 F.3d at 351 – “Put succinctly, an employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women, requiring the same level of physical fitness of each.” Id. – summary judgment for plaintiff vacated, and case remanded to consider plaintiff’s alternative argument that the standards do impose an undue burden of compliance on male trainees compared to female trainees.
Teamsters Local 117 v. Washington Dept. of Corrections, 789 F.3d 979, 127 FEP 1682 (9th Cir. 2015) – no violation when state designated as female only certain correctional positions at women’s prisons – state established that sex based restrictions are BFOQ’s necessary to normal prison operations.

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

Sexual Orientation and Gender Identity (Ch. 11)

Hively v. Ivy Tech Comm. Coll., S. Bend, 830 F.3d 698, 129 FEP 657, (7th Cir. 2016) amended No. 15-1720, 2016 WL 5921763 (7th Cir. Aug. 3, 2016), reh'g en banc granted, op. vacated 2016 WL 6768628 (7th Cir. Oct. 11, 2016) – Title VII does not provide redress for sexual orientation discrimination – recent EEOC decisions stating such discrimination should be cognizable not credited where U.S. Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation – in absence of U.S. Supreme Court opinion, or new legislation, binding precedent dictates that such claims are not actionable.

United States v. Se. Okla. State Univ., ___ F.3d. ___, 2015 U.S. Dist. LEXIS 89547 (W.D. Okla. July 10, 2015) – Plaintiff was male to female transgender professor – she can sue for a hostile work environment based on her “presented gender” – summary judgment denied – allegation sufficient to state a claim for sexual harassment under Title VII.
Dixon v. Univ. of Toledo, 702 F.3d 269, 116 FEP 1604 (6th Cir. 2012),
cert. denied, 134 S. Ct. 119 (2013) – Black HR official for state university
terminated after writing Op Ed piece taking “great umbrage at the notion
that those choosing the homosexual lifestyle are ‘civil rights victims[,]’”
702 F.3d at 272 – No violation of free speech or equal protection in her
termination – she was not similarly situated to other University officials
who spoke publicly on the issue of gay rights because of the nature of her
job.

Age (Ch. 12)

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

Haggenmiller v. ABM Parking Servs., Inc., 837 F.3d 879, 129 FEP 893
(8th Cir. 2016) – Outside audit firm recommended elimination of position
– summary judgment affirmed – company purported to look for alternative
jobs – company “under no obligation to find alternative employment for
[plaintiff],” 837 F.3d at 885 – “ABM was not obligated to find an open
position for her,” 837 F.3d at 888 – factual issue over whether there were
open jobs does not bar summary judgment.

Bordelon v. Board of Educ. of the City of Chicago, 811 F.3d 984, 128 FEP
1243 (7th Cir. 2016) – Summary judgment affirmed in ADEA claim by
school principal who was terminated by school council – supervisor’s
comment that it was time for the principal “to give it up” is not evidence
of age bias – list of older principals disciplined does not support inference
of age discrimination because almost all of the district’s principals were
over age 40 – school’s council’s independent reasons for non-renewal as
well as absence of showing of bias by supervisor render cat’s paw theory
inapplicable.
**Liebman v. Metropolitan Life Ins. Co.**, 808 F.3d 1294, 128 FEP 879 (11th Cir. 2015) – Summary judgment based on fact that replacement was also over age 40 reversed – issue is not whether replacement was in protected age group but whether replacement was substantially younger – here, replacement seven years younger.

**Squyres v. Heico Cos., LLC**, 782 F.3d 224, 126 FEP 1317 (5th Cir. 2015) – Plaintiff sold company to defendant and part of the consideration was a three-year employment contract at $400,000 a year. When the contract ended, plaintiff, now age 70, was told the contract would not be renewed – he was offered but did not accept an independent sales representative position with a reduced $120,000 annual salary plus commissions – new position was offered at rate of pay commensurate with anticipated contribution.

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

**Widmar v. Sun Chem. Corp.**, 772 F.3d 457, 125 FEP 440 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 2892 (2015) – Summary judgment affirmed – plaintiff’s basic evidence was that he was in protected age group and supervisor unfairly blamed him for numerous workplace problems, which were really the fault of others – “The problem . . . is that even if we take each and every one of these facts in the light most favorable to [plaintiff] and even if we were to attribute a nefarious motive to [the supervisor’s] conduct in each incident, we have no way of knowing whether [the supervisor] acted this way because of [plaintiff]’s age. Each and every one of these issues could arise just as easily if [the supervisor] simply did not like [plaintiff’s] personality or his style or, for that matter, his cologne. Title VII does not protect employees from poor managers or unpleasant and unfair employers.” 772 F.3d at 462 – for summary judgment purposes
plaintiff cannot create a factual dispute by stating that his job responsibilities ought to be something other than what they were – the Court cannot say whether it was reasonable for the employer to require plaintiff to be responsible for particular functions – “This Court has repeatedly stated that it is not a super-personnel department that second-guesses employer policies that are facially legitimate” 772 F.3d at 464.

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

*Johnson v. Securitas Sec. Servs. USA, Inc.,* 769 F.3d 605, 124 FEP 1293 (8th Cir. 2014), *cert. denied,* 135 S. Ct. 1715 (2015) – Termination of 76-year-old security guard legitimate since based on unauthorized departure from site and delay in reporting accident – insufficient evidence of pretext even though one of the three people who made the termination decision told him he was “too old” and “needed to hang up his Superman cape and retire.”

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

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

Hutt v. AbbVie Prods. LLC, 757 F.3d 687, 123 FEP 1208 (7th Cir. 2014) – After six years under the supervisor who hired her, plaintiff was given new supervision – one of the new supervisor’s first acts as district manager was to ask for his employee’s dates of birth – this is not indicative of age discrimination – summary judgment affirmed since there is no direct evidence of age discrimination, and no circumstantial evidence under the indirect method – no comparables were “directly comparable.”
Blizzard v. Marion Tech. Coll., 698 F.3d 275, 116 FEP 392 (6th Cir. 2012), cert. denied, 133 S. Ct. 2359 (2013) – Summary judgment affirmed – although alleged comparable made the same type of mistake, the consequences of the plaintiff’s mistakes were much more serious – replacement was 6½ years younger which falls between age difference of six years or less which is not significant and age difference of 10 or more years which is generally considered significant – employer honestly believed that she was not capable of using new software and had made serious mistakes.

General Issues

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

*Vaughn v. Anderson Reg’l Med. Ctr.*, ___ F.3d ___, 129 FEP 1666, 2017 WL 629265 (5th Cir. Feb. 15, 2017) – Fifth Circuit adheres to its view that pain and suffering and punitive damages are not available under the ADEA, either in a discrimination or retaliation case – it notes a circuit split and that the EEOC view is to the contrary – the EEOC interpretation relies on *Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279, 284 (7th Cir. 1993), an unpersuasive opinion – transfer of ADA functions previously performed by Secretary of Labor to EEOC is not an intervening change of law.

*Karlo v. Pittsburgh Glass Works, LLC*, ___ F.3d ___, 129 FEP 1461, 2017 WL 83385 (3d Cir. Jan. 10, 2017) – Lawsuit alleging disparate impact against persons over 50 compared to persons in their 40s revived – Third Circuit rejects view of Second, Sixth, and Eighth Circuits that such claims are not allowed – clear from plain language of ADEA that disparate impact claims may be brought by sub-groups of workers in the protected class – statute prohibits adverse consequences based on age rather than being over 40.

*DeJesus v. WP Co., LLC*, 841 F.3d 527, 129 FEP 1285 (D.C. Cir. 2016) – Summary judgment in age/race case reversed – factual questions about whether supervisor really believed alleged offense was dischargeable based on supervisor’s initial reaction – reliance on telling black plaintiff he “spoke well” and describing a black individual as “not a good fit” for an event – on age, several former employees testified to an alleged
management philosophy of forcing out older workers and replacing them with younger workers.

_Villarreal v. R.J. Reynolds Tobacco Co._, 839 F.3d 958, 129 FEP 1031 (11th Cir. 2016) (en banc), pet. for cert. docketed ___ U.S. ___ (Feb. 6, 2017) – Recruiters were told to target applicants who were “2-3 years out of college” and to avoid those with over eight years of prior sales experience – only 19 of 1,000 hires during a three-year period were over the age of 40 – _Smith v. City of Jackson, Mississippi_, 544 U.S. 228 (2005) authorized disparate impact claims under the ADEA but the case only involved claims of current employees and did not answer the question of whether job applicants could bring disparate impact claims – the disparate impact language of the ADEA, § 4(a)(2) makes it unlawful for an employer “to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age.” 839 F.3d at 976. Although the EEOC for years has taken the position that job applicants can bring ADEA disparate impact claims, the clear language of the statute is to the contrary – disparate impact claims brought by unsuccessful job applicants are not allowed under the ADEA, which protects only employees from such unintentional discrimination – decision was 8-3.

_Richardson v. Wal-Mart Stores, Inc._, 836 F.3d 698, 129 FEP 899 (6th Cir. 2016) – Employee terminated after four instances of discipline – former supervisor had stated that plaintiff was too old to be working and asked about when he was going to quit or leave – this supervisor did not make the decision, and was not even on the premises at the time – plaintiff claimed decisionmaker treated her differently from younger employees, stared at her and did not greet her in the mornings – “Although these facts demonstrate that [the decisionmaker] probably did not like [plaintiff], none of these facts evidences discrimination on the basis of age.” 836 F.3d at 704 (emphasis in original). – Plaintiff’s attempt to contest one of her coachings was unsuccessful, because she offers no evidence that the supervisor responsible for firing her did not honestly believe that her coaching history justified termination – even if the decisionmaker might have concluded upon closer examination that one or more of the coachings should have been removed from her file, an employer’s pre-termination
investigation doesn’t have to be perfect – the issue is age – “Because [the decisionmaker] ‘made a reasonably informed and considered decision,’ . . . Wal-Mart is entitled to the protection of the honest belief rule.” 836 F.3d at 707.

Noreen v. PharMerica Corp., 833 F.3d 988, 129 FEP 814 (8th Cir. 2016) – Summary judgment affirmed despite fact that company ignored its layoff guidelines and retained a younger employee with a lower performance rating – disregarding its layoff policies is something that it did regularly – no showing this was aimed at plaintiff – company’s “sloppy management or arbitrary decisionmaking” (833 F.3d at 995) was insufficient to send age case to trial in the absence of age motivation evidence – plaintiff’s unprofessional reaction to notice of layoff and wife’s subsequent threats to decisionmaker relied upon in denying plaintiff’s application for transfer to a different position to avoid layoff – “there is insufficient evidence to infer age discrimination from the company’s repeated failure to follow the written guidelines,” 833 F.3d at 994.

Lopreato v. Select Specialty Hosp. – N. Ky., 640 Fed. App’x 438, 32 A.D. Cas. 867 (6th Cir. 2016) – Hospital had policy of refusing to hire nurses who had license restrictions – this included nurses whose participation in a drug rehabilitation program resulted in such restrictions – disparate treatment claim fails because all nurses with license restrictions ineligible – disparate impact fails because not specifically alleged – no pretext because hospital’s concern about recidivism applies to any reason for license restriction – summary judgment affirmed.

McLeod v. General Mills, Inc., 140 F.Supp.3d 843 (D. Minn. 2015) – Employees bringing age discrimination collective action based on layoff accepted severance pay for a general release of all claims including age claims – motion to compel arbitration denied – issue is the validity of the release under the Older Worker’s Benefit Protection Act – Section 626(f)(3) in relevant part provides that if there is a dispute over whether the waiver requirements of the OWBPA have been complied with, “the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary” 29 U.S.C. § 626(f)(3) – while the Supreme Court in Gilmer
held that an arbitration agreement could supersede a right to bring suit “in any court of competent jurisdiction,” the language in question in *Gilmer* was that “[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction” (emphasis added) – the difference between “may” and “shall” is critical – since the validity of an age release under the OWBPA can only be litigated “in a court of competent jurisdiction,” this precludes arbitration – motion to compel arbitration denied.

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

*Tramp v. Associated Underwriters, Inc.*, 768 F.3d 793, 124 FEP 1285 (8th Cir. 2014) – Summary judgment in age RIF case reversed – employer wrote its healthcare carrier and stated that it expected lower premiums since it had gotten rid of its “older, sicker employees.”

*Walczak v. Chi. Bd. of Educ.*, 739 F.3d 1013, 121 FEP 506 (7th Cir. 2014), *cert. denied*, 134 S. Ct. 2733 (2014) – Public school teacher sued for wrongful discharge, and lost in state court – her subsequent federal court ADEA suit was dismissed – claim preclusion – both suits involved the same parties and the causes of action in both cases arose from a single group of operative facts regardless of different theories.
Neely v. Good Samaritan Hosp., 345 Fed. App’x 39, 106 FEP 1741 (6th Cir. 2009) (unpublished) – Over-40 employee claimed race discrimination but never claimed age discrimination – district court dismissed all claims except race discrimination and referred matter to mediation – parties reached a settlement which they confirmed on the record – parties never discussed age or right to revoke in mediation – defendant prepared settlement agreement which waived rights under the ADEA and contained a clause allowing employee 21 days to consider and seven days to revoke – employee signed agreement but revoked within seven days – district court rejected revocation on ground that there was a verbal settlement – court of appeals reversed, holding that it did not matter that there was no age issue – the written agreement expressly allowed revocation – employer clearly wanted to protect itself against any theoretical age claim since plaintiff was over 40 – does not matter that right to revoke was not bargained for – once there was an ADEA release right to revoke was required by law.

Disability/Handicap (Ch. 13)

General

Capps v. Mondelez Global, LLC, 847 F.3d 144, 33 A.D. Cas. 377 (3d Cir. 2017) – Employee was allowed intermittent Family Medical Leave Act days off because of off-again, on-again hip pain – arrested and jailed for drunk driving while on leave allegedly for leg pain – employee discharged when employer learned of the drunk driving facts – “Where an employer provides that the reason for the adverse employment action taken by the employer was an honest belief that the employee was misusing FMLA leave, that is a legitimate, nondiscriminatory justification for the discharge.” 847 F.3d at 152.

EEOC v. Flambeau, Inc., 846 F.3d 941, 33 A.D. Cas. 394 (7th Cir. 2017) – Employer adopted wellness program which required employees as a condition of receiving employer-subsidized health insurance to fill out a medical questionnaire and to undergo biometric testing – employee did not meet those requirements for the 2012 benefit year, and as a result he and his family were briefly without health insurance – EEOC lawsuit challenging program on ground that it was a prohibited involuntary medical examination dismissed as moot since employer terminated the
program – no relief is available to the individual on whose behalf suit was brought – with respect to a claim for reimbursement of $82.02 of medical expenses incurred while he did not have insurance coverage, plaintiff actually never paid – the bills were either written off or paid by third parties so there is no right to be repaid – with respect to emotional distress damages, testimony was “when they took my insurance away, and my kids didn’t know what’s going on, and I couldn’t go to the doctor . . . .” 846 F.3d at 946 – “[H]is testimony does not even reach the level of conclusory statements of emotional distress and is insufficient to show he could be entitled to such damages,” Id. at 947 – as to punitive damages, reckless indifference is required – when the individual’s insurance was terminated, the EEOC had not yet proposed regulations – legal uncertainty at the relevant time distinguishes this case from punitive damages cases for well-understood violations – moreover, the employer consulted with its attorneys about the benefit plan’s compliance with state and federal law.

Tennial v. United Parcel Serv., Inc., 840 F.3d 292, 33 A.D. Cas. 62 (6th Cir. 2016) – Black hub manager claimed demotion because of race, age, and disability – summary judgment on race claims affirmed because alleged comparators either were not on a performance improvement plan, or improved their performance while on an improvement plan, or held a dissimilar position – the age claim fails because there was no evidence other than replacement by younger employee which is insufficient – the disability claim fails because decision-makers had no knowledge of stress related disabilities before the decision on demotion.

Parker v. Crete Carrier Corp., 839 F.3d 717, 33 A.D. Cas. 6 (8th Cir. 2016) – Trucking company required all drivers with body mass index of 33 or above to undergo sleep study to determine their risk of sleep apnea – class of drivers required to undergo study was reasonably defined given medical evidence showing correlation between obesity and sleep apnea – study was job related and consistent with business necessity in view of safety concerns – does not matter that individual had no documented sleep related problems at work, and had a five-year record of accident free driving – company stopped giving plaintiff work until he complied.
Mendoza v. Roman Catholic Archbishop of L.A., 824 F.3d 1148 (9th Cir. 2016) – Bookkeeper went on ten month disability leave – church’s pastor temporarily took over bookkeeping duties – pastor decided part-time employee could do the job – when plaintiff returned to work, pastor offered only part-time job – she declined and sued, alleging that failure to reinstate her to a full-time job was disability discrimination – summary judgment affirmed – she could not show full-time job was available.

Roberts v. City of Chicago, 817 F.3d 561, 32 A.D. Cas. 1179 (7th Cir. 2016) – Hiring for firefighters was done “first come, first serve” – the first 111 members of a class under a settlement agreement to complete the court mandated hiring process were to be hired – plaintiffs completed the process – but because they failed their initial medical screenings, they were not cleared until they underwent additional tests – this delay caused them not to be in the first 111 persons – this is not disability discrimination – “[T]o prove causation under the ADA, plaintiffs must show they were not hired because of their disabilities, not because of a delay in medical clearance, even if that delay was caused by their disabilities,” 817 F.3d at 565.

Morriss v. BNSF Ry. Co., 817 F.3d 1104, 32 A.D. Cas. 1173 (8th Cir. 2016), cert. denied 137 S.Ct. 256 (Oct. 3, 2016) – Morbidly obese individual who was disqualified for a position because of safety was not disabled under the ADA – his obesity was not a physical impairment that resulted from an underlying physiological disorder – he could not show he was regarded as disabled even though he was considered a risk for a safety sensitive position.

Gentry v. East West Partners Club Mgmt. Co. Inc., 816 F.3d 228, 32 A.D. Cas. 1128 (4th Cir. 2016) – Jury properly instructed that injured employee required to show “but for” proof that her disability caused her discharge – contention that ADA indirectly incorporates motivating factor causation standard from Title VII rejected – in amending Title VII to add motivating factor standard, Congress did not add that standard to the ADA – ADA’s prohibition on discrimination “on the basis of” disability connotes “but for” causation.
Graziadio v. Culinary Inst. of Am., 817 F.3d 415, 32 A.D. Cas. 1117 (2d Cir. 2016) – Opinion by Guido Calabresi – Issue was association discrimination – one of plaintiff’s sons had diabetes – the other broke his leg shortly after she returned from Family Medical Act Leave – summary judgment reversed on FMLA claim but sustained on ADA associational discrimination claim – ADA prohibits associational discrimination in express terms – “[W]e join our sister circuits in holding that, to sustain an ‘associational discrimination’ claim under the ADA, a plaintiff must first make out a prima facie case by establishing: (1) that she was qualified . . .; (2) . . . adverse employment action; (3) that she was known at the time to have a relative . . . with a disability; and (4) that the adverse employment action occurred under circumstances raising a reasonable inference that the disability of the relative . . . was a determining factor . . . .” 817 F.3d at 432 – we follow the 7th Circuit in Larimer v. IBM, 370 F. 3d 698, which outlined three types of theories that would give rise to associational discrimination: “Expense”, such as insurance costs; “employer” fears that the employee may contract or is genetically predisposed to develop the disability; or “distraction” – the employer fears that the employee will be inattentive – the only possible theory is distraction based on her son’s diabetes – plaintiff produced no evidence that she was fired because the employer believed she would be distracted – her only evidence was that she was terminated because her employer thought she had taken too much leave from work to care for her sons – plaintiff has not shown that her employer feared she would be inattentive at work, but rather that her employer feared she would not be at work at all, because of a need for accommodation to which she was not entitled under the ADA. “Accordingly, we find that [plaintiff] cannot sustain an ADA claim for associational discrimination.” 817 F.3d at 433.

Carothers v. County of Cook, 808 F.3d 1140, 32 A.D. Cas. 731 (7th Cir. 2015) – Fired juvenile detention center worker claimed an anxiety disorder about working with teenagers – this does not qualify as a disability under the ADA because the condition wouldn’t prevent her from working other jobs – to be substantially limited in working the plaintiff must show that her condition “significantly restricts” her ability to work “either a class of jobs or a broad range of jobs” as compared to the average person – plaintiff’s anxiety disorder has not been shown to “prevent her from engaging in any other line of occupation,” 808 F.3d at 1148 – an inability to work with teenagers simply does not restrict plaintiff from either a class of jobs or a broad range of jobs.
EEOC v. Beverage Distribs. Co., 780 F.3d 1018, 31 A.D. Cas. 541 (10th Cir. 2015) – Judgment for EEOC in direct threat reversed – erroneous jury instruction – employer asserting the direct threat defense must prove only that it reasonably believed that an impaired worker’s job performance would pose a “significant risk of substantial harm” to himself or others, not that the threat actually existed – employee in question was legally blind and wanted to work in a warehouse job – employer reasonably determined he posed a significant risk of substantial harm.

Walz v. Ameriprise Fin., Inc., 779 F.3d 842, 31 A.D. Cas. 573 (8th Cir. 2015) – Plaintiff fired for spate of erratic and disrespectful actions – no disability claim since bipolar disorder wasn’t apparent to employer and plaintiff failed to inform the company of her condition or the work limitations it caused her – ability to work well with others was essential job function.

Jarvela v. Crete Carrier Corp., 776 F.3d 822, 31 A.D. Cas. 313 (11th Cir. 2015) – Employee with alcohol problem checked himself into treatment facility, was released, and cleared for work. The diagnosis was “alcohol dependence” and suggested Alcoholics Anonymous meetings. There was testimony that an alcoholic remains an alcoholic for the remainder of their life. Despite being cleared for work, he was fired upon his return. He was an over the road truck driver and DOT regulations require “no current clinical diagnosis of alcoholism”. The question was whether this was a current clinical diagnosis of alcoholism. Summary judgment was affirmed because the diagnosis, even though he was cleared for work only one week prior to the discharge.

Felkins v. City of Lakewood, 774 F.3d 647, 31 A.D. Cas. 15 (10th Cir. 2014) – Plaintiff claimed fractures were due to bone disease – summary judgment properly granted since employee did not provide medical evidence supporting allegation that she had such a disease or explaining how it substantially limited major life activities – lay testimony regarding the effects of her condition was inadmissible.
Associated Builders and Contractors, Inc. v. Shiu, 773 F.3d 257, 30 A.D. Cas. 1793 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 2836 (2015) – The OFCCP’s final rule requiring federal contractors to invite job applicants to identify themselves as qualified individuals with disabilities and with a seven percent utilization goal for employment of such individuals is not illegal because it does not limit affirmative action to those individuals who have been offered jobs – rule not arbitrary and capricious since OFCCP not required to show continuing disparity in contractor’s employment of disabled individuals – rule does not preclude construction contractors from making case-by-case hiring decisions.

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

Taylor-Novotny v. Health Alliance Med. Plans, Inc., 772 F.3d 478, 125 FEP 646 (7th Cir. 2014) – Claims of disability discrimination, failure to accommodate, and race discrimination were all foreclosed by black employees repeated instances of being late or absent – contention that case law establishes that regular attendance is not an essential function for every job – plaintiff failed to establish that regular attendance was not required in someone for her position – an employer is generally permitted to treat regular attendance as an essential job requirement and need not accommodate erratic or unreliable attendance – “The ADA provides that ‘consideration shall be given to the employer’s judgment as to what functions of a job are essential.’” 772 F.3d at 490. – Here, the employer considered it essential that the employee be accessible at regular times to supervisors, staff, and customers, whether working at home or in the office.
Weaving v. City of Hillsboro, 763 F.3d 1106, 30 A.D. Cas. 673 (9th Cir. 2014), cert. denied, 135 S. Ct. 1500 (2015) – City police sergeant’s attention deficit and hyperactivity disorders were not ADA protected disabilities – jury award on ADA unlawful discharge claim reversed – not substantially limited in his ability to work – lack of evidence that his condition effected ability to work and his technical competence as police officer – career-long interpersonal difficulties did not constitute substantial impairment of his ability to interact with others.

Wetherbee v. Southern Co., 754 F.3d 901, 29 A.D. Cas. 1697 (11th Cir. 2014) – Tentative job offer rescinded after employee acknowledged bipolar disorder – ADA revision covering employer’s use of post-offer medical exams and inquiries have limited to those who are actually disabled as defined by the ADA – since plaintiff acknowledged that he couldn’t show he was a qualified individual with a disability, his claim that he was unlawfully excluded from employment failed.

Summers v. Altarum Inst., Corp., 740 F.3d 325, 29 A.D. Cas. 1 (4th Cir. 2014) – Temporary impairment may be covered under the ADA Amendments Act if sufficiently severe to substantially limit a major life activity – Plaintiff was fired shortly after sustaining serious temporary injuries to both legs that prevented him from walking normally for at least seven months – argument that temporary disabilities cannot provide ADA coverage rejected.
Qualified Individual with Disability/Essential Job Functions

Felix v. Wisconsin Dep't of Transp., 828 F.3d 560, 32 A.D. Cas. 1576 (7th Cir. 2016) – Employee had fit at work, screaming and yelling, because of anxiety disorder and related disabilities – employer had independent assessment done as to whether conduct was likely to recur – assessment was that conduct was likely to recur, and employer discharged employee – summary judgment affirmed – employee was not qualified – employer was not required to prove the affirmative defense of direct threat.

Scruggs v. Pulaski Cnty., 817 F.3d 1087, 32 A.D. Cas. 1351 (8th Cir. 2016) – Summary judgment affirmed – county juvenile detention officer with 25-pound lifting restriction could not perform essential functions of job – job required lifting and restraining juveniles weighing more than that – does not matter that there was no interactive process since no accommodation possible – no showing extended leave would have made any difference – “Even if we were to find that extending Scruggs’s FMLA leave was a reasonable accommodation under the ADA, Scruggs did not carry her burden to show that she could perform the essential functions of her job with that accommodation.” 817 F.3d at 1093.

Stephenson v. Pfizer, 641 Fed. App'x 214, 32 A.D. Cas. 1063 (4th Cir. 2016) – Summary judgment reversed – jury trial on whether sales representative who developed an eye disorder that prevented her from driving should have been assigned a driver as a reasonable accommodation – jury question is whether her inability to drive to call on doctors at their offices meant she was no longer able to perform an essential function of her job.

EEOC v. AutoZone, Inc., 809 F.3d 916, 32 A.D. Cas. 803 (7th Cir. 2016) – 15 pound lifting restriction upheld – Appeals Court rejected EEOC’s “team concept” argument – the EEOC’s theory was that where employees work on a team and there is no required division of labor, one team member can perform a certain function for another, and reciprocate – but this was not the normal way work was performed – the proposed accommodation was requiring somebody else to do the lifting which is not acceptable.
Michael v. City of Troy Police Dept., 808 F.3d 304, 32 A.D. Cas. 744 (6th Cir. 2015) – Summary judgment against police officer with brain tumor – City’s physicians found he was unfit for duty and that he posed a direct safety threat to himself and others – his physicians testified to the contrary – City was entitled to rely on their physicians who conducted deep extensive assessments, whereas plaintiff’s physicians had not done so – moreover, his aberrant behavior over a period of two years was an additional basis supporting the City’s decision.

Preddie v. Bartholomew Consol. Sch. Corp., 799 F.3d 806, 31 A.D. Cas. 1761 (7th Cir. 2015) – diabetic school teacher was not a qualified individual since his 23 absences during one school year prevented him from performing the essential job function of being at work.

Mayo v. PCC Structural, Inc., 795 F.3d 941, 31 A.D. Cas. 1556 (9th Cir. 2015) – Plaintiff, who had a major depressive disorder, talked to other employees about bringing a shotgun to kill the supervisor and another manager and stated he was planning to “take out management” – he told HR that he couldn’t guarantee he wouldn’t carry out his threats – when a police officer questioned him he admitted he owns several guns and when asked if he had immediate plans to shoot people, answered “not tonight” – after a hospital stay, a psychiatrist cleared him for return to work, opining that he was not a violent person – contested his discharge, citing Humphrey v. Memorial Hospitals Association, 239 F.3d 1128, 1139-40 (9th Cir. 2001) (“Conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination.”) – the 9th Circuit distinguished Humphrey, holding “we join several other courts in holding that an employee whose stress leads to violent threats is not a ‘qualified individual[,]’” 795 F.3d at 947.

EEOC v. Ford Motor Co., 782 F.3d 753, 31 A.D. Cas. 749 (6th Cir. 2015) (en banc) – By 8-to-5 vote, 6th Circuit finds no violation in rejecting telecommuting for employee with irritable bowel syndrome – “regular and predictable attendance” is an essential job function – EEOC can’t show individual was a qualified individual with a disability able to perform all the job’s essential functions – dissent contended fact issue as to whether her physical presence at the job was essential.
McMillan v. City of New York, 711 F.3d 120, 27 A.D. Cas. 929 (2d Cir. 2013) – Summary judgment for employer reversed in chronic tardiness case – punctuality may not be an essential job function for a schizophrenic employee whose medicine made him groggy in the morning – accommodation such as working through lunch or staying late may have been possible – it is not a given that punctuality is essential for every job – on remand court will have to inquire into the reasonableness of such accommodations.

Reasonable Accommodation

DeWitt v. Southwestern Bell Telephone Co., 845 F.3d 1299, 33 A.D. Cas 305 (10th Cir. 2017) – Diabetic employee is not entitled to retroactive accommodation – prior to requesting accommodation, employee violated company policy by twice hanging up on customers while on last chance agreement – honest belief that representative intentionally hung up on customers in violation of company policy negated ADA claim – her attempt to blame her violation of employer rules on her disability was after the fact, and thus not cognizable under the ADA – four other Circuits similarly have ruled that employers aren’t required to excuse “past employee misconduct” that is a result of a disabling medical condition – she was thus not entitled to “retroactive leniency” even if she could show it was linked to her disability – even if the dropping of calls was simply poor work rather than a rule violation, the ADA allows employers to hold disabled workers to the same performance standards as workers without disabilities – EEOC contention that plaintiff’s waiting until after the dropped calls to request relevant accommodation didn’t relieve Southwestern Bell of further accommodation obligation rejected – the employer wasn’t “obligated to stay its disciplinary hand” based on plaintiff’s “eleventh hour” request that her dropped calls be excused because they were attributable to her disability. 845 F.3d at 1318.

EEOC v. St. Joseph’s Hosp. Inc., 842 F.3d 1333, 33 A.D. Cas. 179 (11th Cir. 2016) – Rejecting EEOC position, employers do not have to reassign disabled workers into open positions ahead of more qualified non-disabled employees – ADA isn’t an affirmative action law – employers are not required to turn away superior job candidates in favor of disabled workers seeking reassignment as an accommodation – court also rejects argument that there is a split in the Circuits – 7th Circuit didn’t actually decide the
question in 2012 – the District of Columbia decision was a non-binding dictum – nurse who had to use a cane removed from psychiatric ward – she was allowed to remain if she could find another nursing position within the hospital – she failed to obtain any of the open nursing positions when other applicants were deemed more qualified – she claimed she was entitled to a reassignment as an accommodation – court cited *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) that ADA does not require an employer to ignore a seniority system – as in *Barnett* the employer was allowed to pick the best qualified applicant – “As things generally run, employers operate their business for profit, which requires efficiency and good performance. Passing over the best-qualified applicants in favor of less-qualified ones is not a reasonable way to promote efficiency or good performance.” 842 F.3d at 1346.

*Murray v. Warren Pumps, LLC*, 821 F.3d 77, 32 A.D. Cas. 1233 (1st Cir. 2016) – Summary judgment affirmed, dismissing ADA failure to accommodate claim – employee had medical restrictions due to back condition – he claimed he was deliberately requested to perform tasks that conflicted with his restrictions – his claim was insufficient to support a claim given that he remained silent when assigned those tasks and never requested accommodation.

*Wells v. Winnebago Cnty.*, 820 F.3d 864, 32 A.D. Cas. 1348 (7th Cir. 2016) – The county was employer, but alleged denial of accommodation came from state employees to whom he reported – does not matter – employer is responsible for controlling the behavior of others in the workplace so as to create non-discriminatory working conditions – employee was “computer navigator” who was assigned to help litigants who had no counsel deal with the judicial system’s requirements – she claimed that because she suffered from anxiety, she was entitled to have a screen or counter between her and the public – she never made a proper connection between an ADA covered disability and her request for separation – the only time she asked for an ADA accommodation – requests for leave – they were granted – summary judgment affirmed.

*Kelleher v. Wal-Mart Stores, Inc.*, 817 F.3d 624, 32 A.D. Cas. 1183 (8th Cir. 2016) – Employee with multiple sclerosis could not climb ladders and do stocker work – transferred as accommodation to cashier – did not like cashier because of concern that customers would make comments about
her speech problems – but a transfer is an adverse action only if an employee cannot carry out the job duties – nothing in this record so indicates – new position called for a pay increase – employee does not have right to choose accommodation as long as accommodation is reasonable – “Not everything that makes an employee unhappy is an actionable adverse action,” 817 F.3d at 632.

*Osborne v. Baxter Healthcare Corp.*, 798 F.3d 1260, 31 A.D. Cas. 1770 (10th Cir. 2015) – summary judgment improperly granted – deaf blood donor technician applicant who cannot safely monitor blood processing machines that have auditory alarms raised factual issue as to whether reasonable accommodation of visual or vibrating alerts possible on processing machines – contention that employer feared adverse donor reactions rejected since adverse donor reactions are extremely rare – direct threat analysis need not eliminate all risks but just significant risks.

*Schaffhauser v. United Parcel Service, Inc.*, 794 F.3d 899, 31 A.D. Cas. 1437 (8th Cir. 2015) – Employee demoted for making racist comment – claimed steroids given in connection with an injury was the cause of the misconduct – duty to accommodate rejected – notice of the disability in a request for accommodation must be made before the misconduct, not after it – “As the district court articulated, liability is not established where ‘an employee engages in misconduct, learns of an impending adverse employment action, and then informs his employer of a disability that is the supposed cause of the prior misconduct and requests an accommodation.’” 794 F.3d at 906 – multiple cases cited for the proposition and an employer is not required to ignore misconduct because the claimant subsequently asserts it was a result of the disability.

*Stern v. St. Anthony’s Health Ctr.*, 788 F.3d 276, 31 A.D. Cas. 1149 (7th Cir. 2015) — Terminated chief psychologist unfit for position – subordinates noted cognitive problems similar to Alzheimer’s – independent third party concluded that plaintiff “definitely had cognitive issues” typical of early Alzheimer’s – court bothered by termination without interactive process – however, plaintiff did not demonstrate how disabilities could be accommodated – not sufficient to suggest delegating essential job functions – summary judgment affirmed.
**Noll v. IBM, 787 F.3d 89, 31 A.D. Cas. 1049 (2d Cir. 2015) – 2-to-1 decision finding IBM reasonably accommodated deaf employee – employee demanded captions on all files on the company internet as accommodation – IBM instead provided him with written transcripts of all files he requested, together with a sign language interpreter either onsite or remotely for any file that he requested for immediate translation – plaintiff alleged this wasn’t effective since it’s tiring and difficult for a deaf employee to simultaneously watch the video and a sign language interpreter – IBM entitled to summary judgment since the offered accommodation, while not the preferred accommodation, is “plainly reasonable” – “[I]n other words, the plain reasonableness of the existing accommodation ends the analysis,” 787 F.3d at 94 – plaintiff acknowledged that the accommodation enabled him to perform his job’s essential functions – but he argued that immediate access to files posted on the internet is a benefit of employment that is being denied to deaf employees – the dissent said it should be a jury issue.

**Minnihan v. Mediacom Commc’ns Corp., 779 F.3d 803, 31 A.D. Cas. 566 (8th Cir. 2015) – Because of seizures plaintiff could not drive – given accommodation of ten month exemption from driving but told this was not permanent – exemption required co-workers to assume additional duties and work extra hours – job description states that valid driver’s license with good driving was required – no duty to restructure job.

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

**Solomon v. Vilsack, 763 F.3d 1, 30 A.D. Cas. 649 (D.C. Cir. 2014) – Employee with depression requested that she be able to determine her own hours as long as she met agency deadlines – trial court ruled that such an accommodation is not required – without ruling on whether it would be a reasonable accommodation on these particular facts, the D.C. Circuit held that “nothing in the Rehabilitation Act establishes, as a matter of law, that
a maxiflex work schedule is unreasonable," 764 F.3d at 4 – a separate analysis is required as to whether an accommodation is reasonable and whether it would result in an undue hardship – in view of the technological advances that are being made in many instances it is less essential for employees in many jobs to be physically present during prescribed hours.

**Hwang v. Kan. State Univ.,** 753 F.3d 1159, 29 A.D. Cas. 1509 (10th Cir. 2014) – University had an inflexible maximum leave of absence for illness of six months. It refused to extend it for the plaintiff. A question, according to the Tenth Circuit, was “must an employer allow employees more than six months’ sick leave or face liability under the Rehabilitation Act?” Their answer: “Unsurprisingly, the answer is almost always no.” – “[I]t’s difficult to conceive how an employee’s absence for six months . . . could be consistent with discharging the essential functions of most any job in the national economy today. Even if it were, it is difficult to conceive when requiring so much latitude from an employer might qualify as a reasonable accommodation,” 753 F.3d at 1162 (emphasis in original)– Contention that all inflexible sick leave policies are illegal violates the Rehabilitation Act rejected – Inflexible leave policies providing unreasonably short sick leave periods might be subject to attack but the six month leave policy herewith does not fall within that category.

**Bunn v. Khoury Enters., Inc.,** 753 F.3d 676, 29 A.D. Cas. 1518 (7th Cir. 2014) – Vision impaired employee at Dairy Queen could not do some of the jobs through which employees rotate – employer unilaterally decided to assign him full time to one of the jobs, which he could do, which enabled him to work full time – this was a reasonable accommodation – does not matter that he preferred other accommodations – there is no separate cause of action for failure to engage in interactive process – in effect, employer restructured the job and/or modified the job schedule to accommodate plaintiff’s vision problems.

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

Retaliation (Ch. 15)


*Fisher v. Lufkin Industries, Inc.*, 847 F.3d 752, 129 FEP 1629 (5th Cir. 2017) – Plaintiff alleged racial discrimination when his supervisor called him “boy” – multiple co-workers were offended at the charge, and conducted a “sting” operation – they purchased pornographic videos from plaintiff – others in the plant had pornographic videos, and sold things without complaint – this triggered an investigation – plaintiff lied during the investigation – Magistrate Judge found that investigation was motivated by retaliatory motives, but that lying during the investigation was an intervening cause, and ruled for the defendant – reversed – cat’s paw theory applicable – investigation into the sale of DVDs motivated by desire to retaliate – subsequent discipline was motivated by a desire to retaliate – but the District Court clearly erred in finding that the chain of proximate cause was broken when plaintiff lied during the investigation – the individuals who triggered the investigation for retaliatory motives were a proximate cause of the termination – plaintiff’s refusal to acquiesce in the retaliatory investigation was not a superseding cause – a superseding cause must be unforeseeable – “While we do not endorse [plaintiff’s] response, we view his mild resistance to a retaliatory investigation as entirely foreseeable[,]” 847 F.3d at 759 – Fisher’s lack of cooperation with the employer’s retaliatory-motivated investigation which itself was “based on a dubious work rule violation” (*id.* at 759-60) did not sever the causal chain.

*Sieden v. Chipotle Mexican Grill, Inc.*, 846 F.3d 1013, 129 FEP 1537 (8th Cir. 2017) – Summary judgment against former restaurant general manager on retaliation claim – discharge for poor performance not pretextual – although plaintiff had received four promotions between 2001 and 2011, his more recent record showed he had been relieved of management duties based on concerns about performance a year prior to the alleged protected activity.
**Lord v. High Voltage Software, Inc.**, 839 F.3d 556, 129 FEP 1021 (7th Cir. 2016), *pet. for cert. docketed ___ U.S. ___* (Jan. 6, 2017) – Summary judgment on sexual harassment and retaliation claims by a male – hostile environment claim based on oft-repeated joke about plaintiff’s alleged sexual interest in a female co-worker, and for unwanted touchings by a male co-worker – hostile environment “is a nonstarter because Lord has not established that his coworkers harassed him because of his sex,” 839 F.3d at 561 – no harasser was homosexual – in same-sex harassment cases the central question is whether the harassment occurred because of the sex of the plaintiff– sexual connotations in a joke are not enough – with respect to retaliation, plaintiff contends he was fired because he complained about the alleged harassment – first, the complaints were not protected activity because they did not concern the type of conduct that Title VII prohibits – while it is not necessary that the complained-of conduct in fact be an unlawful employment practice, the plaintiff must have a sincere and reasonable belief that he is opposing an unlawful practice – plaintiff’s belief that he was complaining about sexual harassment “though perhaps sincere, was objectively unreasonable,” 839 F.3d at 563 – but even assuming it was protected, there is no showing of causation with respect to retaliation – Lord was fired two days after one complaint and one day after indicating that he might file a charge with the EEOC – the timing constitutes circumstantial evidence of a retaliative motive here, but the employer’s legitimate reasons, including failure to follow instructions to immediately report anything believed to be harassment and an obsessive fixation with his co-worker’s performance, timeliness, and conduct had not been called into question – summary judgment affirmed unanimously on discrimination claim and 2-1 on retaliation claim.

**Maggi v. Creative Health Care Servs., Inc.**, 608 Fed. App’x. 472, 127 FEP 713 (9th Cir. 2015) (unpublished) – Supervisor, whom plaintiff alleged sexually harassed her, sued her in state court for defamation – her retaliation claim against employer dismissed – no evidence employer was the but-for cause of the lawsuit – the suit was filed in the supervisor’s personal capacity.
Aldrich v. Rural Health Servs. Consortium, Inc., 579 Fed. App’x 335, 124 FEP 19 (6th Cir. 2014) – Employee not engaged in protected activity under participation clause when she forwarded e-mails containing confidential patient information to a personal account – her contention that she was preserving evidence for an age discrimination suit that had been filed by a co-worker did not bring it within protected activity – she was not directly involved in the litigation and was not responding to any request from co-worker’s attorneys.

Vasquez v. Empress Ambulance Serv., Inc., 835 F.3d 267, 129 FEP 838, (2d Cir. 2016) – Dismissal reversed – plaintiff complained about co-worker sexual harassment – co-worker falsified documents indicating plaintiff had engaged in sexual harassment – plaintiff fired – cat’s paw theory may support retaliation claims in general – even though false documents created by co-worker, employer may be liable if it negligently relies on information from low level worker who employer knew or should have known harbored retaliatory animus.

Foster v. Mountain Coal Co., 830 F.3d 1178, 32 A.D. Cas. 1629 (10th Cir. 2016) – Supervisor requested company’s cooperation with respect to his coming surgery – this was an accommodation request – no magic language is required – fired days later – Supreme Court in University of Texas v. Nassar, 133 S. Ct. 2517 (2013) held that an employee alleging retaliation must show more than temporal proximity – however a 10th Circuit decision issued after Nassar seemed to leave open temporal proximity when the adverse action follows closely upon the protected activity – summary judgment reversed.

Cooper v. N.Y. State Dep’t of Labor, 819 F.3d 678, 129 FEP 44 (2d Cir. 2016) – Rule 12(b)(6) dismissal affirmed on retaliation claim – Director of Equal Opportunity Development removed from her position after she opposed plan by the Governor’s office to alter the means by which EEO complaints were to be handled – plaintiff believed that the proposed changes would increase the likelihood that workplace discrimination would go unredressed – her position was successful, but thereafter she was fired, allegedly in retaliation for having lobbied against the plan of the Governor’s office – dismissal proper since plaintiff could not
reasonably believe that in lobbying against the Governor’s proposal she was opposing conduct that qualified as an unlawful employment practice under Title VII.


*Brandon v. Sage Corp.*, 808 F.3d 266, 128 FEP 649 (5th Cir. 2015) – Truck driving school director resigned after being threatened with 50% pay cut for hiring transgender individual – plaintiff knew that the person rendering the threat was outside her chain of command – should have waited for company president to confirm pay cut or follow its school’s grievance procedure – summary judgment affirmed.

*Ya-Chen Chen v. City Univ. of New York*, 805 F.3d 59, 128 FEP 349 (2d Cir. 2015) – Summary judgment on retaliation claim – assertion of temporal proximity between filing of affirmative action complaint and non-renewal of contract rejected because members of her department had concerns about claimant’s “overaggressiveness and lack of tact” both before and after she filed her complaint – decision not to renew her contract was made before she filed her complaint – reasonable jury could not conclude that failure to renew her contract was motivated by discrimination – with respect to conceded fact that plaintiff received outstanding evaluations on her scholarship and teaching ability, there are no comparators – “[w]ithout such comparators . . . no reasonable jury could decide that CUNY’s decision to prioritize the complaints against Chen over her professional achievements evinces such motives.” 805 F.3d at 73 – Title VII is not an invitation for courts to act as a super personnel department that reexamines employer’s judgments – decision on retaliation was 2 – 1.
Ray v. Ropes & Gray LLP, 799 F.3d 99, 127 FEP 1606 (1st Cir. 2015) –
Summary judgment for defendant on denying black associate a
partnership under up or out policy – after plaintiff filed EEOC charge, two
Ropes’ partners who had promised to support his application for a
position as an assistant U.S. Attorney refused, one of them stating that he
could no longer “in good conscience” write such a letter in light of the
“groundless” EEOC claim – plaintiff, an alumnus of Harvard Law School,
asked that the Harvard Law School bar Ropes from campus interviews – a
legal media website obtained a copy of Ray’s letter to Harvard and asked
for comment – Ropes provided the website with an unredacted copy of
the EEOC’s determination which contained sensitive and confidential
information about Ray’s employment with the firm, which the website
posted – summary judgment on the basic discrimination claim affirmed –
the retaliation claim went to the jury – Ropes argued that Ray did not
actually believe in his EEOC claim, but just used it to try to extort money
– the jury concluded that Ray had not established a prima facie case of
retaliation because he had not engaged in protected activity under Title
VII – retaliation based on both participation (the rejection of letters of
reference after he filed his EEOC complaint) and opposition (contacting
Harvard) – District Court instructed the jury that the EEOC complaint was
protected if done in good faith – jury instructed that opposition was
protected if he had shown it was both undertaken in good faith and based
on a reasonable belief – the participation clause does not require a
reasonable belief – “Simply put, Ray has not set forth a coherent
argument on appeal for why the district court erred as a legal matter in
requiring him to show good faith for purposes of the participation clause.
Thus, we deemed his argument waived for lack of development.” 799
F.3d at 111 – summary judgment on denial of partnership affirmed –
denial was based on negative reviews from partners – contention that
associates who received more favorable reviews should not have been so
favorably traded fails under comparative evidence discussed – every
associate was different – Ray’s reliance on a subjective review process
flounders because it is supported only by speculation – plaintiff’s reliance
on two racially charged remarks from partners about which he protested
not shown to have any connection with the policy committee’s decision –
fact that only one black associate had ever been promoted to partner in the
history of the firm is unfortunate and troubling but it fails to imply pretext
in this case.
Zamora v. City of Houston, 798 F.3d 326, 127 FEP 1525 (5th Cir. 2015) – Cat’s paw theory of liability viable in Title VII retaliation cases even under heightened “but for” standard of causation – jury verdict for plaintiff reinstated – “in the context of Title VII retaliation claims, cat’s paw analysis remains a viable theory of causation[.]” 798 F.3d at 332-34.

DeMasters v. Carilion Clinic, 796 F.3d 409, 127 FEP 1396 (4th Cir. 2015) – Employee whose job was to assist other employees with complaints alleged retaliation because he assisted on sexual harassment complaint – employer cited “manager rule” under Fair Labor Standards Act, which states that in order to engage in protected activity the employee has to step outside of his role as an employee – this has no place under Title VII – lower court dismissal reversed – employee’s job responsibilities included reporting discrimination – if discharged for assisting a fellow employee with discrimination complaint, actionable.

Baird v. Gotbaum, 792 F.3d 166, 127 FEP 961 (D.C. Cir. 2015) – Plaintiff, a former president of a public employee union, is “a frequent filer of Title VII claims” – 792 F.3d at 168 – she claimed that her work environment was made hostile in retaliation for these protected activities – she objects to rude emails, name calling, lost tempers and unprofessional behavior, which she alleged her employer failed to investigate or remEDIATE – “Although [plaintiff] paints an unpleasant picture, she does not allege that [her employer] has done anything illegal. See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (‘Title VII . . . does not set forth a general civility code for the American workplace.’ (quotation marks omitted)).” 792 F.3d at 168 – Plaintiff alleges disparate actions by multiple people and does attempt to tie them together except for the HR department’s refusal to remediate – “a retaliatory failure-to-remediate claim is not actionable unless the underlying incident would itself be actionable.” 792 F.3d at 171 – “A trivial incident does not become nontrivial because an employer declines to look into it. Title VII is aimed at preventing discrimination, not auditing the responsiveness of Human Resources departments.” Id. – Essentially Plaintiff cited an extremely large number of trivial incidents – “[A] long list of trivial incidents is no more a hostile work environment than a pile of feathers is a crushing weight.” 792 F.3d at 172.
Foster v. Univ. of Maryland, E. Shore, 787 F.3d 243, 127 FEP 167 (4th Cir. 2015) – Supreme Court’s decision in Nassar, which required but-for causation and rejected mixed motive theory in retaliation cases, did not alter the plaintiff’s “less onerous” burden of showing causation under the McDonnell Douglas framework at the prima facie case stage – the Nassar Court was silent as to the application of but-for causation in McDonnell Douglas pretext cases – “Nassar did not alter the McDonnell Douglas analysis for retaliation claims, . . . .” 787 F.3d at 246 – the District Court had denied summary judgment on retaliation claim under McDonnell Douglas prior to Nassar – after Nassar District Court reconsidered, holding that under the causation standard of but-for articulated in Nassar summary judgment was warranted – the Court of Appeal reversed – “We conclude that the McDonnell Douglas framework, which already incorporates a but-for causation analysis, provides the appropriate standard for reviewing Foster’s claim,” 787 F.3d at 249 – Nassar significantly altered the causation standard for claims based on direct evidence of retaliatory animus by rejecting the mixed motive theory – however, this case did not involve direct evidence but the indirect McDonnell Douglas order and allocation of proof – that is unaffected by Nassar – at the third stage of McDonnell Douglas “[i]f a plaintiff can show that she was fired under suspicious circumstances and that her employer lied about its reasons for firing her, the factfinder may infer that the employer’s undisclosed retaliatory animus was the actual cause of her termination,” 787 F.3d at 250 – thus a plaintiff must establish causation at two different stages under McDonnell Douglass – first, in the prima facie case, and second, in satisfying her ultimate burden – other circuits disagree as to whether Nassar has applicability to the causation prong of the prima facie case – we conclude it does not – “Had the Nassar Court intended to retire McDonnell Douglas and set aside 40 years of precedent, it would have spoken plainly and clearly to that effect,” 787 F.3d at 251 – the next question is whether Nassar alters the pretext stage – “Because the pretext framework already requires plaintiffs to prove that retaliation was the actual reason for the challenged employment action, we conclude that it does not,” 787 F.3d at 252 – Nassar’s “but-for” standard is no different from McDonnell Douglas’ “real reason” standard – “We conclude, therefore, that the McDonnell Douglas framework has long demanded proof at the pretext stage that retaliation was a but-for cause of a challenged adverse employment action,” id. – this requires reinstatement of the District Court’s original decision denying summary judgment on the retaliation claim under the McDonnell Douglas test.
Allstate switched all of its employee agents to independent contractor status in the year 2000. As a condition of offering an independent contractor relationship selling Allstate products, Allstate required that each former employee waive any pending discrimination claims. The EEOC sued, alleging that this constituted retaliation under the federal anti-bias laws – the Court of Appeal ruled for Allstate – the general rule was that employers may require signed releases of claims in exchange for severance pay of other enhanced benefits not normally available – “Allstate followed the well-established rule that employers can require terminated employees to waive existing legal claims in order to receive unearned post-termination benefits.” 778 F.3d at 453.

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

No prima facie case – seven month time lag between sexual harassment complaint and termination is too long – in the interim she was praised and given salary increase.

Screening panel, members of which had been the subject of discrimination charges filed by plaintiff, did not recommend plaintiff to be interviewed by ultimate decisionmaker – they recommended only two of the five candidates – however, unbiased decisionmaker interviewed all five candidates, and chose someone other than plaintiff – no cat’s paw liability despite bias of screening committee since decisionmaker conducted his own independent investigation.
Cox v. Onondaga Cnty. Sheriff’s Dep’t, 760 F.3d 139, 123 FEP 1185 (2d Cir. 2014) – Summary judgment affirmed against white police officers who were subjected to adverse action for filing knowingly false racial harassment charges against black officer with the EEOC – the employer conducted an investigation, the white officers gave materially inconsistent statements, and the police department concluded that the charges were knowingly false – Title VII does not confer an absolute privilege that immunizes employees who knowingly file false charges with the EEOC – however just because the charges are false does not necessarily permit adverse action – but here the sheriff’s department showed a legitimate, non-retaliatory reason for the adverse action – that the record shows that the officers’ own racial harassment claims were “false, and seemingly intentionally so” – employers have to investigate and curb racial harassment by lower-level employees – the false EEOC charges could themselves be viewed as racial harassment against the black officer they accused of labeling them “skin heads.”

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

Wright v. St. Vincent Health Sys., 730 F.3d 732, 119 FEP 1717 (8th Cir. 2013) – Plaintiff was discharged 45 minutes after she called the hospital’s HR Department to complain of racial discrimination – the court characterized the timing as “incredibly suspicious” – nevertheless, it affirmed the trial court’s dismissal following a bench trial – the hospital’s evidence was that the decision to discharge her was made the day before, multiple individuals had been advised of the decision, and the protected conduct occurred after the discharge decision had been made – no error in the discharge decision not being racially motivated despite the fact that
the decisionmaker had discharged three other African-American employees and no Caucasians during her tenure.

Univ. of Tex., Sw. Med. Ctr. v. Nassar, 570 U.S. ___, 133 S. Ct. 2517, 118 FEP 1504 (2013) – The mixed motive amendments to Title VII are not applicable to retaliation cases – the burden of proof in a retaliation case is “but-for” – 5 to 4 decision – status-based discrimination after 1991 amendments is governed by a motivating factor analysis – this is not applicable to retaliation, which was not covered by the amendments – “Causation in fact – i.e., proof that the defendant’s conduct did in fact cause the plaintiff’s injury – is a standard requirement of any tort claim . . . .” 133 S. Ct. at 2524-25. But-for causation is the default unless Congress indicates a different test – Congress has not done so – case is actually governed by Gross, which found a “but-for” test under a statute that prohibited discrimination “because of age” – the two retaliation subsections of Title VII both use the “because of” language – the number of retaliation claims filed with the EEOC have outstripped every type of status-based discrimination except race – “Lessening the causation standard could also contribute to the filing of frivolous claims . . . .

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

Id. at 2531-32. A mixed motive causation standard “would make it far more difficult to dismiss dubious claims at the summary judgment stage,” id. at 2532 – “Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in [the mixed motive amendments]. This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer,” id. at 2533 – contrary interpretation in the EEOC Guidance Manual rejected as lacking persuasive force – dissent contended that majority seizes upon the 1991 amendments, designed to strengthen Title VII, to weaken retaliation protection – dissent suggests reversing this case and Vance through “another Civil Rights Restoration Act.”
Pearson v. Mass. Bay Transp. Auth., 723 F.3d 36, 119 FEP 1 (1st Cir. 2013) – Opinion by Associate Justice Souter sitting by designation – “The district court correctly held that there was no causal link between [plaintiff’s protected conduct] and his termination, the reason being obvious: [employer] officials recommended firing [plaintiff] before he wrote the letter. Causation moves forward, not backwards, and no protected conduct after an adverse employment action can serve as the predicate for a retaliation claim.” 723 F.3d at 42 – quotation from state court decision that “[w]here, as here, adverse employment actions or other problems with an employee pre-date any knowledge that the employee has engaged in protected activity, it is not permissible to draw the inference that subsequent adverse actions, taken after the employer acquires such knowledge, are motivated by retaliation[,]” id. (citation omitted). Recommendation had not reached the General Manager prior to the protected conduct, but no evidence that recommendation would have been rejected if no one had known of the protected conduct – quotation from prior First Circuit case – ‘Were the rule otherwise, then a disgruntled employee, no matter how poor his performance or how contemptuous his attitude toward his supervisors, could effectively inhibit a well-deserved discharge by merely filing, or threatening to file, a discrimination complaint[,]” id. (citation omitted)

Benes v. A.B. Data, Ltd., 724 F.3d 752, 119 FEP 509 (7th Cir. 2013) – Summary judgment affirmed against employee fired for outburst during mediation session – EEOC conducted mediation session – each side instructed to remain in their room with a third party relaying offers back and forth – upon receipt of employer’s offer, employee barged into employer’s room and shouted: “You can take your proposal and shove it up your ass and fire me and I’ll see you in court” – he was promptly fired, and he sued for retaliation, alleging that he was fired for having “participated in any manner” in Title VII proceedings – held fired not for participating but for the outburst – if the employer would have fired an employee who barged into a superior’s office in violation of instructions and made a similar comment, it was entitled to fire someone who did the same thing during a mediation.
**Hiring (Ch. 16)**

*Wilson v. Cook Cnty.*, 742 F.3d 775, 121 FEP 1077 (7th Cir. 2014) – Low-level administrative assistant at county hospital conducted phony interview with plaintiff, provided her with an application form, and told her if she really wanted the job she must provide sex, which she did – there was no job – the interview was phony – no Title VII claim because she cannot show any employment relationship existed, current or prospective – Title VII does cover job applicants and prospective employees – but in this case the hospital had no job opening and that dooms the Title VII claim – even if the wrongdoer’s conduct could be attributed to the employer he did not “refuse to hire” the plaintiff for the simple reason that he was wholly unable to hire her at all – to proceed on a refusal hire to claim a plaintiff must at a minimum establish that she suffered some adverse employment action such as being passed over for a job – but when no job exists there can be no adverse employment action – a plaintiff must at least have been passed over for a job that actually existed.

**Promotion, Advancement, and Reclassification (Ch. 17)**

*Ortiz-Diaz v. U.S. Dept. of H.U.D.*, 831 F.3d 488, 129 FEP 641 (D.C. Cir. 2016) – 2:1 decision affirms summary judgment on claim that denial of lateral transfer was discriminatory – employee wished lateral transfer to be closer to his wife’s place of employment, and working under a Hispanic supervisor which would allegedly bolster his opportunities for promotion – no adverse action – absent extraordinary circumstances denial of a purely lateral transfer isn’t adverse action – concurring judge said precedent supports the judgment but “In my view, . . . the denial of a requested lateral transfer [because of] race is actionable. . . .” 831 F.3d at 494 – dissent: evidence could reasonably support a conclusion that the denial of the transfer request adversely affected plaintiff’s opportunity for professional advancement.


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

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

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

**Compensation (Ch. 19)**

**David v. Bd. of Trust. Of Cnty. Coll. Dist. No. 508,** 846 F.3d 216, 129 FEP 1505 (7th Cir. 2017) – Summary judgment proper on unequal pay claims under Title VII and Equal Pay Act – Plaintiff unsuccessfully sought change in title and compensation due to her increased responsibilities after she announced she would retire in ten months – proffered comparators who received higher pay had superior qualifications and performed different, additional, and more complex duties – moreover creation of new position would have taken months and her retirement was pending.
Smith v. URS Corp., 803 F.3d 964, 128 FEP 134 (8th Cir. 2015) – Summary judgment reversed by 2:1 vote – black employee hired at salary $11,000 higher than requested – some months later white employee hired for same job at pay rate $7,000 above black employee – black employee requested pay raise which was denied – district court erred in treating case as hiring discrimination case other than one asserting racially disparate treatment in pay – jobs were identical and no material difference in qualifications – even if being hired at a salary at $11,000 higher than requested is material with respect to the initial hire, “URS provides no argument as to the continuing pay disparity after [the black employee] did, in fact, ask for a raise,” 803 F.3d at 972.

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

McReynolds v. Merrill Lynch & Co., 694 F.3d 873, 115 FEP 1668 (7th Cir. 2012) – In McReynolds I the Seventh Circuit reversed a denial of class certification – the African American class alleged that the firm’s “teaming” and account-distribution policies had the effect of steering black brokers away from the most lucrative assignments and prevented them from earning appropriate compensation – three years after that suit was filed Bank of America acquired Merrill Lynch, and the companies introduced a retention incentive program that would pay bonuses to brokers corresponding to their previous levels of production – this new class action alleged that the bonuses incorporated previous production levels which were the product of discrimination – defendants moved to dismiss for failure to state a claim, arguing that the retention program was race neutral and exempt from challenge under Section 703(h) (“a system which measures earnings by quantity or quality of production”) – motion to dismiss granted – under 703(h) protected from challenge unless adopted with intent to discriminate – conclusory allegations of intent to
discriminate insufficient under Ashcroft v. Iqbal – entire case dismissed with prejudice – affirmed – not enough to allege that the bonuses incorporated the past discriminatory effect of Merrill Lynch’s underlying employment practices – disparate impact of those employment practices is the subject of the first lawsuit – motion granted before ruling on class certification – 12(b)(6) motion tests the sufficiency of the complaint not the merits – insufficient to be aware that the program would disfavor black brokers – had to be adopted with that intent – no requirement that the court defer ruling on 12(b)(6) motion until after class certification – to the extent that the plaintiffs are really challenging the disparate impact of the underlying policies “their claim here is subsumed within McReynolds I, and if successful will be remedied there” – import of section 703(h) is that disparate racial impact is insufficient to invalidate a system that measures earnings by quantity or quality production – Teamsters case on seniority determinative – “[t]o the extent that the program incorporated the effects of past discrimination, the same was true of the seniority system in Teamsters,” 694 F.3d 881 – just like in Teamsters (successful plaintiffs could obtain retroactive seniority), plaintiff’s in McReynolds I if they succeed can prove they would have received larger bonuses but for past discrimination and “that loss may be incorporated in the remedy in McReynolds I” – but the retention program itself is shielded from challenge under 703(h) – plaintiffs contend that system is not “bona fide” but those words modify only seniority and merit systems and not production based compensation systems – interpretative question is largely irrelevant because even if the “bona fide” modifier applies, the concept is inherently built into what it means for a system to measure quantity or quality of production – dismissal mandated unless intent to discriminate adequately pleaded – under Twombly, the facts asserted must state a claim that is “plausible” – Iqbal clarified that allegations in the form of legal conclusions are insufficient to survive a 12(b)(6) motion – allegations that Merrill Lynch knew that the system had a disparate impact are legally insufficient – complaint must allege enough facts to support an inference that the retention program was adopted because of its effect on black brokers – all the complaint says is that Merrill Lynch intentionally designed the program based on production levels that incorporated the effects of past discrimination and it did so with the intent to discriminate – the assertion is merely a conclusion unsupported by facts – Lilly Ledbetter Act affects only the question of timing – but under 703(h) there is no Title VII violation in the first place.
Sexual and Other Forms of Harassment (Ch. 20)

Cases Interpreting *Faragher/Ellerth*

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

– Under the Restatement, masters are generally not liable for the torts of their servants if the torts are outside the scope of employment – there is however an exception where the servant was “aided in accomplishing the tort by the existence of the agency relation” – we adapted this to Title VII in *Ellerth* and *Faragher* – neither party challenges the application of *Faragher/Ellerth* to race-based hostile environment claims and we assume that it does apply – lower courts have divided on the test for supervisor – some have followed the EEOC’s Guidance which ties the supervisor’s status to the ability to exercise significant direction over daily work –

“[w]e hold that an employer may be vicariously liable for an employee’s unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect a ‘significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits’.” 133 S. Ct. at 2443 (quoting *Ellerth*, 524 U.S. at 761). “We reject the nebulous definition of ‘supervisor’ advocated in the EEOC Guidance . . . .” 133 S. Ct. at 2443 – Under test set forth herein “supervisory status can usually be readily determined, generally by written documentation,” *id.* – the test we adopt “is easily workable; it can be applied without undue difficulty at both the summary judgment stage and at trial,” *id.* at 2444.
In responding to the dissent’s contention that one of the supervisors in *Faragher* would not have qualified under this test, even though the harasser could impose discipline, the Court responded “If that discipline had economic consequences (such as suspension without pay) then [the harasser in *Faragher*] might qualify as a supervisor under the definition we adopt today,” 133 S. Ct. at 2447 n.9 – In *Faragher*, the harassing lifeguard threatened the plaintiff to “[d]ate me or clean the toilets for a year” – “That threatened reassignment of duties likely would have constituted significantly different responsibilities for a lifeguard, whose job typically is to guard the beach. If that reassignment had economic consequences, such as foreclosing Faragher’s eligibility for promotion, then it might constitute a tangible employment action,” 133 S. Ct. at 2447 n.9 – In determining supervisory status, “[t]he ability to direct another employee’s tasks is simply not sufficient. Employees with such powers are certainly capable of creating intolerable work environments . . . but so are many other co-workers. Negligence provides the better framework . . . .” *Id.* at 2448.

“The interpretation of the concept of a supervisor that we adopt today is one that can be readily applied. In a great many cases it will be known even before litigation is commenced whether an alleged harasser was a supervisor, and in others, the alleged harasser’s status will become clear to both sides after discovery. . . . [S]upervisor status will generally be capable of resolution at summary judgment,” *Id.* at 2449 – “[E]ven where the issue of supervisor status cannot be eliminated from the trial (because there are genuine factual disputes about an alleged harasser’s authority to take tangible employment actions), this preliminary question is relatively straightforward,” *Id.* at 2450 – “Contrary to the dissent’s suggestions . . . this approach will not leave employees unprotected against harassment by co-workers who possess the authority to inflict psychological injury by assigning unpleasant tasks or altering the work environment in objectionable ways. In such cases the victims will be able to prevail simply by showing that the employer was negligent . . . and the jury should be instructed that the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent,” *Id.* at 2451.
– If an employer has a very small number of individuals who can make decisions involving tangible job actions, they “will likely rely on other workers who actually interact with the affected employee,” and “[u]nder those circumstances, the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies,” *id.* at 2452 – Even under the negligence standard “[e]vidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant,” *id.* at 2453 – “We hold that an employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim,” *id.* at 2454 – 5 to 4 decision – Justice Ginsburg’s dissent included “[t]he ball is once again in Congress’ court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today.” *Id.* at 2466.

*Pullen v. Caddo Parish School Board*, 830 F.3d 205, 129 FEP 628 (5th Cir. 2016) – Policy against harassment posted on bulletin board in personnel office – summary judgment reversed based on failure to utilize policy – several employees testified that they were not trained with respect to the policy and did not know that it existed – this creates factual issue as to applicability of *Ellerth/Faragher* defense.

*Stewart v. Rise, Inc.*, 791 F.3d 849, 127 FEP 809 (8th Cir. 2015) – reversing the trial court summary judgment, Circuit Court holds that supervisor may proceed to trial on claims that she was the victim of harassment by her subordinates, that higher management and HR knew about it, and did not protect her – a jury must decide whether the harassment was sufficiently severe and whether employer officials knew or should have known about it – contention that plaintiff should have filed written complaints instead of simply oral complaints rejected – although reversing the Court of Appeals noted that “[w]hen the plaintiff is a supervisor, and the objected-to conduct originates among her subordinates, a jury may look with great suspicion upon claims that the plaintiff adequately presented her concerns up the chain of command.” 791 F.3d at 862 – the summary judgment had been based on *Faragher/Ellerth* and failure to take advantage of corporate procedures for correcting
harassment – the Eighth Circuit viewed failure to follow the harassment procedures as possibly “determinative in the minds of jurors,” but not determinative as a matter of law.

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

_General_

_Zetwick v. County of Yolo_, ___ F.3d ___, 129 FEP 1657, 2017 WL 710476 (9th Cir. Feb. 23, 2017) – Summary judgment reversed – County sheriff greeted female correction officer with more than 100 hugs over a 12-year period and at least one unwelcome kiss – this conduct as well as sheriff’s hugging other female employees and infrequency of hugs to male employees could permit a finding of a hostile work environment – District Court erred in applying mathematical test to determine that officer’s environment was not hostile and by holding that hugs and kisses on cheek in workplace are common behavior; opinion by District Judge Mark Bennett sitting by designation.

_Reynaga v. Roseburg Forest Prods._, ___ F. 3d ___, ___ FEP ___, No. 14-35028, D.C. No. 6:11-cv-06282-MC (9th Cir. January 26, 2017) – 2 to 1 decision – co-employee harassment – employer brought in outside agency to investigate and issued verbal warning to harasser to have no unnecessary contact with harassees – harassees refused to continue work if scheduled for same shift with harasser – summary judgment reversed – reasonable trier-of-fact could conclude that refusing to work was not the
real reason for the termination but was pre-textual – case seems erroneous in suggesting that harasseses have a right to refuse to work on the same shift with harasser even though there has been no repetition of the harassing conduct after an investigation and warning.

_Hansen v. SkyWest Airlines_, 844 F.3d 914, 129 FEP 1494 (10th Cir. 2016) – Grant of summary judgment to employer reversed – same-sex gay harassment – district court misapplied continuing violation doctrine and improperly excluded from consideration incidents that occurred over 300 days before the EEOC filing – acts occurring outside 300-day period involved the same type of harassment.

_Furcron v. Mail Ctrs. Plus, LLC_, 843 F.3d 1295, 129 FEP 1385 (11th Cir. 2016) – Alleged harasser was disabled individual suffering from Asperger Syndrome – he stared at plaintiff with an erect penis and would deliberately bump and rub his erection against her – a second employee witnessed these actions – plaintiff did not originally complain because she recognized that his disability may have affected his behavior – ultimately, plaintiff complained to her supervisor – the supervisor refused to take action – shortly thereafter plaintiff took a picture of the harasser from the neck down to prove that he exhibited an erection in the workplace – she showed the photographs to several co-workers – management did not take her seriously and laughed at her – plaintiff was suspended and then fired for taking an inappropriate photograph and showing it around the workplace – she sued for sexual harassment and retaliatory discharge – summary judgment granted to company on retaliation issue – plaintiff disobeyed instructions with respect to showing the photograph – summary judgment reversed with respect to plaintiff’s sexual harassment complaints that the company did not take adequate action when she complained.

_Graves v. Dayton Gastroenterology, Inc._, 657 Fed. App’x 485, 129 FEP 904 (6th Cir. 2016) – Lead nurse sent two unsolicited emails referencing sex – “[Y]ou just have fun and wild sex” and “[y]ou and your husband . . . have wild sex on the table! I do think about sex all the time. I [sic] just not getting it.” 657 Fed. App’x at 487. – Plaintiff reported both inappropriate text messages to her superior, who reprimanded the sender – the sender became very angry and began treating Graves rudely, but there was no retaliation claim in the case – the only claim was hostile
environment – summary judgment affirmed – first, the conduct was not based on gender – to be actionable, the harassment must consist of more than words that have sexual content – moreover, there is no solicitation or evidence of anti-female animus and no request for sexual favors – the animus expressed after she complained was not based upon gender, but based on the fact of the complaint – and she filed no retaliation claim.

Smith v. Rock-Tenn Servs., Inc., 813 F.3d 298, 128 FEP 1233 (6th Cir. 2016) – Male-on-male harassment jury verdict upheld – same-sex hostile environment – harasser only harassed fellow males – conduct went on for substantial length of time – employer’s response unreasonable since it delayed investigation ten days and did not suspend harasser pending investigation – harasser had previously been threatened with discharge after similar behavior.

Prior v. United Air Lines, Inc., 791 F.3d 488, 127 FEP 801 (4th Cir. 2015) – African American flight attendant harassed by anonymous harasser who left racist death threats in her company mailbox – she showed death threats to her supervisor who said he was sorry but there was not much United could do because there were no security cameras covering the area – summary judgment reversed on the theory that a reasonable jury could find that United should have done more to protect the plaintiff – reliance on the fact that United never reported the incident to police – plaintiff had to do so herself – clear that the harassment was severe and pervasive – “[Q]uestion of United’s liability for the anonymous harassing conduct is a closer one[,]” 791 F.3d at 497 – “The anonymous nature of severe threats or acts of harassment may . . . heighten what is required of an employer, particularly in circumstances where the harassment occurs inside a secure space accessible to only company-authorized individuals[,]” id. – “Given the severity of the threat, a reasonable jury could find that United’s response was neither prompt nor reasonably calculated to end the harassment[,]” id. at 498.

Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 126 FEP 1637 (4th Cir. 2015) (en banc) – Employee complained that white supervisor twice called her a “porch monkey” – 4th Circuit overrules prior precedent that this was not protected activity which could support a retaliation claim – proper standard is whether employee had a reasonable belief that a hostile work environment is occurring – even though the incident was isolated the
question in an isolated incident case is whether the harassment is physically threatening or humiliating – a reasonable jury could find that this was humiliating.

_EEOC v. New Breed Logistics_, 783 F.3d 1057, 126 FEP 1403 (6th Cir. 2015), _reh’g en banc denied_, 2015 U.S. App. LEXIS 12417 (6th Cir. July 8, 2015) – $1.5 million dollar jury verdict affirmed on behalf of three complainants – the three harasseses complained only to the harasser – “[W]e conclude that a demand that a supervisor cease his/her harassing conduct constitutes protected activity covered by Title VII[,]” 783 F.3d at 1067 – Sixth Circuit acknowledged that Fifth Circuit is to the contrary – employer liable because it knew about the protected activities because of the complaints directed to the harasser – all three complainants terminated – two were fired by a different supervisor, but “cat’s paw” liability affirmed – reasonable to conclude that the harasser influenced the terminating supervisor – _Faragher/Ellerth_ defense irrelevant since there were tangible employment actions.

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

_Muhammad v. Caterpillar, Inc._, 767 F.3d 694, 124 FEP 524 (7th Cir. 2014), _cert. denied_, 135 S. Ct. 2844 (2015) – Company reasonably responded to complaints of co-worker harassment which included offensive comments and graffiti and perceptions of sexual orientation – Title VII prohibits the co-workers derogatory comments about race and sexual orientation, but the claims must fail because Caterpillar took prompt action that was reasonably calculated to end the harassment, such as immediately painting over the graffiti and threatening the offending co-workers with termination – prompt response ended the harassment except for one remark that was never reported.
Adams v. Austal USA, LLC, 754 F.3d 1240, 123 FEP 485 (11th Cir. 2014) – Only incidents of harassment of which the plaintiff was aware of at the relevant time frame can be considered – reason is that courts must conduct objective assessment from perspective of reasonable person in plaintiff’s position, knowing what the plaintiff knew – this does not allow consideration of what one learns about harassment only after employment ends or through discovery – 24 African-American employees sued together alleging racial harassment, racial graffiti, nooses, Confederate flags, and racial slurs – summary judgment granted against the claims of 13 of the employees on the ground that their work environment was not objectively hostile – this appeal concerns those 13 orders as well as jury verdicts against two of the plaintiffs who went to trial – “We now hold that an employee alleging a hostile work environment cannot complain about conduct of which he was oblivious for the purpose of proving that his work environment was objectively hostile[,]” – 754 F.3d at 1245 – nevertheless several of the employees submitted sufficient evidence and summary judgment must be vacated against them – summary judgment affirmed against the remaining six employees and the two jury verdicts against plaintiffs – the District Court correctly applied a reasonable person standard but erred in judging the severity of the conduct for summary judgment purposes with respect to seven of the thirteen cases decided on summary judgment.

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

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

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

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

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

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

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

Debord v. Mercy Health Sys. of Kan., Inc., 737 F.3d 642, 120 FEP 1429 (10th Cir. 2013), cert. denied, 134 S. Ct. 2664 (2014) – Summary judgment against female employee who complained of sexual harassment – no retaliation – she posted inflammatory material about her supervisor on the internet, saying that he was a “snake” who “needs to keep his creepy hands to himself” – she also sent text messages to her co-workers containing such allegations – her contention that she was merely trying to gather evidence rejected – properly terminated for improper postings and lying about them – company policy dictates that investigation should be confidential.
Williams-Boldware v. Denton Cnty., 741 F.3d 635, 121 FEP 755 (5th Cir.), cert. denied, 135 S. Ct. 106 (2014) – Racial harassment judgment reversed – employer took prompt action – reprimand and requirement to attend diversity training sufficient – “Employers are not required to impose draconian penalties upon the offending employee in order to satisfy this court’s prompt remedial action standard,” 741 F.3d at 640.

Bertsch v. Overstock.com, 684 F.3d 1023, 115 FEP 745 (10th Cir. 2012) – Summary judgment properly granted on hostile environment claim – employer took proper remedial action by conducting investigation and issuing written warning to alleged harasser – plaintiff contended that employer did not “follow up” to ensure that the harassment had ended – that is not the employer’s burden – it is the claimant’s burden to seek relief if the harassing conduct continues after the discipline.

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

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

Varno v. Canfield, 664 Fed. App’x 63, 129 FEP 1235 (2d Cir. 2016) (non-precedential) – Summary judgment in race/retaliation discharge case – fact that employee was hired and terminated by the same supervisor creates inference against discriminatory intent.
Cosby v. Steak-N Shake, 804 F.3d 1242, 32 A.D. Cas. 405 (8th Cir. 2015) – No constructive discharge – first, employee failed to show an intolerable work environment. Next, “[i]f an employee quits without giving the employer a reasonable chance to resolve his claim, there has been no constructive discharge.” 804 F.3d at 1246. With respect to state law disability claim, decision to demote was made before employee requested leave of absence for depression – employer had no knowledge of disability at time decision made.

Watson v. Heartland Health Labs, Inc., 790 F.3d 856, 127 FEP 964 (8th Cir. 2015) – Summary judgment on constructive discharge claim – “Given the nature of the alleged conduct in this case [sexual harassment by patient], however, Watson was not reasonable in voluntarily abandoning her job after giving her employer only ten working days to remedy the perceived intolerability.” 790 F.3d at 864.

Ames v. Nationwide Mut. Ins. Co., 760 F.3d 763, 123 FEP 658 (8th Cir. 2014), cert. denied, 135 S. Ct. 947 (2015) – Summary judgment affirmed on constructive discharge claim by woman who just returned from maternity leave – she alleged that her department head told her she should go home to her babies – “[b]y not attempting . . . to contact human resources, [Plaintiff] acted unreasonably and failed to provide [the employer] with the necessary opportunity to remedy the problem she was experiencing.” 760 F.3d at 769.

Employers (Ch. 22)

Faush v. Tuesday Morning, Inc., 808 F.3d 208, 128 FEP 469 (3d Cir 2015) – Summary judgment reversed – retail store claimed it was not employer of temporary employee and therefore not liable for race discrimination claims – reasonable jury could find that temporary employee was store’s employee since plaintiff was trained, equipped, supervised, instructed, and controlled by the store’s managers.
Love v. JP Cullen & Sons, Inc., 779 F.3d 697, 126 FEP 659 (7th Cir. 2015) – African American plaintiff dismissed from construction job site after physical altercation with another worker – general contractor employed a sub-contractor who in turn employed a second sub-contractor which in turn employed plaintiff – the job superintendent for the second tier sub-contractor received work instructions from the general contractor, and passed those instructions on to plaintiff – the general contractor only gave specific directions if it reviewed a finished product and found it unsatisfactory – in the event of “serious incidents,” the general contractor retained the right to investigate alleged misconduct by its subcontractors’ employees and to permanently remove them from the job site – the general ordered both combatants permanently removed from the job site – plaintiff’s employer attempted to persuade the general to reinstate plaintiff but unsuccessfully – plaintiff’s employer terminated him, since it had no other pending projects – court below granted summary judgment on the ground that the general contractor was not the de facto or direct employer – a plaintiff may have multiple employers for the purpose of Title VII liability – precedents have looked to five factors: (1) the extent of the employer’s control and supervision over the employees; (2) the kind of occupation and nature of skill required; (3) the employer’s responsibility for the cost of operation; (4) the method and form of payment and benefits; and (5) the length of the job commitment. Of all the factors, the employer’s right to control is the most important in determining whether an individual is an employee or independent contractor – here the control was only as to the result to be achieved – if the general reviewed a finished product and found it to be unsatisfactory, it would communicate further instructions – “This minimal supervision is essentially limited to ‘the result to be achieved,’ which militates against a finding of control.” 779 F.3d at 703 – when control is examined, the key powers are hiring and firing – here the general retained the final decision regarding the continued presence of any worker on the project site – but the record lacks any evidence that the general attempted to jeopardize plaintiff’s continued employment with the sub-contractor – the fact that the sub-contractor had no other projects is unrelated – here none of the five factors support an employment relationship – our prior cases have indicated that an entity other than the direct employer may be considered a Title VII employer if it directed the discriminatory act – but the general didn’t fire him, it just directed that he be removed from its project – in any case, “evidence that a de facto employer ‘directed the discriminatory act’ is not – without more – enough to establish a de facto employer-employee relationship under Title VII[,]” 779 F.3d at 706 (internal quotation marks omitted) – the
general’s decision to remove plaintiff from the project is relevant but not determinative on the control issue – summary judgment affirmed.

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

*EEOC v. Simbaki, Ltd.*, 767 F.3d 475, 124 FEP 713 (5th Cir. 2014) – Female bartenders, represented by counsel, brought harassment charges only against the franchisee – the EEOC served both the franchisee and the franchisor – District Court dismissed for failure to name the franchisor – circuit court decisions have allowed exceptions to the named party requirement for pro se plaintiffs, but never for plaintiffs represented by counsel – this makes no sense – remanded for determination as to whether the franchisor was adequately put on notice.

*Knitter v. Corvias Military Living, LLC*, 758 F.3d 1214, 123 FEP 1023 (10th Cir. 2014) – Plaintiff, a handyman, worked for a contractor that supplied handyman services to Military Living, a company that provided housing for military personnel. When a unit was vacated, the housing company paid the contractor a flat fee to send in a handyman and do all necessary repairs. The contractor then paid the handyman. The housing company was the sole client of the contractor. Plaintiff sued the housing company. Summary judgment was granted and affirmed on the ground that the housing company was not plaintiff’s employer or joint employer – under the joint employer test, the two entities must share or co-determine matters governing the essential terms and conditions of employment – both entities must exercise significant control such as promulgating work rules and day-to-day supervision – no reasonable jury could find that plaintiff was an employee of the housing company – the housing company did not have authority to terminate plaintiff, did not pay her directly, did not have authority to supervise or discipline beyond the confines of a
vendor-client relationship – the housing company treated the plaintiff as a vendor providing a service rather than an employee – ability to ask that the employee not work on housing company projects is not the same as authority to terminate – although some degree of supervision and even discipline is to be expected when a vendor’s employee comes on another’s worksite, here the supervision and discipline was too limited to support a joint employer finding – the housing company exerted only the sort of control that one would expect from a client to exert over its vendors – supervising limited aspects of their work, providing them with instruction on particular tasks, and furnishing some supplies when necessary.

**Unions (Ch. 23)**

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

**Employment Agencies (Ch. 24)**

*Nicholson v. Securitas Security Servs. USA, Inc.*, 830 F.3d 186, 129 FEP 617 (5th Cir. 2016), *on remand* 2016 WL 7669518 (N.D.Tex., Dec. 29, 2016) – Staffing agency placed plaintiff with client – client requested plaintiff be removed for age discriminatory reasons – staffing agency complied – staffing agency liable only if it knew or should have known that client’s motive for requesting removal was discriminatory – remanded for factual determination.

**Charging Parties and Plaintiffs (Ch. 25)**

*Marie v. Am. Red Cross*, 771 F.3d 344, 125 FEP 264 (6th Cir. 2014) – Catholic nuns who volunteered to work with the Red Cross as disaster relief helpers were not employees protected by Title VII – reliance on fact that they received no compensation or substantial benefits, they retained considerable discretion and flexibility over when and how they volunteered, and Red Cross did not exercise any real control over them.
Bluestein v. Cent. Wis. Anesthesiology, S.C., 769 F.3d 944, 124 FEP 1459 (7th Cir. 2014) – Issue was whether anesthesiologist who was partner and shareholder of medical practice was employee or employer – plaintiff worked as an employee for 2½ years and then became a full partner – she had a vote in all matters – physician shareholders shared profits and losses equally – most issues were resolved by a majority vote – plaintiff participated in many votes – summary judgment affirmed – extensive analysis of non-exclusive list of 6 factors under Clackamas – no one factor is determinative – there were approximately 16 shareholders at the time of her termination – hire and fire decisions were by vote – indeed plaintiff voted on her own termination – “the right to cast a vote equal to that of any other board member unequivocally indicates that Bluestein was an employer rather than an employee,” 769 F.3d at 953 – the second part of the first factor, whether the organization set the rules and regulations of the individual’s work, does not assist plaintiff – it was not the organization but the physician shareholders who collectively voted on rules and regulations – the second factor, whether the organization supervises the individual’s work, undisputed that plaintiff was not supervised – third factor, whether she reports to someone higher in the organization, is essentially coextensive with the second factor on supervision – the fourth factor is to what extent the individual is able to influence the organization – she had a full vote – Bluestein’s situation was markedly different from EEOC v. Sidley Austin where a large law firm consisting of more than 500 partners was controlled by a small self-perpetuating executive committee – we held some shareholders may be considered employees and remanded for discovery – the fifth factor, whether the parties intended the individual to be an employee, we note that she did have an employment agreement – the language in plaintiff’s contract cannot overcome the reality of her position – as to the sixth factor, she clearly shared in profits – “Our conclusion that she was an employer is fatal to all her discrimination claims,” 769 F.3d at 956 – summary judgment affirmed – award of attorneys’ fees against plaintiff and her lawyer also affirmed since case was frivolous – trial court found that “a reasonable amount of legal research should have alerted counsel to the implausibility of success on the merits of any of her claims,” 769 F.3d at 957. – “A reasonable jurist could conclude that [plaintiff’s] suit was frivolous, unreasonable and without foundation, and we therefore affirm the award of attorneys’ fees.” id.
EEOC Administrative Process (Ch. 26)

_EEOC v. TriCore Reference Labs_, ___ F.3d ___, ___ FEP ___, 2017 BL 59316, No. 16-2053 (10th Cir. Feb. 27, 2017) – Employer does not have to submit broad personnel information to EEOC in the agency’s investigation of a single discrimination charge – EEOC contended, in relation to a charge dealing with a requested pregnancy accommodation, names of all employees who became pregnant to allow the agency to determine if there was a pattern or practice – the broad data request simply wasn’t relevant to the individual charge – the scope of EEOC subpoenas is before the Supreme Court in _McLane Co. v. EEOC_ – nothing in the individual charge suggested a pattern or practice – requiring the employer to provide the names of pregnant workers who never sought accommodations has no apparent connection to the pending disability or sex bias charge.

_EEOC v. McLane Co., Inc._, 804 F.3d 1051, 128 FEP 285 (9th Cir. 2015), cert. granted 137 S. Ct. 30 (Sept. 29, 2016) – Underlying charge was that strength test constituted sex discrimination – district court partially enforced EEOC subpoena, but refused to enforce two categories of information: (1) “pedigree information” (identities, social security numbers, and contact information for each test taker) and (2) information about employees terminated for non-test reasons – “pedigree information” must be produced – the issue is relevance, not necessity – case remanded to district court on issue (2) to consider whether would be unduly burdensome.

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

\textit{EEOC v. Aerotek, Inc.}, 815 F.3d 328, 128 FEP 1478 (7th Cir. 2016) – EEOC investigation subpoena against staffing company enforced – staffing company required to submit information related to its clients and their requests for staffing – EEOC’s initial review of information revealed hundreds of age-based discriminatory job requests made by clients at 62 of the staffing firm’s facilities – EEOC entitled to identifying information about the staffing agency’s clients.

\textit{Moreland v. Johnson}, 806 F.3d 961, 128 FEP 579, (7th Cir. 2015), \textit{cert. granted}, ___ U.S. ___ (Sept. 29, 2016) – A “spinoff” charge is one that alleges dissatisfaction with the processing of a previous charge and can be summarily dismissed – dismissal here reversed – plaintiff’s allegation of retaliation at a hearing on her discrimination charge is not a spinoff and should have been consolidated with the original charge.

\textit{EEOC v. Royal Caribbean Cruises, Ltd.}, 771 F.3d 757, 30 A.D. Cas. 1553 (11th Cir. 2014) – EEOC investigation of hiring and firing – EEOC subpoenaed information about both U.S. and non-U.S. citizens – EEOC subpoena power does not extend to non-U.S. citizens since their employment conditions are not relevant to the charge under investigation.
**Timeliness (Ch. 27)**

**Continuing Violation**

*Jenkins v. City of San Antonio Fire Dep’t*, 784 F.3d 263, 126 FEP 1527 (5th Cir 2015) – Three-day presumption of receipt after mailing determines whether Title VII suit was timely filed when date of receipt of EEOC right-to-sue letter is unknown.

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

**General Issues**

*Hamer v. Neighborhood Housing Servs. of Chicago*, ___ U.S.____, Sup. Ct. Case No. 16-658 *(review granted Feb. 27, 2017)* – Issue is time to appeal from federal district court dismissal of discrimination claims – District Court granted 60-day extension of deadline – appeal filed within that period – Seventh Circuit decided it lacked power to decide her appeal because under the federal rules of appellate procedure, the District Court could not grant extensions of more than 30 days – issue is whether the appeals court can decide the merits if it decides there is good cause to excuse a late filing.
Artis v. D.C., ___ U.S. ___, U.S. Sup. Ct. Case No. 16-460 (review granted Feb. 27, 2017) – Supreme Court agrees to review Court of Appeals timeliness decision – if District Court denies federal claims in combined federal/state lawsuit, it must decide whether to exercise “supplemental jurisdiction” over the state law claims – if District Court dismisses, the issue is how long after the dismissal may an employee wait to refile in state court – multiple courts say that plaintiffs in bias cases must file their new lawsuits within 30 days of the federal court dismissal – but other courts say that if the state statute of limitations provides more than 30 days, the state statute governs.

Green v. Brennan, ___ U.S. ___, 136 S. Ct. 1769, 129 FEP 117 (May 23, 2016) – Statute of limitations on constructive discharge claims runs from date of resignation, not date of last discriminatory act, not last day of work.

Carlson v. Christian Bros. Servs., 840 F.3d 466, 33 A.D. Cas. 61 (7th Cir. 2016) – Discharged employee’s ADA claim properly dismissed because there was no timely EEOC charge – “Complainant Information Sheet” filled out with state agency was not the equivalent of a charge even though it identified the parties and described the alleged discrimination since the form did not request remedial action or relief, which is required information for a charge under Supreme Court precedent.

Rembisz v. Lew, 830 F.3d 681, 129 FEP 673 (6th Cir. 2016) – Charging party received right to sue notice more than 90 days before suit was filed; notice was separately sent to attorney for charging party, who received it less than 90 days before suit was filed – time limit runs from earliest delivery of notice to either charging party or counsel, not from latest – summary judgment affirmed.

Castagna v. Luceno, 744 F.3d 254, 121 FEP 1533 (2d Cir. 2014) – A timely EEOC charge does not toll the statute of limitations with respect to tort claims – both the Seventh and Ninth Circuits have already so held.
Jurisprudential Bars to Action (Ch. 28)

*Matson v. United Parcel Serv., Inc.*, 840 F.3d 1126, 129 FEP 1205 (9th Cir. 2016) – Trial court dismissal on LMRA preemption reversed – claim that company favored men over her in the assignment of lucrative extra work was only part of her gender-based claim – her right to be free from workplace discrimination is independent of any rights under the collective bargaining agreement – normally employers will not be successful in arguing LMRA preemption to try to get hostile work environment claims dismissed – hostile work environment cases are different from claims brought under or requiring interpretation of a collective bargaining agreement – while LMRA preemption can be present if the claim requires interpretation of the collective bargaining agreement, the term “interpret” is defined narrowly.

*Kovaco v. Rockbestos-Surprenant Cable Corp.*, 834 F.3d 128, 32 A.D. Cas. 1721, (2d Cir. 2016) – Social Security disability application which stated plaintiff “unable to work” inconsistent with ADA unlawful discharge claim – Plaintiff judicially estopped from showing qualified at time of discharge.


*Van Horn v. Martin*, 812 F.3d 1180, 128 FEP 1293 (8th Cir. 2016) – Employee is judicially estopped from bringing Title VII case – case arose while employee had pending Chapter 13 Bankruptcy suit – employee failed to disclose employment claims to Bankruptcy court – failure to disclose not good faith mistake given that employee had received right to sue letter due during pendency of Bankruptcy proceedings – Bankruptcy court discharged employee’s debts based on representation she had no such claims.
Jones v. Bob Evans Farms, Inc., 811 F.3d 1030, 128 FEP 1181 (8th Cir. 2016) – Federal and State race discrimination claims dismissed because not disclosed in Chapter 13 bankruptcy proceeding. Judicial estoppel found – asserting the claims was inconsistent with his Bankruptcy position that they didn’t exist – Bankruptcy plan was confirmed that ordered him to report lawsuits that are received or receivable during the plan term – he received a right to sue letter from the EEOC and filed suit but didn’t report it – after summary judgment was granted on judicial estoppel grounds he reopened his Bankruptcy estate to amend his schedules to include the discrimination lawsuit – Too late.

Robinson v. Concentra Health Servs. Inc., 781 F.3d 42, 126 FEP 925 (2d Cir. 2015) - Black plaintiff awarded total disability benefits under social security for multiple sclerosis – this bars her from pursuing Title VII and Section 1981 claims – her social security claims were filed months before she was fired – but she asserted in support of her bias claims that she was qualified at the time of her discharge – summary judgment granted since plaintiff failed to explain the contradiction – she was judicially estopped – plaintiff argued that she couldn’t have been totally disabled when she applied for social security since she was still working – this “demonstrates only that her statements to the SSA and the ALJ may have been false,” but doesn’t affect judicial estoppel – reliance on Cleveland v. Policy Management System Corp., 526 U.S. 795 (1999) (to overcome contradictions between SSA application and lawsuit there must be a “sufficient explanation”).

Myers v. Knight Protective Serv., Inc., 774 F.3d 1246, 31 A.D. Cas. 1 (10th Cir. 2014), cert. denied, 135 S. Ct. 2061 (2015) – Security guard injured on previous job applied for social security disability benefits – represented was in constant pain, could only walk or stand between 10 and 20 minutes, and could not lift more than 10 pounds – new employer noticed he seemed to be in pain and stated he could not continue without a physical exam – plaintiff never scheduled the exam but sued for disability discrimination – in law suit claimed could perform essential functions of job – no prima facie case since could not show was qualified in light of such “seemingly inconsistent statements” unless he could explain the “apparent contradiction,” which he failed to do.
Huon v. Johnson & Bell, Ltd., 757 F.3d 556, 122 FEP 1540 (7th Cir. 2014) – Claim preclusion bars federal court discrimination suit – litigated and lost state court suit alleging defamation and intentional infliction – even though he had the right to allege discrimination in a state court complaint, he elected not to do so – he thus had a full and fair opportunity to litigate his discrimination claims in his state court suit.

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

Dzakula v. McHugh, 746 F.3d 399, 121 FEP 636 (9th Cir. 2014) – Case dismissed because Plaintiff failed to list discrimination claim as an asset in Chapter 7 Bankruptcy – only after Defendant moved to dismiss did she amend her Bankruptcy schedules – no evidence suggested that the omission was inadvertent or mistaken – while appeal pending Ninth Circuit decided Ah Quin v. County of Kauai Department of Transportation, 733 F.3d 267 (9th Cir. 2013) – in that case the District Court applied a narrow interpretation to the terms “inadvertent or mistaken” – the trial court in Ah Quin held that since the Plaintiff knew about the claim and had a motive to conceal it, that barred the claim as a matter of law – we reversed and held that mistake and inadvertence should be interpreted using the ordinary understanding of the terms – in that case there had been some facts supporting the conclusion that the omission may have been inadvertent – in that case viewing the facts most favorably to plaintiff we remanded for further facts – Ah Quin is distinguishable – the District Court did not apply the wrong legal standard – the District Court interpreted inadvertent or mistaken under the ordinary understanding of those terms – Plaintiff presented no evidence explaining her initial failure to include the action on her Bankruptcy schedules – Plaintiff seems to argue that our Ah Quin decision mandates an evidentiary hearing every time a plaintiff debtor omits a claim – Ah Quin is applicable only when a reasonable jury could conclude based on the factual record that the failure to list the asset was inadvertent – argument that the District Court abused its discretion in assessing the three principle factors that one relies on in these cases rejected – as to the first factor, by failing to list the claim while
at the same time pursuing the claim Plaintiff clearly asserted inconsistent positions – as to the second factor the Bankruptcy Court was misled by Plaintiff’s omission – on the third factor, Plaintiff derived an unfair advantage in Bankruptcy Court by failing to list the claim – summary judgment affirmed.

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

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

**Title VII Litigation Procedure (Ch. 29)**

*Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 129 FEP 1413 (7th Cir. 2016) – Plaintiff paid co-worker money to lie about having witnessed discrimination – witness tampering is a grave abuse of judicial process – dismissal with prejudice as sanction is proper – facts underlying District Court’s decision to dismiss as sanction only need to be established by preponderance of the evidence.

McCleary-Evans v. Maryland Dep’t of Transp., 780 F.3d 582, 126 FEP 640 (4th Cir. 2015) – 12(b)(6) dismissal affirmed since complaint did not contain sufficient factual matter to state a plausible claim of discrimination because plaintiff was African American or female under Iqbal and Twombly – the complaint simply alleged in conclusory fashion that the decision-makers were biased with respect to her not being selected for promotion – plaintiff relies on Swierkiewicz v. Sorema, 534 U.S. 506 (2002) (prima facie case not necessary to survive motion to dismiss) – but under Iqbal and Twombly a complaint must contain factual allegations sufficient to create a non-speculative right to relief – a complaint must contain sufficient factual matter which if accepted as true states a claim to relief that is “plausible on its face” – this complaint stopped short of a line between the possibility of discrimination and the plausibility of discrimination – “the Supreme Court in Swierkiewicz applied a different pleading standard than that which it now requires under Iqbal and Twombly[,]” 780 F.3d at 586 – while Swierkiewicz remains good law, Twombly and Iqbal did alter the criteria in at least two respects – (1) it rejected the holding that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff could prove no set of facts sufficient for relief, and (2) “Iqbal and Twombly articulated a new requirement that a complaint must allege a plausible claim for relief, thus rejecting a standard that would allow a complaint to ‘survive a motion to dismiss whenever the pleading left open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery[,]’” 780 F.3d at 587 (internal quotation marks omitted; emphasis in original).
**Climent-Garcia v. Autoridad de Transporte Maritimo**, 754 F.3d 17, 122 FEP 1543 (1st Cir. 2014) – Employer waived right to challenge jury loss on basis of sufficiency of evidence when, although it moved for directed verdicts at the close of the employee’s case and at the close of all the evidence, it failed to file a JNOV motion after the jury returned a verdict or to move for a new trial.

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

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

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

*Gates v. Caterpillar, Inc.*, 513 F.3d 680, 102 FEP 609 (7th Cir. 2008) – In response to summary judgment motion in retaliation case, employee in declaration alleged for the first time that she had made a statement to her supervisor opposing gender bias – statement made for first time in declaration properly disregarded even though there was never a specific deposition question calling for the comment – “Although the affidavit statement does not necessarily conflict with [plaintiff’s] testimony from her previous deposition, the omission of such a significant statement during her deposition in a sex discrimination case speaks volumes.” 513 F.3d at 688 – while we have long held that a plaintiff cannot avoid summary judgment by contradicting a prior deposition, it is less obvious when the new statement does not directly contradict prior testimony – “Under the circumstances at hand here, where specific, gender-based complaints are vital to [plaintiff’s] claim and where she made no mention of the statement in her deposition, it is reasonable to exclude it.” *Id.* at 688 n.5 – summary judgment affirmed.
EEOC Litigation (Ch. 30)

*Mach Mining, LLC v. EEOC,* ___ U.S. ___, 135 S. Ct. 1645, 126 FEP 1521 (2015) – Courts may review EEOC conciliation efforts prior to filing a lawsuit but the scope of review is narrow – 7th Circuit holding that Title VII shields EEOC’s pre-suit conciliation efforts from any review rejected – nothing in Title VII “withdraws the courts’ authority to determine whether the EEOC has fulfilled its duty to attempt conciliation of claims,” 135 S. Ct. at 1656 – but the EEOC has considerable discretion over the conciliation process and judicial review is limited – if a court finds for the employer regarding a conciliation shortfall, the remedy is not dismissal but further conciliation.

*EEOC v. Bass Pro Outdoor World, LLC,* 826 F.3d 791 (5th Cir. 2016) – EEOC can pursue pattern or practice discrimination claims under Section 706 – this will potentially allow the shifting of the burden to employers to disprove bias at individual hearings at the remedial stage – the EEOC can employ the bifurcated trial framework set forth in *Teamsters v. U.S.* even if it sues under Section 706, which permits compensatory and punitive damages – employer position that EEOC can pursue pattern or practice claims only under Section 707 which limits relief to back pay and injunctive relief rejected.

*EEOC v. PJ Utah, LLC,* 822 F.3d 536, 32 A.D. Cas. 1427 (10th Cir. 2016) – Unconditional right of employee to intervene in EEOC enforcement action trumps individual’s arbitration agreement – “Once it is established that a party enjoys an unconditional statutory right to intervene, the language of Rule 24(a)(1) does not allow the district court any discretion to deny intervention even if the party would ultimately need to go to arbitration,” 822 F.3d at 540 – nevertheless, Circuit Court refused to disturb district court’s order compelling individual plaintiff to arbitrate – order compelling arbitration is not a final decision – the bottom line is that plaintiff is allowed to intervene, but ordered to proceed to arbitration – not clear what affect the arbitration award would have on the EEOC litigation.
EEOC v. CVS Pharmacy, Inc., 809 F.3d 335, 128 FEP 797 (7th Cir. 2015)
– CVS entered into a severance agreement with a terminated employee
that included a broad release of waivable claims including claims under
Title VII – it carved out the employee’s right to participate in a proceeding
with any appropriate governmental agency enforcing discrimination laws
– the EEOC sued without engaging in conciliation – summary judgment
affirmed – “[T]he EEOC argues that Section 707(a) of Title VII gives it
broad powers to sue without engaging in conciliation or even alleging that
the employer engaged in discrimination . . . . [W]e disagree with the
EEOC and affirm the judgment of the district court.” 809 F.3d at 336 –
prior to suit CVS asked the EEOC to comply with the pre-suit procedures
of Section 706, and to reconsider its position that merely offering a
severance agreement to a terminated employee without any allegation of
discrimination or retaliation was actionable – the EEOC stated it would
resolve the claims only by a consent decree and it was not required to
engage in conciliation – the EEOC contends that since Section 707(a)
authorizes it to bring actions challenging a “pattern or practice of
resistance,” this lets it proceed without following any of the pre-suit
procedures in Section 706 – the EEOC further contended that a reasonable
jury could conclude that the severance agreement deterred signatories
from filing charges because of the length of the agreement, the small font,
and the fact that it was drafted in “legalese” – in 1972 Congress gave the
EEOC the right to sue under Section 706, and transferred the Attorney
General’s authority to initiate pattern or practice suits to the EEOC under
Section 707 – but Section 707(e) provided that the EEOC’s authority on
pattern or practice cases “shall be conducted in accordance with the
procedures set forth in [Section 706]” – the legislative history indicated
that the EEOC would have the same power the Attorney General formerly
had under Section 707 – the problem is that it reads Section 707(e) out of
the statute – “We reject the EEOC’s expansive interpretation of its powers
under Section 707(a),” 809 F.3d at 341 – suits under Section 707(a) must
challenge practices that threaten the employee’s right to be free from
workplace discrimination and retaliation for opposing discriminatory
employment practices – the only right secured by Title VII.
Section 707(a) does not create a broad enforcement power for the EEOC
to pursue non-discriminatory employment practices that it dislikes –
offering a terminated employee new benefits for a release is not retaliation
– there is no difference between a suit challenging a “pattern or practice of
resistance” under Section 707(a) and a “pattern or practice of
discrimination” under Section 707(e) – the EEOC was required to comply
with all pre-suit procedures contained in Section 706, including
conciliation – “If we were to adopt the EEOC’s interpretation of
Section 707(a), the EEOC would never be required to engage in
conciliation before filing a suit because it could always contend that it was
acting pursuant to its broader power under Section 707(a).” 809 F.3d at
342 – “The 1972 amendments gave the EEOC the power to file ‘pattern or
practice’ suits on its own, but Congress intended for the agency to be
bound by the procedural requirements set forth in Section 706, including
proceeding on the basis of a charge,” 809 F.3d at 343.

EEOC v. Sterling Jewelers Inc., 801 F.3d 96, 128 FEP 8 (2d Cir. 2015) –
Title VII requires the EEOC to “investigate the charge” before filing a
lawsuit – a district court granted summary judgment to the employer on
the grounds of inadequate investigation – reversed – the inquiry should
simply have been whether the Commission conducted an investigation, not
whether it was sufficient – Supreme Court in Mach Mining LLC v. EEOC,
135 S. Ct. 1645 (2015) did authorize some inquiry into whether the
EEOC fulfilled its duty to conciliate, however, Title VI grants the EEOC
considerable discretion over the process – while Mach Mining did not deal
directly with the investigation requirement, “we conclude that judicial
review of an EEOC investigation is similarly limited, 801 F.3d at 101 – an
affidavit from the EEOC stating that it performed its investigative
obligations in outlining the steps taken to investigate will usually suffice –
a court should not second guess how the EEOC conducted its
investigation.

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

EEOC v. Peoplemark, Inc., 732 F.3d 584, 120 FEP 181 (6th Cir. 2013) –
$751,942 attorney and expert witness fees award against EEOC for
frivolous lawsuit – claim that agency had a blanket companywide policy of
denying jobs to applicants with felony records groundless – decision was 2
to 1 – EEOC unreasonably continued to litigate once discovery revealed
that no such policy existed – case was not groundless when filed but
became groundless.
**Federal Employee Litigation (Ch. 32)**

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

**Class Actions (Ch. 33)**

*Spokeo, Inc. v. Robins*, 578 U.S. ___, 136 S. Ct. 1540 (May 16, 2016) – The Fair Credit Reporting Act (FCRA) requires consumer reporting agencies to “follow reasonable procedures to assure maximum possible accuracy” of consumer reports – Spokeo, a “people search engine,” got some facts wrong with respect to plaintiff Robins – he filed a class action alleging that the company willfully failed to comply with the above requirements, and sought the liquidated damages provided in the statute for violations – between $100 and $1,000 per person – there was a serious question as to whether his complaint alleged injury in fact – the Ninth Circuit held that this was not required, since Congress could dispense with injury in fact simply by creating a federal right – the Supreme Court reversed, holding that under Article III of the Constitution Congress could not authorize monetary damages simply because a statute had been violated in relation to a particular person – injury in fact was required:

“‘Injury in fact is a constitutional requirement, and ‘[i]t is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.’”

136 S. Ct. at 1547-48.

“To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.”

*Ibid.* (internal quotations and citation omitted).
“A concrete injury must be de facto; that is, it must actually exist. . . . When we have used the adjective ‘concrete,’ we have meant to convey the usual meaning of the term – ‘real,’ and not ‘abstract.”’

*Id.* at 1548 (internal quotations, emphasis, and dictionary citations omitted).

“Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.”

*Id.* at 1549.

“Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA’s procedural requirements may result in no harm.”

*Id.* at 1550.

The case was remanded to the Ninth Circuit with the following instruction:

“[The Ninth Circuit] did not address the question framed by our discussion, namely, whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement [which the Court just held existed in the FCRA].”

*Id.*

*Tyson Foods, Inc., v. Bouaphakeo et al.*, 577 U.S. ___, 136 S. Ct. 1036 (2016) – This was an FLSA and state wage hour Rule 23 representative/class action – at issue was the compensability of “donning and doffing” time with respect to protective gear worn before killing and cutting chickens – Tyson did not keep any records of the time – plaintiffs’ expert did videotaped observations and then analyzed on average how long each contested activity took – there was no *Daubert* challenge to the
expert—plaintiffs’ other expert then estimated from the first expert the amount of uncompensated time—the jury did not award the entire amount claimed and it was not clear which types of donning and doffing the jury found compensable and which they did not—the jury awarded the class 2.9 million dollars—the parties did not dispute that the standard for certification under Rule 23 and 29 USC § 216 was the same—the central question was whether representative evidence could be used by the plaintiffs to show that each employee worked more than 40 hours a week when average time for donning and doffing was added to regular hours—the court concluded that in this case the representative evidence was admissible—

“In a case where representative evidence is relevant in proving a plaintiff’s individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act’s pellucid instruction that use of the class device cannot ‘abridge . . . any substantive right.’ . . . One way for respondents to show, then, that the sample relied upon here is a permissible method of proving class-wide liability is by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action.” 577 U.S. at ___, 136 S. Ct. at 1046.

The Court explained that this is not a trial by formula of the sort condemned by Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011)—there the employees were not similarly situated and none of them could have prevailed in an individual suit by relying on evidence from other stores and other managers—

“In contrast, the study here could have been sufficient to sustain a jury finding as to hours worked if it were introduced in each employee’s individual action. While the experiences of the employees in Wal-Mart bore little relationship to one another, in this case each employee worked in the same facility, did similar work, and was paid under the same policy. As Mt. Clemens confirms, under these circumstances the experiences of a subset of employees can be probative as to the experiences of all of them.” 577 U.S. at ___, 136 S. Ct. at 1048.

The Court continued “Representative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or
accurate estimate of the uncompensated hours an employee has worked. Petitioner, however, did not raise a challenge to respondent’s experts methodology under Daubert . . .” Id. at 1048-49 – Tyson argued that there has to be some mechanism to identify uninjured class members – class members who even with donning and doffing would not exceed 40 hours in a week – the Court remanded so that this question could be considered since it was not fairly presented – the court invited Tyson to challenge any method of allocation. The vote was 6 to 2, with Thomas and Alito in dissent.

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

Phipps v. Wal-Mart Stores, Inc., 792 F.3d 637, 127 FEP 945 (6th Cir. 2015) – Follow on class action to Dukes case, covering smaller geographic area, is entitled to the benefit of American Pipe tolling.
Brown v. Nucor Corp., 785 F.3d 895, 126 FEP 1793 (4th Cir. 2015) – Class of black employees alleging promotion discrimination meets commonality requirement even after Dukes – statistical evidence is sound and yields results that satisfy Dukes’ requirements – statistical disparity in promotions is significant at 2.54 standard deviations.

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

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

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

*McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 114 FEP 710 (7th Cir. 2012) – Posner opinion reversing denial of certification of a class of 700 African-American financial advisers – class sought injunctive relief against company policies that allegedly had a race-based adverse impact, specifically a “teaming” policy (which allows advisers to team up to share accounts) and policy for distributing accounts
of departing advisers (generally favoring those with the best prior record of production) – rejecting the company’s reliance on *Wal-Mart Stores, Inc. v. Dukes* – it is true that the company policies are implemented at the local level by local managers, but the local managers still are implementing a company-wide policy – if those “company-wide policies authorizing broker-initiated teaming, and basing account distributions on past success, increase the amount of discrimination,” 672 F.3d at 490, then “[t]he incremental causal effect . . . of those company-wide policies — which is the alleged disparate impact — could be most efficiently determined on a class-wide basis[,]” *id.* – court emphasized that plaintiffs did not seek a classwide determination of monetary relief – Rule 23(c)(4) allows “an action [to] be brought or maintained as a class action with respect to particular issues,” *id.* at 491 – here the question of class-based adverse impact – “The practices challenged in this case present a pair of issues that can most efficiently be determined on a class-wide basis . . . .” *Id.* – it is true that “resolving an issue common to hundreds of different claimants in a single proceeding may make too much turn on the decision of a single, fallible judge or jury,” *id.*, but “that is an argument for separate trials on pecuniary relief,” *id.*, not injunctive relief – “We have trouble seeing the downside of the limited class action treatment that we think would be appropriate in this case[,]” *id.*, because no money will be paid without individualized factfinding - even if adverse impact is established, “hundreds of separate trials may be necessary[,]” *id.*, to decide who is entitled to monetary relief, in which “[e]ach class member would have to prove that his compensation had been adversely affected by the corporate policies, and by how much[,]” *id.* – “[A]t least it wouldn’t be necessary in each of those trials to determine whether the challenged practices were unlawful.” *Id.*

*Bolden v. Walsh Constr. Co.*, 688 F.3d 893, 115 FEP 1153 (7th Cir. 2012) – Black employees claim that by granting discretion to job site supervisor company allowed discrimination against them with respect to assigning overtime and in working conditions – no commonality – class members worked on at least 262 different construction sites having different superintendents and foremen – the sites had materially different working conditions – the only policy being protested was the policy of affording discretion to each job site superintendent – commonality is the basis of the *Wal-Mart v. Dukes* case – “when multiple managers exercise independent discretion, conditions at different stores (or sites) do not present a common question,” 688 F.3d at 896 – “[t]he sort of statistical evidence that
plaintiffs present has the same problem as the statistical evidence in Wal-Mart: it begs the question,” id. - “[i]f [the company] had 25 superintendents, 5 of whom discriminated in awarding overtime, aggregate data would show that black workers did worse than white workers – but that result would not imply that all 25 superintendents behaved similarly, so it would not demonstrate commonality,” id. - “[a]ccording to plaintiffs – in Wal-Mart and this case alike – local discretion had a disparate impact that justified class treatment,” id. at 897 – but Wal-Mart rejected that proposition – in Wal-Mart the court recognized that discretion might facilitate discrimination (Watson v. Fort Worth Bank & Trust) but it also observed that some managers will take advantage of the opportunity to discriminate while others won’t – “One class per store may be possible; one class per company is not,” id. – the District Court relied on McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012) – in that case we remarked that the class in Wal-Mart would not have been manageable – in McReynolds we held that a national class could be certified to contest the policy allowing brokers to form and distribute commissions within teams and to determine who would be on a team – this single national policy was the missing ingredient in Wal-Mart – plaintiffs contend McReynolds supports their position – “it doesn’t.” While plaintiff’s brief on appeal contends Walsh has 14 policies that present common questions, they all boil down to affording discretion – “Wal-Mart tells us that local discretion cannot support a company-wide class no matter how cleverly lawyers may try to repackage local variability as uniformity,” 688 F.3d at 898 – this is applicable to both the overtime class and the hostile work environment class – “[t]he order certifying two multi-site classes is reversed.” Id. at 899.

Overview

Unanimous – case improperly certified under Rule 23(b)(2) – claims for monetary relief may not be so certified at least where the monetary relief is not incidental – individualized monetary claims must be certified if at all under 23(b)(3).

Unanimous – Wal-Mart is entitled to individualized determinations of each employee’s eligibility for back pay – this is required by § 706(g) of Title VII and by the Teamsters line of cases – this right cannot be replaced by “trial by formula.”

5-4 – commonality requirement of 23(a)(2) not established – common question means determination of its truth or falsity will resolve a central issue.

5-4 – plaintiffs must factually prove all requirements of Rule 23 – Eisen does not prohibit considering merits evidence when relevant to Rule 23 issues.

Detail of Majority Opinion

Wal-Mart store managers have great discretion with respect to pay and promotions utilizing their own subjective criteria – plaintiffs say because Wal-Mart is aware of statistics indicating men were favored that this amounts to disparate treatment – plaintiffs contend strong and uniform corporate culture permits bias against women to infect these discretionary decisions making every woman the victim of a common practice – Ninth Circuit en banc approved nationwide class certification based on three forms of proof: statistical evidence, anecdotal reports, and a sociologist’s testimony – Ninth Circuit would allow formula relief by randomly selecting claims that would be litigated and then extrapolating the value of those claims to the entire class – crux of the case is commonality –
whether the named plaintiffs’ claims and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence – commonality requires the plaintiffs to have suffered the same injury as the class members – “Their claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor” (131 S. Ct. at 2550) – commonality “means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke” (id.) – quoted a commentator that commonality requires “the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation” (id. at 2551) (citation omitted; emphasis in original) – analysis is rigorous – plaintiff must prove with evidence that frequently will overlap the merits of each of the Rule 23 requirements – Eisen case has been mistakenly believed to preclude consideration of merits evidence even if relevant to Rule 23 issues – not so – it merely precludes deciding the merits – “Proof of commonality necessarily overlaps with [plaintiffs’] merits contention [of] a pattern or practice of discrimination” (id. at 2552) (emphasis in original) – crux of the inquiry is the reason for a particular employment decision – here plaintiffs wish to sue about literally millions of employment decisions at once – “Without some glue holding the alleged reasons for all those decisions together, it will be impossible to . . . produce a common answer to the crucial question why was I disfavored.” (id.) (emphasis in original) – Falcon describes how commonality must be proven: “[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.” (id. at 2553) (quoting Falcon) – significant proof is absent – the only evidence of a general policy of discrimination was the testimony of Dr. William Bielby, plaintiffs’ sociological expert, who testified that Wal-Mart has a strong corporate culture which makes it vulnerable to bias – but “[a]t his deposition . . . Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.” (id.) – the parties dispute whether Bielby’s testimony should even be admissible under Daubert – the district court concluded that Daubert did not apply to experts at the certification stage – “We doubt that is so” but even if properly considered, Bielby’s testimony adds nothing in light of his concession that he cannot even estimate what percent of employment decisions were infected by stereotypes – the only corporate
policy attacked is allowing discretion by local supervisors – this “is a policy against having uniform employment practices” (id. at 2554) (emphasis in original) – subjective decisionmaking is common and presumptively reasonable – when different store managers can operate differently, “demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s. A party seeking to certify a nationwide class will be unable to show that all the employees’ Title VII claims will in fact depend on the answers to common questions.” (id.) – the statistical studies are insufficient – “As Judge Ikuta observed in her dissent, ‘[i]nformation about disparities at the regional and national level does not establish the existence of disparities in individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level.’ [citation omitted] A regional pay disparity, for example, may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs’ theory of commonality depends.” (id. at 2555) – moreover, despite the requirements of Wards Cove plaintiffs have identified no specific employment practice that ties together their 1.5 million claims – the anecdotal evidence is too weak – in Teamsters it was one anecdote for every 40 class members – here it is one for every 12,500 – next, certification under 23(b)(2) was improper – whether or not monetary relief can ever be certified under (b)(2) “we now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief” (id. at 2557) – “Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class” (id.) – these claims could be certified if at all under 23(b)(3), which “allows class certification in a much wider set of circumstances but with greater procedural protections” (id. at 2558) – moreover, the test of whether injunctive relief predominates, which plaintiffs urge, creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief, including, in the Wal-Mart case, dropping compensatory damages – “Contrary to the Ninth Circuit’s view, Wal-Mart is entitled to individualized determinations of each employee’s eligibility for backpay. Title VII includes a detailed remedial scheme.” (id. at 2560) - § 2000e-5(g)(1) flatly bars backpay to any non-victim – “[I]f the employer can show that it took an adverse employment action against an employee for any reason other than discrimination, the court cannot order backpay under §2000e-5(g)(2)(A)” (id. at 2560-61) – Teamsters sets forth the procedure – a district court must usually conduct additional proceedings to determine individual relief – the
burden of proof will shift to the company but it will have the right to raise any individual affirmative defenses – “The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula” (id. at 2561) – “We disapprove that novel project.” (id.) – the Rules Enabling Act forbids interpreting Rule 23 to abridge any substantive right and therefore “a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.” (id.).

**Discovery (Ch. 34)**

*Brown v. Oil States Skagit Smatco*, 664 F.3d 71, 113 FEP 1537 (5th Cir. 2011) *(per curiam)* – Title VII case properly dismissed for perjured deposition testimony – at deposition plaintiff testified that he quit for only one reason – racial harassment, in his accident personal injury lawsuit, he testified under oath that he left his job “solely” because of the back pain caused by the accident – lawsuit dismissed with prejudice – “[D]ismissal with prejudice [is] a more appropriate sanction when the objectionable conduct is that of the client, not the attorney,” 664 F.3d at 77 – contention lesser sanction should have been imposed rejected – “Brown deceitfully provided conflicting testimony in order to further his own pecuniary interests . . . and, in doing so, undermined the integrity of the judicial process. Through his perjured testimony, Brown committed fraud upon the court, and this blatant misconduct constitutes contumacious conduct[,]” id. at 78 – the lesser sanction of a monetary sanction would not work because Brown could not pay it – not everyone like Brown will be caught and when perjury is discovered the penalty needs to be severe – “Brown plainly committed perjury, a serious offense that constitutes a severe affront to the courts and thwarts the administration of justice. . . . Brown, and not his attorney, committed the sanctionable conduct, which makes the harsh sanction of dismissal with prejudice all the more appropriate.” Id. at 80.
Statistical and Other Expert Proof (Ch. 35)

_Burgis v. NYC Dep’t of Sanitation, 798 F.3d 63, 127 FEP 1341 (2d Cir. 2015)_ – Statistical proof alone can be used to prove intent under Section 1981 and/or the equal protection clause if statistically significant and makes other plausible non-discriminatory explanations very unlikely – dismissal affirmed because statistical proof was inadequate, basically showing simply declining percentages of minorities as one went up the job scale – in order to show discriminatory intent “the statistics must not only be statistically significant in the mathematical sense, but they must also be of a level that makes other plausible non-discriminatory explanations very unlikely[.]” 798 F.3d at 69.

The Civil Rights Acts of 1866 and 1871 (Ch. 36)

_Bonenberger v. St. Louis Met. Police Dep’t, 810 F.3d 1103, 128 FEP 1045 (8th Cir. 2016)_ – $620,000 jury award against three police department officials who discriminated against the white plaintiff because of a desire to hire a black sergeant affirmed – the job in question did not have any increase in pay, benefits, or rank but offered a more favorable work schedule and greater prestige and increased opportunities for promotion – that was deemed sufficient for an adverse employment action – a reasonable jury could conclude that there was an understanding of the decision-makers to discriminate on the basis of race – case brought under Section 1983.

Reverse Discrimination and Affirmative Action (Ch. 38)

*Formella v. Brennan*, 817 F.3d 503, 128 FEP 1525 (7th Cir. 2016) – white decision maker chose black applicant over white plaintiff for promotion – since decision-maker and alleged discriminatee are both white, reverse discrimination proof standards govern – to survive summary judgment, white plaintiff must show, in addition to meeting employer’s legitimate expectations in suffering an adverse action, the following: (1) “[B]ackground circumstances exist to show an inference that the employer has reason or inclination to discriminate invidiously against whites or evidence that there is something ‘fishy’ about the facts at hand”; and (2) “[Plaintiff] was treated less favorably than similarly situated individuals who are not members of his protected class,” 817 F.3d at 511 (internal quotations and citations omitted) – there is no evidence of an inclination of the white decision maker to favor non-whites – alleged comparators are not similarly situated – this is especially true because the successful candidate did a much better job in answering questions in the competitive oral interviews – “Officer Fields performed better in the interview than Formella. Better performance in an interview is unquestionably a legitimate, non-discriminatory basis to hire one candidate over another,” 817 F.3d at 514.

*Deets v. Massman Const. Co.*, 811 F.3d 978, 128 FEP 1248 (7th Cir. 2016) – Reverse discrimination – summary judgment reversed – plaintiff alleged employer told him he was being laid off because “[m]y minority numbers aren’t right. I’m supposed to have 13.9 percent minorities on this job, but I’ve only got 8 percent.” 811 F.3d at 980. – This factual assertion makes the case appropriate for resolution by a jury – the labor contract required proper minority staffing – lower court’s conclusion that the alleged statement didn’t “point directly at discrimination” was puzzling – plaintiff was in fact replaced the next day by a black worker.

*Shea v. Kerry*, 796 F.3d 42, 127 FEP 1507 (D.C. Cir. 2015) – White foreign service officer challenged state department affirmative action plan – proper analytical framework is set forth in the Supreme Court’s *Johnson* and *Weber* cases despite contention that *Ricci* “strong basis in evidence” standard should apply – *Johnson* and *Weber* are directly applicable to this situation, and *Ricci* via implication did not overrule these decisions – burden was thus to establish that affirmative action plan was based on a
“manifest racial imbalances in traditionally segregated job categories” – state department met this test – summary judgment affirmed.

Injunctive and Affirmative Relief (Ch. 40)

*Olivares v. Brentwood Industries*, 822 F.3d 426, 129 FEP 199 (8th Cir. 2016) – Jury awarded $1.00 in nominal damages and no reinstatement or front pay to discriminatorily discharged plaintiff – denial of reinstatement affirmed since it was neither possible nor practical because all supervisory positions were already filled and there were unrepairable trust issues between the employee and the company. Denial of front pay award was proper since the supervisor’s testimony about his post-verdict salary was unsupported by any admissible documentation.

Monetary Relief (Ch. 41)

*Guenther v. Griffin Constr. Co., Inc.*, 846 F.3d 979, 33 A.D. Cas. 400 (8th Cir. 2017) – Death of plaintiff does not moot compensatory damages claim for mental pain and suffering under the Americans With Disabilities Act – no view on whether a claim for punitive damages would survive.

*Zimsumbo v. Ogden Reg’l Med. Cir.*, 801 F.3d 1185, 128 FEP 220 (10th Cir. 2015) – Federal District Court properly refused to instruct jury on punitive damages prior to jury returning a verdict for discharged employee on retaliation claim – employer submitted substantial evidence that it trained employees properly on anti-discrimination – alleged failures of its HR director and ethics director to adhere to policies do not establish a broader failure by employer to enforce anti-discrimination policies – punitive damages therefor are not justified.

*Johnson v. Nextel Commun’s, Inc.*, 780 F.3d 128, 126 FEP 473 (2d Cir. 2015) – Company and law firm representing over 500 employees entered into agreement to set up a dispute resolution process and drop lawsuits – total payout to employees was $3.9 million – approximately double that amount went to the law firm – class action suit versus company and class
malpractice suit versus law firm – class certification reversed – claims were under state law, and laws of different states differed on relevant issues – punitive damages trial plan unacceptable – in *Simon II Litigation v. Philip Morris U.S.A., Inc.*, 407 F.3d 125 (2d Cir. 2005), the court rejected a trial plan that called for the jury to determine a lump sum of punitive damages for the entire class, prior to any determination of actual injury to individual plaintiffs – such a trial plan might conflict with *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), which held that punitive damage awards must be tethered to compensatory damages in order to comply with due process – plaintiffs attempted to avoid this problem by proposing that the phase two jury determine only a punitive damages ratio that would then be applied to each class member’s compensatory damages – under the specific facts of this case, determining a punitive damages ratio without any grounding in a compensatory damages award is impracticable and fails to give the jury an adequate basis for determining what measure of punitive damages is appropriate – as *State Farm* explained, while there is no rigid upper limit on a ratio of punitive damages to compensatory damages, the propriety of the ratio can be meaningfully assessed only when comparing the ratio to the actual award of compensatories – a larger punitive to compensatory ratio might be appropriate where there were particularly egregious acts but little damages – similarly, “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee[,]” 780 F.3d at 149 (quoting *State Farm*, 538 U.S. at 425) – under plaintiff’s trial plan the phase two jury would determine a ratio based on an amalgam of the actual damages to only the named plaintiffs yet based on the defendants’ conduct toward the entire class – “This one-size-fits-all punitive damages ratio would therefore be no more tethered to compensatory damages than the lump sum we disapproved of in *Simon II[,]*” id. – “Plaintiffs’ trial plan therefore suggests that . . . the punitive damages inquiry in this case fails to meet the predominance and superiority requirements of Rule 23(b)(3)[,]” id. at 150.

*EEOC v. N. Star Hospitality, Inc.*, 777 F.3d 898, 125 FEP 1681 (7th Cir. 2015) – Proper to award 15% tax component increase to retaliation claimant to offset tax burden and he will face as a result of a lump sum back pay award – because of a lump sum award he will be bumped into a higher tax bracket.
Turley v. ISG Lackawanna, Inc., 774 F.3d 140, 125 FEP 895 (2d Cir. 2014) – Punitive damage award of $5 million in racial harassment case required further reduction despite extremely egregious conduct – compensatory award of $1.32 million is particularly high, so 4-to-1 ratio serves neither predictability nor proportionality – 2-to-1 ratio is maximum allowable under these circumstances.

Arizona v. ASARCO LLC, 773 F.3d 1050, 125 FEP 753 (9th Cir. 2014) (en banc) – A $300,000 punitive damage award under Title VII is constitutionally permissible even though the prevailing plaintiff recovered only $1 in nominal damages on her sexual harassment claim – the due process analysis set forth by the U.S. Supreme Court in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), must be modified in the Title VII context – Gore’s ratio analysis has little applicability in the Title VII context – Title VII places a consolidated cap on both compensatory and punitive damages – Under Title VII when compensatory damages are awarded that decreases the punitive damages.

Attorney’s Fees (Ch. 42)

CRST Van Expedited, Inc. v. EEOC, ___ U.S. ___, 136 S. Ct. 1642, 129 FEP 134 (2016) – The issue was whether a favorable judgment on the merits was necessary in order for a defendant employer to recover attorneys’ fees against the EEOC – the underlying case was dismissed because the EEOC failed to properly conciliate – in order to recover attorneys’ fees the party must be the “prevailing party” – there had been no judgment that CRST was not guilty of hostile environment sexual harassment – the suit was dismissed because of the failure to conciliate and/or comply with other Section 706 requirements – the trial court awarded over $4 million in attorneys’ fees – the court of appeal affirmed the dismissal of almost all the Commission’s claims, reversing only the claims of two employees – the Commission withdrew one of the claims and settled the other – the Court of Appeal had vacated the award of attorneys’ fees, CRST moved again for attorneys’ fees, which were again awarded – the trial court noted that under Fox v. Vice, 563 U.S. 826 (2011), fees could be awarded with respect to the claims on which CRST prevailed – the Court of Appeal again reversed, holding there had to be a favorable judicial determination on the merits before a defendant could recover fees – the Supreme Court reversed, holding “that a defendant need
not obtain a favorable judgment on the merits in order to be a ‘prevailing party.’” 136 S. Ct. at 1651 – “The defendant has . . . fulfilled its primary objective whenever the plaintiff’s challenge is rebuffed, irrespective of the precise reason for the court’s decision. The defendant may prevail even if the court’s final judgment rejects the plaintiff’s claims for a non-merits reason.” Id. – The purpose of attorneys’ fee awards to defendants is to spare defendants from the cost of frivolous litigation – it makes no sense to distinguish “between merits-based and non-merits-based frivolity,” Id. at 1652 – case remanded to consider ancillary arguments.

*Fox v. Vice,* 131 S. Ct. 2205 (2011) – Must apportion attorney’s fees between those caused by frivolous cause of action and fees that would have been incurred without frivolous cause of action – “but for” test – just as plaintiffs may receive fees even if they are not victorious on every claim, so too may a defendant even if the plaintiff’s suit is not wholly frivolous – but defendant is not entitled to fees caused by the non-frivolous claims – the issue is whether the attorney’s fees and costs would have been incurred in the absence of the frivolous allegation – this should not result in a second major litigation since the essential goal is rough justice, not auditing perfection – case filed in state court with § 1983 claim – removed by defendant to federal court - § 1983 claim dismissed and state claims remanded to state court – award of totality of attorney’s fees vacated and remanded.

*Perdue v. Kenny A.*, 559 U.S. 542, 130 S. Ct. 1662, 109 FEP 1 (2010) – Prevailing plaintiff in civil rights case can have lodestar increased but only in “extraordinary circumstances” – lodestar approach is key – it has “achieved dominance” – six important rules govern decision – (1) reasonable fee is one that is sufficient to induce a capable attorney to take a meritorious case but does not provide “a form of economic relief to improve the financial lot of attorneys.”” 130 S. Ct. at 1673 (citation omitted); (2) strong presumption that lodestar method yields a sufficient fee; (3) Court has never sustained an enhancement of a lodestar for performance and has always said enhancement is only for “rare” and “exceptional” circumstances; (4) lodestar includes most if not all of the relevant factors constituting a reasonable attorney’s fee and thus an enhancement may not be based on a factor already subsumed such as novelty, complexity or the quality of an attorney’s performance; (5) burden of proving an enhancement is necessary is borne by the fee
applicant; and (6) an applicant seeking enhancement must produce “specific evidence” supporting the enhancement to ensure that the calculation is objective and capable of being reviewed – lodestar may be overcome only in those rare instances in which the lodestar does not adequately account for a factor that may be properly considered in determining a reasonable fee – it would be a rare and exceptional case where the lodestar does not take into account superior attorney performance – an example might be where the lodestar hourly rate is based on years of practice but the attorney’s ability transcends that measure – an enhancement might be warranted if the attorney had to advance extraordinary expenses and the litigation is exceptionally protracted – the enhancement amount in such cases must be calculated through objective criteria – an enhancement may be appropriate where an attorney’s performance involves exceptional delay – enhancement in this case reversed – reliance on the contingency of the outcome was inappropriate and contravenes Burlington v. Dague, 505 U.S. 557 (1992) – case is remanded for proceedings consistent with the opinion.

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

Muniz v. United Parcel Service, Inc., 738 F.3d 214, 120 FEP 1549 (9th Cir. 2013) – Ninth Circuit 2 to 1 in opinion written by District Court judge sitting by designation approved $697,971.80 in attorneys’ fees in a case where the plaintiff recovered only $27,280 – District Court judge reduced lodestar by 10% to account for lack of success – did not explain reasoning why the number was 10% – plaintiff originally sought $2 million in fees – unreasonably inflated – under state law would qualify as a special circumstance that would have justified a substantial reduction in total denial of fees – but majority holds that this is discretionary.
Alternative Dispute Resolution (Arbitration) (Ch. 43)

*DirecTV, Inc. v. Imburgia*, 577 U.S. ___, 136 S. Ct. 463 (2015) – By 6 – 3 vote, consumer arbitration agreement that precludes class actions upheld – California Court of Appeal decision reversed – California courts bound by AT&T Mobility LLC v. Concepcion and its holding that no court, state or other body may avoid Concepcion’s mandate – FAA preemption found.

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

id. at 2311 (emphasis in original) – “The class-action waiver merely limits arbitration to the two contracting parties[,]” id. This result is all but mandated by AT&T Mobility – “[T]he switch from bilateral to class arbitration”, we said, ‘sacrifices the principle advantage of arbitration’ – its informality[,]” id. at 2312 (citation omitted; first alteration in original) –

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

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

“We would face a different issue if Oxford had argued below that the availability of class arbitration was a so-called ‘question of arbitrability.’ Those questions – . . . whether a concededly binding arbitration clause applies to a certain type of controversy’ – are presumptively for courts to decide.
Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 . . . (2003) (plurality opinion). A court may therefore review an arbitrator’s determination of such a matter de novo absent clear and unmistakable evidence that the parties wanted an arbitrator to resolve the dispute. [Citations, quotation marks and alterations omitted.]

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

133 S. Ct. at 2068 n.2 – Oxford relies on Stolt-Nielsen – but there “[t]he parties in Stolt-Nielsen had entered into an unusual stipulation that they had never reached an agreement on class arbitration,” id. at 2069 – so there the arbitrator could not have construed the contract – here the arbitrator did construe the contract – “[Section] 10(a)(4) bars . . . overturn[ing the arbitrator’s] decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly.” – “Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator’s contract interpretation, or any quarrel with Oxford’s contrary reading. All we say is that convincing a court of an arbitrator’s error – even his grave error – is not enough.” 133 S. Ct. at 2070. – Concurring opinion of Justices Alito and Thomas pointed out that “unlike petitioner, absent members of the plaintiff class never conceded that the contract authorized the arbitrator to decide whether to conduct class arbitration. It doesn’t.” Id. at 2071. Not clear that absent class members will be bound unless the class arbitration is opt-in – “In the absence of concessions like Oxford’s, this possibility [the absent class members would not be bound but could unfairly claim a benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one] should give courts pause before concluding that the availability of class arbitration is a question the arbitrator should decide.” Id. at 2072. [NOTE: Essentially, the court is saying it has not yet decided a normal case – no stipulations – arbitration agreement is silent on class actions – employer takes the position that a court must decide arbitrability of a class action – arbitrator nevertheless orders class arbitration].
AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) – California’s judicially created Discover Bank rule finds arbitration agreements unconscionable if they do not allow classwide arbitration – the Discover Bank rule is preempted by the FAA – the issue is “whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures” (131 S. Ct. at 1744) – the answer is yes – the FAA was enacted in response to widespread judicial hostility to arbitration agreements – federal policy favors arbitration – Section 2 of the FAA permits arbitration agreements to be declared unenforceable “upon such grounds as exist at law or in equity for the revocation of any contract” (id.) – this allows arbitration agreements to be invalidated by generally applicable defenses such as fraud, duress or unconscionability “but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” (id. at 1746) – plaintiffs argue that unconscionability is included within FAA Section 2 – when state law prohibits outright the arbitration of a particular claim the analysis is straightforward – FAA preemption – inquiry is more complex when a normally applicable doctrine such as duress or unconscionability is alleged to have been applied in a manner that disfavors arbitration – an obvious illustration would be a state policy finding unconscionable arbitration agreements that fail to provide for judicially monitored discovery, or finding unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence – although Section 2’s savings clause preserves generally applicable contract defenses it is not intended to preserve state law rules that stand as an obstacle to the accomplishment of the FAA’s objective – “Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” (id. at 1748) – arbitration is a creature of contract – parties may agree to limit the issues – parties may agree to limit with whom they will arbitrate – parties can agree that the proceedings will be kept confidential to protect trade secrets – the parties can agree on streamlined procedures – “California’s Discover Bank rule . . . interferes with arbitration. . . . [Its] rule is limited to adhesion contracts . . . but the times in which consumer contracts were anything other than adhesive are long past.” (id. at 1750) – “States remain free to take steps addressing the concerns that attend contracts of adhesion – for example, requiring class-action waiver provisions in adhesive agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.” (id. at 1750 n.6) – Gilmer case cited as allowing ADEA claims
“despite allegations of unequal bargaining power between employers and employees” (id. at 1749 n.5) – as held in Stolt-Nielsen cannot interpret silent arbitration agreement to allow class arbitration – huge differences between individual and class arbitration – arbitrators not generally knowledgeable about procedural aspects of certification – “The conclusion follows that class arbitration, to the extent it is manufactured by Discover Bank rather than consensual, is inconsistent with the FAA.” (id. at 1750-51) – switch from bilateral to class arbitration sacrifices the principal advantage of arbitration, its informality – as of September 2009, AAA had opened 283 class arbitrations, 121 remained active, and “[n]ot a single one, however, had resulted in a final award on the merits” (id. at 1751) – class arbitration was not envisioned by Congress when it passed the FAA – “[I]t is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties’ due process rights are satisfied” (id. at 1751-52) – class arbitration greatly increases the risks to defendants – “[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of ‘in terrorem’ settlements that class actions entail . . . .” (id. at 1752) – “Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well.” (id.) – “We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.” (id.) – “Because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . California’s Discover Bank rule is preempted by the FAA.” (id.) (citation and internal quotation marks omitted) – 5-4 decision – Justice Thomas concurred based on his interpretation of the wording of the FAA, which allowed a failure to enforce only based on grounds applicable to all contracts “for the revocation of any contract” (id. at 1753).

Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 559 U.S. 662, 130 S. Ct. 1758 (2010) – Arbitration agreement was silent on class arbitration – parties stipulated that there was no agreement on arbitrating class cases – AAA found that silent contract allowed for class arbitration – Supreme Court reversed – imposing class arbitration on those who had not agreed is
“fundamentally at war” with the Federal Arbitration Act since under the FAA arbitration is a matter of consent – an implicit agreement on class arbitration “is not a term that the arbitrator may infer solely from the fact of the parties’ agreement to arbitrate,” 559 U.S. at 685 – FAA’s purpose is to enforce private arbitration agreements according to their terms – a party may not be compelled to arbitrate under the FAA unless there is a contractual basis for concluding that the party agreed to do so – the differences between individual and class arbitration are just too great to presume a consent to class arbitration from silence – one enters into individual arbitration agreements for reasons such as speed and lower costs but that is not true for class arbitration – a presumption of confidentiality does not apply in class arbitration – rights of absent parties are adjudicated – what is at risk is comparable to class action litigation but without judicial review – “We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties’ mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings[,]” id. at 687 – since the parties stipulated there was no agreement to class arbitration, “We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration.” Id. 687 n.10.

*Lawrence v. Sol G. Atlas Realty Co., Inc.*, 841 F.3d 81, 129 FEP 1229 (2d Cir. 2016) – Union contract did not clearly refer statutory claims to arbitration – Union contract contained a non-discrimination clause that expressly stated that “[a]ny disputes under this provision shall be subject to . . . arbitration . . . .” 841 F.3d at 83 – However, there is a difference between a contractual prohibition on discrimination and statutory claims – if the parties to a collective bargaining agreement want all statutory claims to go to arbitration, the contract must expressly so state.

*Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted* 2017 WL 125664, ___ U.S. ___ (Jan. 13, 2017) – Breaking ranks with other federal circuits, Seventh Circuit agrees with the Board that an employer’s arbitration agreement requiring claims against the company may be brought in individual arbitrations in prohibiting class and collective actions violates the National Labor Relations Act. Filing a collective or class action lawsuit constitutes “protected activity” under Section 7 of the National Labor Relations Act – prohibiting concerted
activity conflicts with the Act – the phrase in Section 7 “other concerted activity” includes “resort to administrative and judicial forums” – although the NLRA does not define “concerted activities,” an ordinary dictionary definition would include collective or class legal proceedings – the NLRA’s history and purposes include noting that “a single employee is helpless in dealing with an employer,” and that the NLRA was designed to equalize bargaining power by allowing employees to band together – the fact that Rule 23 did not exist when the National Labor Relations Act was passed is countered by highlighting the broad language “other concerted activities for the purpose of . . . other mutual aid or protection,” 823 F.3d at 1154 – a prohibition on class action in an arbitration “runs straight into the teeth of Section 7,” id. at 1155 – Section 7’s right to engage in “other concerted activities” is a substantive right, and accordingly falls within the savings clause of the FAA – the FAA allows overturning arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract” – agreements that deny employee’s right to engage in concerted activities are illegal under the NLRA and thus fall within the FAA’s savings clause – the right to engage in a collective legal action is a “core substantive right protected by the NLRA” rather than simply a procedural right and therefore it must be invalidated because there is no conflict with the FAA – the Seventh Circuit disagreed with the Fifth Circuit which had rejected the NLRB’s analysis of the substantive procedural rights distinction – the Fifth Circuit had reasoned that the right to act collectively in a class action is a procedural and not a substantive right and therefore under the FAA can be waived. D.R. Horton, Inc., 737 F.3d at 357.

Two days after Epic Systems the Eighth Circuit, without mentioning the Seventh Circuit decision, agreed with other Circuits that the NLRA did not prohibit class action waivers in arbitration agreements. Cellular Sales of Missouri, LLC v. NLRB, 824 F.3d 772 (8th Cir. 2016).

Ashbey v. Archstone Prop. Mgmt., Inc., 785 F.3d 1320, 126 FEP 1789 (9th Cir. 2015) – Arbitration agreement binding – plaintiff waived rights to go to court when he signed a form acknowledging receipt of the company’s policy manual, which mandated arbitration – irrelevant that acknowledgment form did not lay out the terms, since the “full text of the Policy was at [plaintiff’s] fingertips,” 785 F.3d at 1325 – “[T]he Acknowledgment here explicitly notified [plaintiff] the Manual contained a Dispute Resolution Policy . . . .” Id.
Davis v. Nordstrom, Inc., 755 F.3d 1089, 22 W.H. Cas. 2d 1432 (9th Cir. 2014) – Original arbitration agreement in employee handbook did not prohibit class claims – employer sent employees a letter telling them that under the provision in the handbook allowing updates it was unilaterally amending the arbitration agreement to prohibit class actions – under California Supreme Court precedent it is permissible to tell employees that continued employment indicates consent to revised agreement.

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

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

Tillman v. Macy’s, Inc., 735 F.3d 453, 120 FEP 998 (6th Cir. 2013) – Arbitration ordered – no signed agreement – employee notified of arbitration program at mandatory meeting – watched video on arbitration – provided with informational brochure – received three separate mailings at her home that reiterated need to opt-out if did not want to be bound by agreement – had more than two months to review agreement and over a year to opt-out which she did not do – “Arbitration should therefore have been required, notwithstanding the absence of an employee-signed written agreement to arbitrate,” 735 F.3d at 455.
Richards v. Ernst & Young, LLP, 744 F.3d 1072 (9th Cir. 2013), cert. denied, 135 S. Ct. 355 (2014) – District Court improperly denied motion to compel individual arbitration – did not matter that employer failed to move to compel arbitration until after there had been some rulings, discovery, and expense – expenses employee incurred were as a result of her deliberate choice of an improper forum and does not establish prejudice – argument that Ninth Circuit should follow NLRB D.R. Horton decision rejected since that was not argued below – However, footnote “without deciding the issue” noted that two courts of appeal and the overwhelming majority of district courts have determined not to defer to D.R. Horton.

Kilgore v. KeyBank, N.A., 718 F.3d 1052 (9th Cir. 2013) (en banc) – Non-employment case – arbitration agreement prohibited class actions – District Court refused to order arbitration – en banc 9th Circuit reversed – California law governed – “Plaintiffs claimed below that the [arbitration agreement’s] ban on class arbitration is unconscionable under California law, but that argument is now expressly foreclosed by Concepcion . . . . Plaintiff’s assertion that students may not be able to afford the arbitration fees fairs no better. See Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90-91 . . . (2000) (‘The “risk” that [a plaintiff] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.’).” 718 F.3d at 1058 – Confidentiality Agreement not a reason to find an arbitration clause unconscionable – “[T]he enforceability of the confidentiality clause is a matter distinct from the enforceability of the arbitration clause in general. Plaintiffs are free to argue during arbitration that the confidentiality clause is not enforceable,” id. at 1059 n.9.

Parisi v. Goldman, Sachs & Co., 710 F.3d 483, 117 FEP 1055 (2d Cir. 2013) – District Court which refused to honor arbitration agreement’s prohibition of class claims reversed – plaintiff claimed that since “pattern or practice” cases could proceed only on a class basis and that she had a statutory right to bring such a case, this rendered the arbitration agreement’s prohibition on class actions unenforceable – the 2nd Circuit reversed – “[T]here is no substantive statutory right to pursue a pattern-or-practice claim,” 710 F.3d at 486 – that term simply refers to a method of proof and does not create a separate cause of action.
D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013) – NLRB held that D.R. Horton violated the NLRA by requiring its employees to sign an arbitration agreement that prohibited a collective or class action – by a 2 to 1 vote, the Fifth Circuit holds that the Board did not give proper weight to the Federal Arbitration Act – Board upheld on requiring Horton to clarify with its employees that the arbitration agreement did not eliminate their right to file unfair labor practice charges with the NLRB – the Board held that Section 7 of the National Labor Relations Act protected the right of employees to join together to pursue workplace grievances including through litigation and arbitration – the Board has not been commissioned to effectuate the policies of its Act so single-mindedly that it may wholly ignore other and equally important congressional objectives – the Federal Arbitration Act has equal importance – arbitration has been deemed not to deny a party any statutory right – class action procedure is not a substantive right – the Board determined that invalidating restrictions on class or collective actions would not conflict with the FAA – basically the NLRB concluded that the policies behind the NLRA trumped the different policy considerations supporting the FAA – under the FAA arbitration agreements must be enforced according to their terms – there are only two exceptions: (1) the FAA saving clause; and (2) application of the FAA may be precluded by another statute – the Board relied on the FAA saving clause but analysis of Concepcion leads to the conclusion that the Board’s rule does not fit within the FAA saving clause – in Concepcion the court found that California’s prohibition on class action waivers did not fall within the saving clause – like the statute in Concepcion, the Board’s interpretation prohibits class action waivers – Concepcion held that requiring class actions under arbitration agreements interferes with the fundamental attributes of arbitration – the NLRA does not contain a congressional command to override the FAA – there is no basis in the wording of the statute to override the FAA – there is no evidence in legislative history of an intent to override the FAA – “[b]ecause the Board’s interpretation does not fall within the FAA’s ‘saving clause,’ and because the NLRA does not contain a congressional command exempting the statute from application of the FAA, the Mutual Arbitration Agreement must be enforced according to its terms[,]” 737 F.3d at 362 – “Every one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB’s rationale,” id. (citations to Second, Eighth, and Ninth Circuits).
Sandquist v. Lebo Automotive, Inc., 1 Cal. 5th 233, 129 FEP 744 (2016) – California Supreme Court 4 to 3 holds arbitrator not court determines whether arbitration agreement silent on the subject allows class actions – question of whether agreement allows class actions held to be procedural rather than “gateway” inquiry – dissent by Justice Krugar notes that every Federal Court of Appeal to consider the issue has held to the contrary, and that language in recent Supreme Court decisions indicates that issue of whether agreement allows class actions is qualitatively different from other procedural issues.

Settlement (Ch. 44)

Beverly v. Abbott Labs, 817 F.3d 328, 128 FEP 1680 (7th Cir. 2016) – Federal District Court properly granted enforcement of handwritten settlement agreement reached during mediation – does not matter that parties intended to execute binding agreement in the future and that handwritten agreement omits certain terms – mediation lasted 14 hours – both parties represented by counsel – near the end both parties and counsel signed a handwritten agreement that indicated that the employer’s offer of $200,000 and the Plaintiff’s demand of $210,000 to resolve the matter would remain open for a specified period of time – the following day the employer’s counsel emailed acceptance – the employer’s counsel sent a formal draft settlement agreement which was largely identical to a template settlement agreement sent before the mediation which gave the employee 21 days to review and 7 days to revoke – plaintiff ultimately declined to sign the agreement, arguing that the handwritten agreement was merely a preliminary document and it only evidenced an intention to execute a binding settlement agreement in the future – plaintiff also contended that numerous material items were omitted from the handwritten agreement – the material terms were undisputed – payment of a set sum and dismissal of all claims – the anticipation of a more formal future writing does not nullify an otherwise binding agreement – the fact that some terms were missing does not affect enforceability as long as the terms are not material – the material terms were the amount paid and the dismissal of the case – plaintiff offers no explanation as to why the missing terms “are so vital that the parties would not have settled the dispute without them,” 817 F.3d at 335.
Roman-Oliveras v. Puerto Rico Electrical Power Auth., 797 F.3d 83, 31 A.D. Cas. 1784 (1st Cir. 2015) – Oral settlement reached before federal judge held binding despite inability to agree on written agreement – following oral settlement agreement, the parties over a period of months circulated several draft agreements – plaintiffs demanded several changes – the parties could not agree – the court nevertheless dismissed the case as settled – District Court found that the unsigned instrument “captured the terms and conditions” of the oral settlement agreement – plaintiffs “bare assertion” that there was no settlement is insufficient to overcome the finding of the settlement judge that an oral agreement had been reached.

Golden v. Cal. Emergency Physicians Med. Grp., 782 F.3d 1083, 126 FEP 1169 (9th Cir. 2015) – In 2-1 decision, Ninth Circuit refused to enforce settlement agreement that not only barred the physician plaintiff from working at any facility where the emergency physician’s group staffed the emergency room, but it also provided that the emergency physician’s group had the right to terminate the plaintiff if it took over responsibility for any emergency room where he was working – the Ninth Circuit said the issue was whether the restraint imposed was of a substantial character – it remanded for determination of that issue – Judge Kozinski in dissent said that the settlement agreement had no effect on the plaintiff’s right to pursue his profession.

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

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