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What Employers Need to Know in 2010

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Hot Topics: What Employers Need to Know in 2010

by Julie Lucht and Andrew Moriarty

I. LEGISLATION

A. Federal Legislation

As evidenced below, Congress and the Obama Administration have been hard at work proposing and enacting new legislation. This new legislation will undoubtedly affect workplace laws and regulations. Although keeping up with these new laws and regulations can be quite the task, employers should take appropriate steps to ensure compliance with these new laws and regulations governing the workplace.

1. Patient Protection and Affordable Care Act ("PPACA")

President Obama signed the Patient Protection and Affordable Care Act ("PPACA") on March 23, 2010 and the Health Care and Education Reconciliation Act ("RA") on March 30, 2010 (together, the "Acts"). The Acts make sweeping changes to the health care system in the United States and will have a significant impact on employer-sponsored group health plans.

While many provisions of the Acts will require clarifying regulations and additional information for full comprehension, employers, plan sponsors and plan administrators can anticipate and prepare for significant changes in a number of general areas. The changes imposed and anticipated under the Acts will be implemented over a long period of time (some provisions will not take effect until as late as 2018). Some provisions, however, are effective now and many will become effective over the next few years.

One provision, amending the federal Fair Labor Standards Act, is not squarely related to health care but is of particular interest to employers. PPACA requires employers to provide "a reasonable break time" for an employee to express breast milk for a nursing child for a period of one year from the child's birth *each* time that the employee has a need to express the milk. Further, employers must provide a place—not a bathroom—that is shielded from view and intrusion for the employee's use.

The employer need not pay the employee for the break time. Employers with less than 50 employees are not subject to these requirements if such requirements would cause the employer "significant difficulty or expense" when considered in connection with the employer's size, financial resources, or the nature of the employer's business.

The provision does not preempt state law that may provide more protections to nursing mothers, and raises a number of unresolved questions. For example, it is not clear whether an employer could credit time for a breast milk expression break toward a rest break required by state law.

As with PPACA's other provisions, further guidance may be forthcoming. For a more complete summary of the legislation, see http://www.perkinscoie.com/news/pubs_detail.aspx?op=updates&publication=2554.

2. Hiring Incentives to Restore Employment Act (P.L. 111-147)

On March 18, 2010, President Obama signed the Hiring Incentives to Restore Employment Act ("Hire Act"). The bill seeks to spur hiring by providing tax breaks for companies that hire unemployed workers in 2010 and creating a bonds program for construction-related projects.

The bill makes $13 billion available to private employers by giving employers a Social Security payroll tax exemption for each worker hired in 2010 who as been out of work for at least 60 days. Employers will also receive, for each worker hired and retained for 52 weeks, the lesser of a $1,000 tax credit or 6.2% of the wages paid to the worker for that 52-week period.

The bill also provides a one-year extension of a small business "expensing" tax break, which allows small businesses to write-off up to $250,000 in a defined set of capital expenditures rather than depreciating those costs over time. The bill also extends the current federal aid for highway programs through the end of 2010.

Finally, the bill establishes a $4.6 billion "Build America Bonds" program, which will make available a direct subsidy payment, which could be received rather than a tax credit, for bonds issued to certain school and energy projects.

3. Airline Flight Crew Technical Corrections Act (P.L. 111-119)

On December 22, 2009, President Obama signed the Airline Flight Crew Technical Corrections Act into law. The bill was narrowly targeted to extending benefits under the Family and Medical Leave Act ("FMLA") to airline flight attendants and pilots, who generally have been denied coverage due to the unique timekeeping practices of the airline industry.

In calculating hours worked, airlines take into account time that flight crews spend between flights on overnight trips, layovers or on reserve status. Courts have, however, interpreted the FMLA to exclude such hours when determining whether the employee has reached the 1,250-hour threshold that triggers FMLA coverage. To remedy the unintended exclusion of flight crews from the FMLA's protections, the Airline Flight Crew Technical Corrections Act lowers the FMLA benefit threshold to 60 percent of a full-time schedule (a 504-hour annual total) for flight crew members.

4. Lilly Ledbetter Fair Pay Act (P.L. 111-2)

The Lilly Ledbetter Fair Pay Act (the "Fair Pay Act") overturns the U.S. Supreme Court's opinion in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). In *Ledbetter*, the Court held that a plaintiff bringing a claim for discriminatory pay practices had to show that the discriminatory acts affecting his or her pay occurred during the 180

days (for states without a fair employment agency) or 300 days (for states with a fair employment agency) prior to the filing of a discrimination charge.[1]

The Fair Pay Act eliminates this required showing by amending Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act ("ADA"), and the Rehabilitation Act. Each statute now provides that the period for an employee to file a charge of pay discrimination is triggered each time the employee receives an allegedly discriminatory paycheck, even if the pay decision was made much earlier.[2] Under the so-called "paycheck rule," each paycheck triggers a new 180- or 300-day filing period.

A plaintiff's back pay damages, however, remain capped at two years.[3] Although plaintiffs under the Fair Pay Act can now look back to the first day of their employment for evidence of discrimination, they cannot recover back pay for a period longer than two years.

5. ADAAA (P.L. 110-325)

On January 1, 2009, the ADAAA came into effect, overturning a number of employer-friendly U.S. Supreme Court decisions and expanding the definition of "disability" under the ADA. In passing the ADAAA, Congress overturned the U.S. Supreme Court cases of *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

First, the ADAAA overturned *Sutton* by clarifying that the determination of whether an individual is disabled is generally made without consideration given to assistive devices.[4] On the other hand, the mitigating measures of ordinary vision correctives, such as eyeglasses or contact lenses, *can* be taken into account in determining whether an impairment substantially limits a major life activity.[5]

Second, the ADAAA reversed the Court's decision in *Toyota Motor Manufacturing*, which imposed a "demanding standard" on plaintiffs seeking to establish that a condition was a disability that substantially limited a major life activity. The ADAAA requires "substantially limits" to be interpreted consistently with the findings and

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[1] *Ledbetter*, 550 U.S. at 632.

[2] Fair Pay Act §§ 3-5. A successful Fair Pay Act claim requires a discriminatory compensation *decision*. *Compare Mikula v. Allegheny County Of PA*, 583 F.3d 181, 186 (3d Cir. 2009) (holding that report issued after internal investigation of discriminatory pay complaint not a "compensation decision")) *with Gentry v. Jackson State Univ.*, 610 F. Supp. 2d 564, 566 (S.D. Miss. 2009) (denial of tenure, which plaintiff contended negatively affected her compensation, qualified as a "compensation decision" or "other practice" affecting compensation under the Fair Pay Act).

[3] Fair Pay Act § 3.

[4] ADAAA § 4(a)(4)(E)(i) (codified at 42 U.S.C. § 12102(4)(E)(i)).

[5] *Id.*

purposes of the ADAAA and "the primary object of attention in cases brought under the ADA" to be whether employers "have complied with their obligations."[6] Thus, "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[7] The ADAAA further states that the ADA's definition of disability "shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."[8]

The ADAAA also includes other new definitions and interpretive guidance that will likely result in a greater number of employee medical conditions meeting the ADA's definition of disability. First, the ADAAA provides that the ADA's third prong of the definition of disability (being "regarded as" disabled) means that an employee has been discriminated against because of an actual or perceived impairment *regardless* of whether the impairment would meet the ADA's first prong (i.e., that the impairment was believed to substantially limit the employee in a major life activity).[9] On the other hand, the ADAAA clarifies that the "regarded as" prong does *not* apply to "impairments that are transitory and minor," defined as those impairments that have "an actual or expected duration of 6 months or less."[10]

The ADAAA also adds a new definition of "major life activities."[11] The new definition mainly sets forth the life functions that courts have typically found to be major life activities, including, but not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[12] The ADAAA also provides that a major life activity includes "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[13]

Finally, the ADAAA states that "disability" encompasses impairments that are episodic or in remission so long as the impairment would "substantially limit a major life activity when active."[14] This provision is primarily intended to address diseases such as

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[6] *Id.* §§ 2(b)(5), 4(a)(4)(B) (codified at 42 U.S.C. § 12102(4)(B)).

[7] *Id.* § 2(b)(5).

[8] *Id.* § 4(a)(4)(A) (codified at 42 U.S.C. § 12102(4)(A)).

[9] *Id.* § 4(a)(1)(C), (3) .

[10] *Id.* § 4(a)(1)(C), (3)(B).

[11] *Id.* § 4(a)(2) (codified at 42 U.S.C. § 12102(2)).

[12] *Id.* § 4(a)(2)(A)).

[13] *Id.* § 4(a)(2)(B)).

[14] *Id.* § 4(a)(4)(D)).

epilepsy, diabetes, or cancer, which some courts have determined in specific circumstances are not disabilities because the conditions could be treated with medication or were in remission.

6. Genetic Information Nondiscrimination Act of 2008 (P.L. 110-233)

On May 21, 2008, the Genetic Information Nondiscrimination Act of 2008 ("GINA") was signed into law.[15] GINA prohibits discrimination on the basis of genetic information by health insurers and employers. GINA does *not* prevent discrimination on the basis of actual diseases and disorders. That remains a prohibition governed by the ADA and various state law equivalents. The provisions governing insurers came into effect on May 21, 2009, and those governing employers came into effect on November 21, 2009. By enacting GINA, Congress created a "floor" of protection for genetic information. States are free to provide more protection, but any state law that provides less is preempted by GINA. The EEOC is in the process of developing regulations to implement the employment provisions of GINA. These are described below in Part III.F.

B. Federal Regulations

1. Federal Trade Commission Issues Guidelines That May Render Employers Liable for Online Conduct by Employees

On October 5, 2009, the Federal Trade Commission ("FTC") revised its guidelines intended to protect consumers from deceptive endorsements and advertising. The new guidelines took effect on December 1, 2009. Under the guidelines, employers who fail to adopt internal policies forbidding certain employee comments on social media or other online sites that constitute an "endorsement" of or advertising for the employer's products may be liable for the employee's activities.

Under the guidelines, the FTC may take corrective action against endorsers and companies for failure to make required disclosures about "material connections" (including employment relationships) that exist between endorsers and companies about whom they comment even in the absence of evidence that the employee's commentary was done at the behest of the employer. 16 C.F.R. § 255.1(c).

The FTC provides the following example of online activity that requires disclosure of an employee's relationship to an employer:

An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting

[15] 42 U.S.C. §§ 2000ff *et seq.* .

the manufacturer's product. Knowledge of this poster's employment likely would affect the weight or creditability of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board. 16 C.F.R. § 255.5 (Example 8).

On the other hand, the FTC suggested in the notice of its adoption of the new guidelines that if an employer adopted policies and practices concerning "social media participation" by its employees, and an employee failed to comply with such policies, "the establishment of appropriate procedures would warrant consideration in its decision as to whether law enforcement action would be an appropriate use of agency resources given the facts set forth in Example 8."[16] The FTC further noted that while it had brought enforcement actions against companies "whose failure to establish or maintain appropriate internal procedures resulted in consumer injury, it is not aware of any instance in which an enforcement action was brought against a company for the actions of a single 'rogue' employee who violated established company policy that adequately covered the conduct in question."[17]

In short, to avoid potential liability for employee commentary on blogs or other social media that could be viewed as an "endorsement" of the employer's products, the employer must institute and enforce clear policies. At the least, an employer's policy must require employees to make full disclosure of their relationship to the employer whenever commenting on the employer online, such as "I am an employee of company ___. I am not a company spokesperson, and these are my own opinions."

2. EEOC Issues Proposed Rule to Modify Process for Handling Federal Employee Discrimination Complaints

On December 21, 2009, the EEOC issued a proposed rule to modify the process for handling discrimination complaints by federal employees.[18] The rule would require federal agencies to notify claimants of their option to request an EEOC administrative hearing or sue in federal court if an agency has not completed investigating their complaints within 180 days. The regulations would clarify that complaints alleging discrimination in federal agencies' *proposed* personnel actions should be dismissed unless the employee claims that the agency is retaliating for an individual's prior bias charge or other protected activity. The EEOC deems such proposals of preliminary steps capable of being "reasonably likely to deter the charging party or others from engaging in protected activity."[19] According to the EEOC, this change would "conform"

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[16] Fed. Trade Comm'n, Guides Concerning the Use of Endorsements and Testimonials in Advertising 48 (2009), *available at* http://www.ftc.gov/os/2009/10/091005endorsementguidesfnnotice.pdf, at 48.

[17] *Id.*

[18] Federal Sector Equal Employment Opportunity, 74 Fed. Reg. 67,839 (proposed Dec. 21, 2009) .

[19] 2 EEOC Compliance Manual § 8-II.D.3 (1998).

the rules governing federal employees with the "long-standing private sector Commission policy guidance."[20] In other words, the proposed rule makes it so that a *proposed* personnel action cannot constitute discrimination for either federal or private sector employees (although it may be retaliatory). The rule also, in some cases, changes deadlines or other administrative rules for federal agency and EEOC action regarding complaints, such as deadlines for submitting briefs during the administrative process.

3. EEOC Publishes Notice of Proposed Rulemaking to Revise ADA Regulations After Passage of ADAAA

In the ADAAA, Congress expressed its "expectation" that the EEOC would revise its regulatory definition of "substantially limits" to conform its definition to the ADAAA's more expansive approach.[21] On June 17, 2009, the EEOC approved, by a 2-1 vote, a notice of proposed rulemaking designed to implement the ADAAA. The EEOC published a Notice of Proposed Rulemaking in the Federal Register on September 23, 2009.[22] The public comment period on the proposed rules closed on November 23, 2009.[23] A final rule should be adopted sometime in 2010.

Expanded Definition of Major Life Activity

The EEOC proposal adds additional "major life activities" to the EEOC's current nonexhaustive list, including bending, reading, and communicating. The ADAAA includes conditions that affect "major bodily functions" in the "major life activities" section, and the EEOC proposal adds conditions affecting the hemic, lymphatic, and musculoskeletal systems. The EEOC has also moved its definition of "major life activities" from the appendix of its original ADA regulations to the text of the proposed rule.

Treatment of "Substantially Limits"

The proposed rule eliminates the requirement that an individual's condition "significantly restrict" a major life activity, implementing Congress's finding that the restriction imposed "too high a standard" for individuals trying to establish ADA coverage. On the other hand, the proposed rule does not alter the preexisting rule that temporary impairments with little lasting effect do not "substantially limit" major life

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[20] Federal Sector Equal Employment Opportunity, 74 Fed. Reg. at 67840.

[21] ADAAA, Pub. L. No. 110 No. 110-325, § 2(b)(6).

[22] Regulations to Implement the Equal Employment Provisions, 74 Fed. Reg. 48,431 (proposed Sept. 23, 2009).

[23] *Id.*

activities.[24] Thus, the ADA will continue to impose a more restrictive test on the definition of disability than do some states.[25]

Under the proposal, an individual would not need to show that an impairment that substantially limits at least one major life activity inhibits any other major activity. The proposal further provides that determining whether an individual's impairment imposes "substantial" limitations can be made on a "common sense" basis, and does *not* require reference to scientific or medical evidence.[26]

The proposal eliminates the phrase "condition, manner, or duration" from the EEOC's current definition of "substantially limited." Under the current definition, "substantially limited" is defined to mean "significantly restricted as to the condition, manner, or duration under which an individual can perform a major life activity" as compared to the "condition, manner, or duration" an average person in the general population can perform the same activity.

The proposal also identifies some conditions that are presumptively considered to be "substantially limiting," including diabetes, HIV/AIDS, major depression, post-traumatic stress disorder, and schizophrenia. While the EEOC has stated that it does not intend to thereby undermine the individualized assessment required by the ADA, it asserts that the listed conditions "should be found 'substantially limiting' each time" an individual assessment is conducted because they affect "major bodily functions."[27]

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[24] *See, e.g.*, *Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 381 (3d Cir. 2002) (pneumonia is "a temporary condition and is not protected by the ADA"); *Borgialli v. Thunder Basin Coal Co.*, 235 F.3d 1284, 1290 (10th Cir. 2000) ("The ADA was not designed to apply to temporary conditions.").

[25] *See, e.g.*, N.Y. City Admin. Code § 8-102(16)(a) ("any physical, medical, mental or psychological impairment" is a protected disability); 775 Ill. Comp. Stat. 5/1-103(I) (defining a disability as any determinable physical or mental characteristic that may result from disease, injury, congenital condition, or functional disorder); RCW 49.60.040 (Washington State's sweeping definition of disability states that "[a] disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter"); *Arteaga v. Brink's, Inc.*, 163 Cal. App. 4th 327, 348, 77 Cal. Rptr. 3d 654 (2008) (stating that while California's Fair Employment and Housing Act (Cal. Gov. Code § 12926(k)(1)(B)) only requires that an "employee's disease, disorder, or condition need only 'limit' a major life activity, the ADA requires that the limitation be *substantial*") (citation omitted); *La Crosse Police & Fire Comm'n v. Labor & Indus. Review Comm'n*, 407 N.W.2d 510, 518 (Wis. 1987) (under Wis. Stat. § 111.32(8)(a) an individual is disabled if an impairment "makes achievement unusually difficult, or . . . limits the capacity to work," and "limits the capacity to work" refers to the individual's *specific* job).

[26] *Compare Minnix v. City of Chillicothe*, No. 98-4285, 2000 WL 191828, at *2 (6th Cir. Feb. 10, 2000) (holding that plaintiff failed to present a genuine question of material fact that impairment substantially limited breathing when there was no medical evidence that plaintiff's breathing problems were "severe, long term, or permanent").

[27] http://news.bna.com/dlln/DLLNWB/split_display.adp?fedfid=13008692&vname=dlrnotallissues&fn=13008692&jd=A0B8W8U4H9&split=0.

Because the ADA does require an "individualized assessment," it remains to be seen whether courts will strike down this "per se disability" portion of the EEOC's proposed rule.[28]

Should an employee suffer from one of the enumerated conditions, an employer can expect little success arguing that the employee is not disabled. Instead, defeating the individual's ADA claim will depend on a showing that the individual does not need reasonable accommodation, poses a "direct threat" to health or safety, or experienced an adverse action because of a legitimate, nondiscriminatory business reason.[29]

The proposal also alters the framework under which it is determined whether an individual is substantially limited in the major life activity of working. Historically, courts have required a showing that the individual is unable to perform a "class or . . . range of jobs."[30] Under the EEOC proposal, a plaintiff simply must show that he or she is unable to perform a "type of work." The proposal provides examples of "type of work," including commercial trucker, assembly line work, clerical work, or law enforcement. It is not yet apparent where a "type of work" falls on the spectrum between "one particular job" and a "class or . . . range of jobs," but it is apparent that more employees will be substantially limited in the major life activity of working under the new regulations. Finally, that an individual obtains paid employment elsewhere is *not* dispositive in determining whether the individual is "substantially limited" in working.

Mitigating Measures

The proposal also implements the new rule that "mitigating measures," such as medication, prostheses, or other steps taken to ameliorate an impairment, may *not* be used to determine whether an individual is disabled.[31] In addition, the EEOC arguably expands a statutory exception that provides that the use of "ordinary" eyeglasses or contact lenses *can* be considered in determining disability. Under the ADAAA, "[t]he ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity" and "the term 'ordinary eyeglasses or contact lenses' means lenses that are

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[28] *Singh v. George Washington Univ. Sch. of Med. & Health Scis.*, 508 F.3d 1097, 1104 (D.C. Cir. 2007) (requiring "individualized assessment" of whether a limitation in a major life activity is substantial).

[29] *See* 42 U.S.C. § 12113 (creating an affirmative defense for action under a qualification standard "shown to be job-related and consistent with business necessity," including "a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace"). *See also Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78 (2002).

[30] *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 523 (1999) ("[T]he EEOC defines 'substantially limits' as: 'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.'") (quoting 29 C.F.R. § 1630.2(j)(3)(i)).

[31] *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481 (1999)

intended to fully correct visual acuity or eliminate refractive error."[32] Under the EEOC proposal, the exception only applies where "ordinary" eyeglasses or contact lenses "fully correct" vision. It remains unclear whether the EEOC regulations would not allow consideration of the ameliorative effects of ordinary eyeglasses or contacts if such equipment does not actually succeed in restoring an individual to perfect visual acuity.

4. DOL Revises Existing FMLA Regulations and Issues New Regulations Implementing Military Family Leave Entitlements

On November 17, 2008, the DOL issued a comprehensive set of revisions to the regulations implementing the FMLA and issued new regulations implementing the military leave entitlements enacted by Congress as part of the 2008 National Defense Appropriations Act. The new regulations, which took effect on January 16, 2009, were the first significant revisions to the FMLA regulations since the law was enacted 15 years ago and will affect all employers subject to the FMLA. The National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-118)[33] further expanded the scope of the new military leave entitlements.

a. New Regulations Clarify Military Family Leaves

Qualifying Exigency Leave

Under qualifying exigency ("QE") leave, eligible employees of covered employers may take up to 12 weeks of FMLA leave due to a "qualifying exigency" that arises because the employee's spouse, son, daughter or parent is on active duty or has been notified of an impending call to active duty in support of a "contingency operation," as defined under specific military statutes.[34]

Family members are broadly defined. For example, a "son or daughter" includes an employee's biological child, adopted child, foster child, legal ward, stepchild, or one for whom the employee stood in place of a parent, regardless of age.[35] Under the original regulations, QE leave applies only to families of members of the National Guard, the military Reserves, and certain retired members of the military, not to families of active members of the regular armed services.[36] However, Section 565 of the National Defense Authorization Act for Fiscal Year 2010 - extended QE leave to families

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[32] ADAAA § 4(a)(4)(E)(ii), (iii) (codified as 42 U.S.C. § 12102(4)(E)(ii), (iii)) (emphasis added).

[33] http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.02647:.

[34] 29 C.F.R. § 825.100(a).

[35] *Id.* § 825.122(c).

[36] *Id.* § 825.126(b).

of activity duty members.[37] The regulations also contain a "specific and exclusive" list of reasons for QE leave:

(1) Issues arising out of short-notice deployment, meaning a call or order that is given no more than seven calendar days before deployment;

(2) Military events and related activities;

(3) Urgent childcare and school activities arising from active duty/call to active duty status;

(4) Financial or legal tasks arising from active duty/call to active duty status;

(5) Counseling for the employee, the covered service member, or the covered service member's minor/dependent child where the need for counseling arises out of active duty/call to active duty status;

(6) Time spent with the covered service member on rest and recuperation breaks during deployment, for up to five days per break;

(7) Post-deployment military events and related activities; and

(8) Any other purposes arising out of the call to duty, as agreed upon by the employee and employer.[38]

Employers may require certification for QE leave.[39] However, if the employee provides a complete, sufficient certification supporting his or her request for QE leave, the employer may not request additional information, and recertification for QE leave is not permitted. An employer may verify with a third party that the employee met with the third party (a teacher or counselor, for example) while on leave.

Military Caregiver Leave

Under military caregiver leave, eligible employees may take up to 26 weeks of FMLA leave during a single 12-month period to care for a spouse, daughter, son, parent or next of kin who is a "covered servicemember."[40] A "covered servicemember" is a person who is a member of the regular Armed Forces, the Reserves or the National Guard or anyone in one of these categories who is on the temporary disability retired

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[37] http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2647enr.txt.pdf.

[38] 29 C.F.R. § 825.126(a).

[39] *Id.* § 825.309.

[40] *Id.* § 825.127(c).

list.[41] The National Defense Authorization Act for Fiscal Year 2010 extended military caregiver leave to encompass family members of recent veterans.[42] The service member must have a serious injury or illness incurred while on active duty for which he or she is undergoing medical treatment, recuperation, therapy or outpatient care.[43]

"Family members" are defined broadly. The new regulations also address "next of kin," defined as "the nearest blood relative, other than the covered servicemember's spouse, parent, son, or daughter."[44] A service member can designate in writing a specific blood relative to be his "next of kin" for purposes of caregiver leave. Absent a designation, the order for "next of kin" is: (1) blood relatives who have been granted legal custody by a court or statute; (2) brothers and sisters; (3) grandparents; (4) uncles and aunts; and (5) first cousins.[45]

There is a separate "FMLA year" for military caregiver purposes, beginning on the first day that the employee takes military caregiver leave and ending 12 months later. Employees are entitled to a combined total of 26 weeks of leave for any FMLA-qualifying reason during this 12-month period.[46] For example, if an employee uses 15 weeks of FMLA leave during a single 12-month period to care for a covered service member, then that employee is limited to 11 additional weeks of leave during that single 12-month period for any other FMLA-qualifying reason. If military caregiver leave also qualifies as leave to care for a family member with a serious health condition, the employer must designate the leave as military caregiver leave.

Military caregiver leave entitlement is determined on a per-service-member, per-injury basis. The 26 weeks of leave do not carry over from year to year.

Employers may require certification of the need for military caregiver leave.[47] The DOL offers an optional form for caregiver certification (WH-385), but employers must accept "invitational travel orders" and "invitational travel authorizations" issued by the Department of Defense to family members to join an ill service member as sufficient certification, at least until the order's or authorization's expiration date. Employers may seek authentication or clarification of the certification, but employers may not seek second or third opinions or recertification.

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[41] *Id.* § 825.127(a).

[42] http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2647enr.txt.pdf.

[43] 29 C.F.R. § 825.127(a)(1).

[44] *Id.* § 825.127(b)(3).

[45] *Id.*

[46] *Id.* § 825.127(c).

[47] *Id.* § 825.310.

b. New Regulations Contain Notable Nonmilitary Revisions to FMLA Regulations

The new regulations clarify the rights and responsibilities of employers and employees under the FMLA and address rulings issued by the U.S. Supreme Court and lower courts that invalidated portions of the DOL's previous regulations. Again, the nonmilitary revisions came into effect on January 16, 2009.

Employers should note that the DOL has substantially updated its FMLA forms to reflect the changes in FMLA leave administration under the new regulations. These updated forms, including certification forms and FMLA eligibility notice and FMLA designation notice, are available on the DOL Web site at http://www.dol.gov/whd/fmla/index.htm.

5. EEOC Approves Proposed Regulations to Implement Law Banning Genetic Discrimination

On March 2, 2009, the EEOC published proposed regulations to implement GINA. GINA is the first expansion of the EEOC's jurisdiction since the ADA was enacted nearly 20 years ago. GINA's employment provisions, Title II of the act, took effect on November 21, 2009. The final version of the proposed regulations will be codified at 29 C.F.R. pt. 1635. On August 6, 2009, after a public comment period, the EEOC voted to adopt a final version of the regulations, which are currently pending before the Office of Management and Budget and ("OMB"). It remains uncertain when OMB will approve EEOC's proposed regulations. When it does, a final rule should follow shortly thereafter.

GINA prohibits employment discrimination based on individuals' genetic information. In addition, GINA restricts employers and other covered entities from (1) acquiring individual or family genetic information from job applicants and employees, (2) requiring genetic tests, and (3) disclosing private medical data.

The proposed regulations implement GINA's general rule that employers may not request, require, or purchase genetic information regarding a job applicant or employee. The proposed regulations describe GINA's five exceptions to the general rule prohibiting acquisition of genetic information, including (1) inadvertently requesting or requiring genetic information; (2) acquiring genetic information as part of voluntary health or genetic services programs, such as a voluntary wellness program; (3) acquiring genetic information in connection with a request for FMLA leave; (4) acquiring genetic information that is commercially and publicly available; and (5) acquiring genetic information in connection with genetic monitoring of the biological effects of toxic substances in the workplace. The proposed regulations also describe GINA's six narrow exceptions to the rule prohibiting disclosure of genetic information, including disclosure (1) to the individual to whom the genetic information relates; (2) to an occupational health researcher; (3) to comply with a court order; (4) to comply with the requirements of the FMLA, or similar state and local laws; (5) to government officials

investigating GINA compliance; and (6) to government health officials in connection with a family member's contagious disease.

The proposed regulations state that the Health Insurance Portability and Accountability Act ("HIPAA") privacy rule, not GINA, governs the obligations of HIPAA-covered entities regarding genetic data that constitutes protected health information. The proposed regulations also clarify that GINA does not limit or expand federal agencies' rights to conduct or support health and occupational research. GINA does not limit the statutory or regulatory authority of the DOL's OSHA or Mine Safety and Health Administration, or any other workplace health and safety laws and regulations. The proposed regulations also stipulate, consistent with GINA's explicit language, that the EEOC will not punish employers for neutral policies that have a disparate impact on employees with genetic diseases.

The text of the EEOC proposed regulations, as originally proposed, may be accessed online at http://edocket.access.gpo.gov/2009/E9-4221.htm.

6. Federal Immigration Law Developments

a. DHS Rescinds "No-Match" Regulation

On October 9, 2009, the Department of Homeland Security ("DHS") issued a final rule rescinding its controversial "no-match" regulation (also known as the "safe harbor rule") that had targeted employers with undocumented workers.[48] Under the no-match regulation, the Social Security Administration would have been required to send no-match letters to employers when employees' Social Security numbers did not match government records. The letters were to include information telling the employers that they would be required to resolve discrepancies or face liability.

In 2007, the no-match regulation was challenged in the Northern District of California upon its adoption, and the court enjoined the rule from going into effect.[49] On March 26, 2008, DHS issued a supplemental proposed rule that sought to address issues that had been raised in the court case.[50] On October 9, 2009, after the change in administrations, DHS issued a final rule scrapping the no-match regulation altogether.[51]

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[48] Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Rescission, 74 Fed. Reg. 51,447 (Oct. 7, 2009).

[49] *AFL-CIO v. Chertoff*, No. C:07-cv-04472-CRB (N.D. Cal. Oct. 10, 2007) (order granting preliminary injunction).

[50] Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification, 73 Fed. Reg. 15,944 (Mar. 26, 2008) .

[51] Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Rescission, 74 Fed. Reg. 51,447 (Oct. 7, 2009).

b. DOL Issues Final Rule to Amend H-2A Agricultural Guestworker Program

On September 4, 2009, the DOL issued a proposed rule to amend regulations that govern the employment of aliens under the H-2A temporary agriculture program.[52] The rule is intended to reverse portions of a 2008 final rule issued by the Bush Administration that, according to the DOL, "do[es] not provide an adequate level of protection for either U.S. or foreign workers." On February 12, 2010, the DOL issued its final order.[53]

Among other revisions, under the rule, an employer must provide the DOL with documentation that it has complied with prerequisites for bringing H-2A workers into the United States, including the requirement that the employer has first searched for qualified American workers. Under the Bush-era rule, employers simply needed to provide confirmation that they had complied with such prerequisites. The rule also modifies the methodology for determining the required wage. The rule returns to reliance on the Department of Agriculture's quarterly farm labor survey (known as the "adverse effect wage rate"). The Bush-era rule had instead calculated wages using the Bureau of Labor Statistics' occupational survey data, which the DOL found had "adversely impacted" the wages of agriculture wages.

c. E-Verify Use Mandated for Federal Contractors as of September 8, 2009

On September 8, 2009, a final rule requiring federal contractors to certify workers' immigration status through E-Verify went into effect.[54] The rule had been delayed on four separate occasions.

E-Verify is the federal government's electronic employment verification system. It is an Internet-based system that electronically compares information on employment authorization Form I-9s with records held by the Social Security Administration and DHS.

Under the final rule, all federal contractors holding a contract with a performance period over 120 days at a value of over $100,000 are required to participate in E-Verify.[55] Subcontractors providing services or construction worth over $3,000 are also required to participate in E-Verify.

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[52] Temporary Agricultural Employment of H-2A Aliens, 74 Fed. Reg. 45906, 45,908 (proposed Sept. 4, 2009).

[53] Temporary Agricultural Employment of H-2A Aliens, 75 Fed. Reg. 6,884 (Feb. 12, 2010).

[54] http://www.uscis.gov/USCIS/Office%20of%20Communications/Press%20Releases/FY%2009/September%202009/EVerifyFederalContractorRule8Sep09.pdf.

[55] http://edocket.access.gpo.gov/2008/pdf/E8-26904.pdf.

C. Federal Labor and Employment Bills Pending in Congress

The current session of Congress has seen the introduction of numerous bills pertaining to labor and employment issues. Congress is currently considering numerous bills that would, among other things, make it easier for unions to organize, extend the scope of the FMLA, provide paid leave to certain workers, and extend federal antidiscrimination laws to prohibit discrimination based on sexual orientation. With the Democrats' loss of their filibuster-proof majority and what appears to be a difficult midterm election rapidly approaching, we may see reduced activity on labor and employment bills. While numerous other employment-related bills are currently pending, some of the more notable pending legislation is described below.

1. Union Organization

a. Employee Free Choice Act (H.R. 1409, S. 560)[56]

In 2009, the much-publicized Employee Free Choice Act ("EFCA") was reintroduced in Congress, but stalled in the face of widespread opposition and Congress's focus on economic and health care issues. Previous versions of EFCA would have amended the NLRA to require the NLRB to certify a union as the representative of employees if a majority of employees sign union authorization cards. By doing away with an employer's right to demand a secret ballot election, EFCA would inevitably increase unionization across the country by making it easier for employees to organize. Under current law, a secret election can be held if 30% of employees sign cards requesting an election or union representation. Passage of EFCA may reverse the long-standing decline in union membership, which plunged by nearly 800,000 in 2009.[57]

EFCA would also have allowed parties unable to reach a first contract after 90 days of collective bargaining to refer the dispute to the Federal Mediation and Conciliation Service. If, after 30 days, the dispute is unresolved, the EFCA would have required the dispute to be referred to binding arbitration. In addition, the EFCA would have increased the penalties for labor law violations by employers.

EFCA supporters worked in 2009 to develop compromise versions of the bill that could garner filibuster-proof support. Under a proposal advanced by Senator Dianne Feinstein (D-Cal.), workers could sign authorization cards and mail them directly to the NLRB. If more than 50% of workers mailed the cards, the NLRB would order the employer to recognize the union. The purpose of the provision would be to protect workers' privacy and reduce the amount of pressure a labor organization could place on workers to sign authorization cards.

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[56] http://thomas.loc.gov/cgi-bin/query/z?c111:S.560:.

[57] Steven Greenhouse, *Most U.S. Union Workers Are Working for the Government, New Data Shows*, N.Y. Times, Jan. 22, 2010, *available at* http://www.nytimes.com/2010/01/23/business/23labor.html.

On July 17, 2009, *The New York Times* reported that Senate Democrats had decided to drop EFCA's card-check provision in order to increase support for the bill.[58] Democrats would trade the card-check provision for an agreement that union elections must be held within five to 10 days after 30% of workers have signed cards in favor of the union. In September 2009, Senator Arlen Specter (D-Pa.) detailed the provisions of a revised EFCA, which would omit the card-check provision, but would sharply limit the time between when an election is called and the day of the vote, and would provide union organizers access to workers if employers held mandatory anti-union meetings on company time.[59] The revised bill would include mandatory arbitration, which would require the arbitrator to pick the offer made by either the union or the employer.

A watered-down version of EFCA may be reintroduced in 2010, although the expected focus on job creation and the economy will likely limit the Democrats' appetite to invest political capital in EFCA. The shape of any compromise bill remains uncertain. Changes to EFCA could include dropping the card-check provision entirely, speeding up the timetable for union elections, or allowing union organizers access to the workplace leading up to elections.

b. Public Safety Employer-Employee Cooperation Act of 2009 (H.R. 413)[60]

On January 9, 2009, Representative Dale Kildee (D-Mich.) introduced the Public Safety Employer-Employee Cooperation Act of 2009. The bill would authorize the Federal Labor Relations Authority ("FLRA") to determine whether states adequately protect the right of public safety employees to form and join a labor organization.

If the FLRA determines that a state does not "substantially provide" for public safety employees' right to unionize, the FLRA must take over oversight of unionization for public safety employees in the state in question. The bill would require the FLRA to issue governing regulations that would set forth the FLRA's oversight to, among other things, (1) determine the appropriate bargaining unit for union representation; (2) supervise and conduct elections; (3) resolve issues pertaining to the duty to bargain in good faith; and (4) investigate and resolve complaints of unfair labor practices.

"Public safety employees" include law enforcement officers, firefighters, and emergency medical services personnel. The bill has 204 cosponsors and has been referred to the Committee on Education and Labor.

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[58] Steven Greenhouse, *Democrats Drop Key Part of Bill to Assist Unions*, N.Y. Times, July 17, 2009, *available at* http://www.nytimes.com/2009/07/17/business/17union.htm.

[59] Alec MacGillis, *Spector Unveils Revised EFCA Bill*, Wash. Post., *available at* http://voices.washingtonpost.com/capitol-briefing/2009/09/specter_unveils_prospective_de.html?hpid=news-col-blog.

[60] http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.413.

2. Wage and Hour Legislation

a. Paycheck Fairness Act of 2009 (H.R. 12, S. 182)[61]

The Paycheck Fairness Act of 2009 ("PFA") would amend the Equal Pay Act ("EPA") by revising the EPA's "other factor" exception to the general prohibition on wage rate differentials between men and women in the same establishment performing equivalent work. Currently, employers are prohibited from paying lower wages to an employee of one sex than to an employee of the opposite sex in the same establishment for equal work on jobs that require equal skill, effort, and responsibility, and which are performed under similar working conditions. The EPA includes a number of exceptions to this rule including where such payment is made pursuant to a differential "based on any other factor" other than sex. The PFA would limit the "other factor" defense to "bona fide factors" such as education, training, or experience. The PFA would also limit the application of the "bona fide factor[s]" exception to situations where the employer can demonstrate that the factor is (1) not based on or derived from a sex-based differential in compensation; (2) job-related with respect to the position in question; and (3) consistent with business necessity. Conversely, the "bona fide factor" defense would *not* apply where the employee bringing the claim demonstrated that the employer refused to adopt an alternative practice that could achieve the same business purpose without producing such a differential.

The PFA also includes provisions that (1) prohibit retaliation for discussing or disclosing the wages of the plaintiff or another employee in connection with a sex discrimination complaint or investigation; (2) authorize compensatory and punitive damages in civil actions; (3) allow plaintiffs to bring PFA class action claims in which individuals are joined as party plaintiffs without their consent (an "opt out" provision); and (4) authorize the Secretary of Labor to seek additional compensatory or punitive damages in sex discrimination actions.

The PFA has been passed by the House and is currently pending in the Senate. It has 38 cosponsors. As with many of the employment bills discussed, it languished as the Senate took up health care reform. On March 11, 2010, the HELP Committee held hearings on the bill.

b. Family-Friendly Workplace Act (H.R. 933)[62]

The Family-Friendly Workplace Act ("FFWA") would amend the Fair Labor Standards Act ("FLSA") (29 U.S.C. §§ 207 *et. seq.*) to allow private employers to offer employees compensated time off ("comp time") at the rate of one and one-half hours per hour of employment for which overtime compensation is required. Employers would be authorized to provide comp time instead of cash overtime only if such payment is

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[61] http://thomas.loc.gov/cgi-bin/query/z?c111:S.182:.

[62] http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.933:.

permitted by either an applicable collective bargaining agreement or written agreement between the employer and the employee. Employees would have the right to select payment in cash rather than comp time. Comp time agreements may not be made a condition of employment.

Thus, under the FFWA, an hourly worker who works 50 hours in one week could elect payment for the ten hours of overtime by accepting a check for ten hours of pay at time and one-half (the current method), or the employee could elect payment in the form of fifteen hours of comp time.

The bill was introduced by Representative Cathy McMorris Rodgers (R-Wash.) on February 10, 2009, and was referred to the Subcommittee on Workforce Protections on March 23, 2009. The bill currently has 17 cosponsors.

3. Employee Leave Legislation

An array of bills remain pending that would provide paid leave under a variety of circumstances. Given President Obama's stated intent to focus on job creation in 2010, it seems likely that passage of such bills, which would increase the cost of employing workers, will not be a high priority.

a. The Balancing Act of 2009 (H.R. 3047)[63]

On June 25, 2009, Representative Lynn Woolsey (D-Cal.) introduced legislation that incorporates several earlier-produced bills and would substantially amend and increase the scope of the FMLA. If passed, the legislation would provide employees with 12 weeks of paid leave for family issues, seven days of paid sick leave, "parental involvement" leave, domestic violence leave, and various other expansions of the FMLA. The wide-ranging bill would also, among other provisions, provide certain part-time worker benefits and provide benefits for same-sex spouses of federal employees.

The bill would provide 12 weeks of paid leave for all workers to care for a family member suffering from a serious medical condition, bond with a newborn or newly adopted child, recover from a serious illness, or respond to an exigency arising from the deployment of a relative member of the military. The leave would be paid out of a newly established Family and Medical Leave Insurance Fund. The paid leave provision would apply to all entities employing two or more employees, although small businesses (those with 19 or fewer employees) would not be required to provide paid leave. The provision is similar to legislation (H.R. 1723) introduced on March 25, 2009, by Representative Fortney "Pete" Stark (D-Cal.).[64]

The bill incorporates the Family and Medical Leave Enhancement Act of 2009 (*see* Part IV.C.4 *infra*). It would, in general, make the FMLA applicable to employers

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[63] http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.3047:.

[64] http://thomas.loc.gov/home/gpoxmlc111/h1723_ih.xml.

who employ 25 or more employees (rather than 50 or more employees). As more fully described below, these provisions would provide employees with unpaid leave to stay involved in their child's school activities or to meet "routine family medical care needs."

The bill also incorporates the Domestic Violence Leave Act (*see* Part IV.C.6). As more fully described below, these provisions would provide employees with unpaid leave to care for family members who are addressing domestic violence, sexual assault, or stalking, or because the employees are themselves addressing such issues.

The bill includes the Healthy Families Act (S.B. 1152) (*see* Part IV.C.2), which would require employers to provide a week of paid sick or health-related leave per year. The bill also incorporates the Family and Medical Leave Enhancement Act (*see* Part IV.C.4), which would allow employees to take "family wellness" leave to accompany family members to regularly scheduled medical appointments or participate in their children's and grandchildren's educational and extracurricular activities.

The bill currently has 44 cosponsors.

b. Healthy Families Act (S. 1152)[65]

The Healthy Families Act would require employers to provide a week of paid sick or health-related leave per year. The bill was introduced by Senator Dodd and the late Senator Ted Kennedy (D-Mass.) on May 21, 2009. The bill has 24 cosponsors, and would apply to employers who employ 15 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

Under the measure, employees would earn one hour of paid sick leave for every 30 hours worked, to a maximum of 56 hours (seven days) per year. Leave could be taken (1) for the worker's own recovery time from a "physical or mental illness, injury, or medical condition"; (2) to care for a sick family member; or (3) to receive preventative or diagnostic medical treatment. In addition, the measure would require paid leave for absences resulting from "domestic violence, sexual assault, or stalking" if the time is to (1) seek medical attention for the employee or certain relatives; (2) recover from physical or psychological injury or disability; (3) obtain services from a victim services organization; (4) obtain psychological or other counseling; (5) seek relocation; or (6) take legal action relating to or resulting from domestic violence, sexual assault, or stalking.

Notably, an employee would be authorized to take the leave described above to care for a person "related by blood or affinity whose close association with the employee is the equivalent of a family relationship." Presumably, this definition would extend coverage to meretricious heterosexual and homosexual relationships.

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[65] http://thomas.loc.gov/cgi-bin/query/z?c111:S.1152:.

Employers could, if they chose, allow workers to accrue paid sick leave in excess of 56 hours per year. Workers would begin accruing sick leave on their first day of employment, and would become eligible to use the accrued time after 60 days of employment. Earned sick leave would carry over from one year to the next, although employers would not be required to allow employees to accrue more than 56 hours of earned leave at a given time.

The measure would allow employers to require workers to provide certification by a health care provider of an employee's illness if an employee takes more than three consecutive days of leave. If the employee knows of the need to take leave at least seven days in advance, the employee must give at least seven days' notice. The employee must use "reasonable efforts" to schedule the leave in a manner that will not unduly disrupt the operations of the employer. When providing the notice, the employee must say why the leave is being requested and how long the employee expects to need time off. The employer cannot request medical certification unless or until the leave extends beyond three consecutive workdays.

Employers must put up a poster that outlines the availability of sick leave and discusses the employee's ability to file a lawsuit if his or her employer violates its obligations.

Unlike other federal antidiscrimination laws, there is no requirement that the employee first file with the EEOC prior to filing suit. The statute of limitations is generally two years. The statute of limitations extends to three years for "willful" violations. Damages for interference or retaliation would include lost wages and benefits, actual monetary losses, equitable relief such as reinstatement or promotion, attorneys' fees, and expert witness fees and costs.

The bill is currently pending before the HELP Committee.

c. Federal Employees Paid Parental Leave Act of 2009 (H.R. 626, S. 354)[66]

On June 4, 2009, the Federal Employees Paid Parental Leave Act of 2009 ("FEPPLA"), was approved by the House. Senator Jim Webb (D-Va.) has introduced companion legislation in the Senate, which currently has 22 cosponsors.

Under FEPPLA, four of the 12 weeks of leave currently provided for the birth or adoption of a child under the FMLA would be designated as paid leave for federal employees. The bill also authorizes the OPM to issue regulations increasing the amount of paid parental leave available to federal workers to up to eight weeks. In addition to providing paid leave, this measure would allow federal employees to substitute accrued paid leave in lieu of the 12 weeks of unpaid leave currently provided

[66] http://thomas.loc.gov/cgi-bin/query/z?c111:S.354:.

by the FMLA. Currently, federal employees may ask to substitute paid leave, but federal agencies are not required to approve the requests in all circumstances.

The bill is currently pending before the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia.

d. Family and Medical Leave Enhancement Act of 2009 (H.R. 824)[67]

The Family and Medical Leave Enhancement Act ("FMLEA") would amend the FMLA to allow employees to take "family wellness" leave to accompany family members to regularly scheduled medical appointments. The proposed legislation would also permit workers to take "parental involvement" leave to participate in their children's and grandchildren's educational and extracurricular activities. Under the FMLEA, employees would also be permitted to take "parental involvement" leave to meet routine family medical care needs and to assist elderly family members. The FMLEA would also expand the scope of FMLA coverage to include businesses with 25 or more employees (currently, the FMLA only applies to businesses with 50 or more employees).

The FMLEA was introduced on February 3, 2009 by Representative Maloney and was referred to the Subcommittee on Federal Workforce, Post Office, and the District of Columbia on May 4, 2009. The bill currently has 13 cosponsors.

e. Paid Vacation Act (H.R. 2564)[68]

The Paid Vacation Act, introduced by Representative Alan Grayson (D-Fla.) on May 21, 2009, would amend the FLSA to require employers with at least 100 employees to offer at least one week of paid vacation annually. Three years after enactment, companies with at least 100 employees would be required to offer at least two weeks of paid vacation, and companies with at least 50 employees would be required to provide at least one paid week off. All employees who worked over 25 hours per week, or 1,250 hours per year, would be eligible for the specified paid vacation after one year of service.

The bill notes that 147 nations have a paid vacation law and that the United States is the only industrialized nation without a minimum annual leave law.

The bill has only four cosponsors and was referred to the Subcommittee on Workforce Protections on October 22, 2009.

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[67] http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.824:.

[68] http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.2564:.

f. Domestic Violence Leave Act (H.R. 2515)[69]

The Domestic Violence Leave Act would amend the FMLA to allow workers to take unpaid leave to address the consequences of domestic violence, sexual assault, and stalking. The bill would allow an employee to take leave if (1) he or she is the victim of domestic violence, sexual assault, or stalking; or (2) he or she is caring for a family member who is a victim of domestic violence.

The act extends to same-sex spouses and domestic partners. In those states that do not recognize domestic partnerships, the term is defined as "a single, unmarried adult person of the same sex as the employee who is in a committed intimate relationship with the employee, is not a domestic partner to any other person, and who is designated to the employer by such employee as that employee's domestic partner."

Leave could be taken for (1) seeking medical attention (including psychological counseling) or recovering from injuries; (2) seeking legal advice or remedies; (3) attending victim support groups; (4) participating in safety planning to prevent future domestic violence (including relocation); or (5) "participating in any other activity necessitated by domestic violence, sexual assault, or stalking which must be undertaken during hours of employment."

The bill was introduced by Representative Woolsey on May 20, 2009, and referred to the Committee on Education and Labor, as well as the Committee on Oversight and Government Reform and the Committee on House Administration. On October 22, 2009, the bill was referred to the Subcommittee on Workforce Protections. The bill has ten cosponsors.

4. Antidiscrimination Measures

a. Employment Nondiscrimination Act of 2009 (H.R. 3017, S. 1584)[70]

On June 19, 2009, Representative Barney Frank (D-Mass.) reintroduced a bill to prohibit discrimination against gay, bisexual, and transgender employees. The original measure had 10 cosponsors. On June 24, 2009, Representative Frank "redropped" the bill, which now has 198 cosponsors. Permutations of the bill have been debated for more than 30 years.

The bill would expand Title VII protections to prohibit employers from firing, refusing to hire, denying a promotion to, or otherwise discriminating against an employee because of his or her sexual orientation or gender identity. "Sexual orientation" is defined as "homosexuality, heterosexuality, or bisexuality." "Gender identity" means "the gender-related identity, appearance, or mannerisms or other

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[69] http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.2515:.

[70] http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.3017:.

gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."

The bill also extends Title VII's antiretaliation provisions but would exempt religious organizations, the armed forces, and employers with fewer than 15 employees from its scope.

Many states have already passed similar antidiscrimination measures. Twenty-one states and the District of Columbia forbid discrimination on the basis of sexual orientation, while twelve states and the District of Columbia forbid discrimination on the basis of gender identity as well.[71]

The bill has been referred to the Committee on Education and Labor, as well as the Committee on House Administration, the Committee on Oversight and Government Reform, and the Committee on the Judiciary. The Committee on Education and Labor held hearings on the bill on September 23, 2009. The companion bill pending in the Senate (S. 1584) was introduced by Senator Jeff Merkley (D-Or.) and currently has 45 cosponsors. The HELP Committee held hearings on the bill on November 5, 2009. The bill has not yet been referred out of either the House or Senate Committees. It remains unclear whether the bill has sufficient support in the Senate. Of the bill's 45 cosponsors, only two (Susan Collins and Olympia Snowe of Maine) are Republicans, and there have been reports that the Democrats may not have the 60 votes necessary to overcome a filibuster.[72]

b. Protecting Older Workers Against Discrimination Act (S. 1756, H.R. 3721)[73]

In June 2009, the U.S. Supreme Court held in a 5-4 decision that employees pursuing claims under the Age Discrimination in Employment Act ("ADEA")[74] must establish that age was the "but for" cause of an adverse employment action. *Gross v. FBL Fin. Serv. Inc.*, 129 S. Ct. 2343 (2009). Thus, the Court determined, "mixed motive" jury instructions are never proper in an ADEA case.

On October 6, 2009, Senator Tom Harkin (D-Iowa) and Representative Miller introduced a bill that would reject the *Gross* decision. Under the bill, an ADEA plaintiff would merely need to adduce evidence that age was a "motivating factor" in an adverse employment. The burden would then shift to the employer to demonstrate that it would have taken the same action in the absence of the impermissible motivating factor. In a

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[71] *See supra* note 110.

[72] Lou Chibbaro Jr., *Filibuster Threat Makes ENDA Unlikely in 2010*, Wash. Blade, *available at* http://www.washingtonblade.com/2010/01/27/filibuster-threat-makes-enda-unlikely-in-2010/.

[73] http://thomas.loc.gov/cgi-bin/query/z?c111:S.1756:.

[74] 42 U.S.C. §§ 6101 *et. seq.*

case where a defendant musters such a showing, the court could award declaratory or injunctive relief and attorneys' fees and costs "directly attributable" to the claim, but could not award damages or order reinstatement, hiring, promotion, or similar relief. The bill would, in essence, make the rules governing ADEA claims consistent with the rules governing claims under Title VII. According to the bill, "Congress has relied on a long line of court cases holding that language in the [ADEA], and similar antidiscrimination and antiretaliation laws, that is nearly identical to language in title VII . . . would be interpreted consistently with judicial interpretations of title VII." The *Gross* decision "has eroded this long-held understanding of consistent interpretation and circumvented well-established precedents."

The Senate bill has 22 cosponsors, while the House bill has 32 cosponsors. The Senate bill has been referred to the HELP Committee. On November 16, 2009, the House bill was referred to the Subcommittee on Health, Employment, Labor, and Pensions. The act has the backing of, among other groups, the American Association of Retired Persons.[75]

5. Worker Classification

a. Taxpayer Responsibility, Accountability, and Consistency Act of 2009 ("TRACA") (S. 2882)[76]

On December 15, 2009, Senator John Kerry (D-Mass.) introduced the Taxpayer Responsibility, Accountability, and Consistency Act of 2009 ("TRACA") (S. 2882). TRACA is aimed at closing a safe harbor "loophole" in Section 530 of the Revenue Act of 1978 (26 U.S.C. § 3511) that allows an employer to treat a worker as an independent contractor for employment tax purposes, regardless of the worker's actual status under the common law independent contractor/employee test, unless the employer has no reasonable basis for such treatment or fails to meet specified requirements.

TRACA contains two primary provisions. First, TRACA tightens the definition of "reasonable basis." Under TRACA, a taxpayer has a reasonable basis for not treating an individual as an employee only if the taxpayer's tax treatment of the individual was in reasonable reliance on (1) a written determination issued to the taxpayer of the individual's employment status (or that of an individual holding a substantially similar position) or a concluded examination for employment tax purposes of whether such individual (or another individual holding a substantially similar position) should be treated as an employee of the taxpayer, and (2) the taxpayer has not treated a person in a substantially similar position as an employee at any point from 1978 onward.

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[75] http://help.senate.gov/newsroom/press/release/?id=108ff53c-cb27-4b49-8d1d-aa9709bb2ebc&groups=Chair.

[76] http://thomas.gov/cgi-bin/query/z?c111:S.2882:.

TRACA would also require businesses that pay any amount greater than $600 during the year to corporate providers of property and services to file an information report with each provider and with the Internal Revenue Service. Finally, TRACA requires the Secretary of the Treasury to put out an annual report on worker misclassification that contains, among other things, an overall estimate of the number of employers misclassifying workers, the industries involved, and the impact of such misclassification on the federal tax system.

TRACA has six cosponsors, and has been referred to the Committee on Finance. The bill is substantially similar to H.R. 3408, introduced by Representative Jim McDermott (D-Wash.) on July 30, 2009. That bill currently has 36 cosponsors and has been referred to the Committee on Ways and Means.

6. Layoffs

a. Federal Oversight, Reform, and Enforcement of the WARN Act (H.R. 3042, S. 1374)[77]

On June 25, 2009, Senator Sherrod Brown and Representative George Miller introduced identical versions of the Federal Oversight, Reform, and Enforcement of the WARN Act ("FOREWARN Act"). A similar measure was introduced in 2007.

The FOREWARN Act would give the DOL authority to enforce the WARN Act. Currently, the WARN Act requires employers who employ at least 100 employees to give 60 days' advance notice prior to laying off 50 or more workers in a mass layoff. The FOREWARN Act would reduce the layoff trigger to 25 employees and would make the WARN Act applicable to employers who employ only 75 employees. The FOREWARN Act would also increase the notification requirement to 90 days and would require an employer to give notice to the Secretary of Labor, the governor of the state(s) in which the layoffs will occur, and any applicable labor unions. The Secretary of Labor would then be required to notify applicable members of Congress.

A notice to employees under the FOREWARN Act must include (1) a statement of the number of affected employees; (2) the reason for the plant closing or mass layoff; (3) the availability of employment at other establishments owned by the employer; (4) a statement of each employee's rights with respect to wages and severance and employee benefits; and (5) a statement of the available employment and training services provided by the Department of Labor. A notice to the other individuals and entities described above must also include the names, addresses, and occupations of the affected employees.

According to the bill's proponents, the WARN Act currently governs 24% of all layoffs, and employers only comply with their notice obligations in approximately one-third of all covered layoffs.

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[77] http://thomas.loc.gov/cgi-bin/query/z?c111:S.1374:.

H.R. 3042 currently has 62 cosponsors and has been referred to the Committee on Education and Labor. S. 1374 has six cosponsors and has been referred to the HELP Committee.

7. Workplace Safety

a. Protecting America's Workers Act of 2009 (H.R. 2067, S. 1580)[78]

On April 23, 2009, Representative Woolsey introduced the Protecting America's Workers Act of 2009 ("PAWA"). PAWA would expand OSHA and increase the penalties that the DOL can issue for employer health and safety violations. House Democrats reintroduced PAWA in April 2009 after an earlier version, cosponsored by President Obama, Vice President Biden and Secretary of State Clinton, stalled in committee.

Expanding the scope of OSHA and the consequences for noncompliance, PAWA would have four significant effects. First, it would extend OSHA to include all private and public sector employees. Currently, OSHA does not cover all public employees, and it excludes millions of private employees in industries subject to safety regulations issued by other federal agencies. PAWA would effectively remove the latter exclusion by requiring other federal agencies to enforce occupational health and safety at a level "at least as effective as the protection provided" by OSHA.

Second, PAWA raises the civil penalties for OSHA violations. PAWA would raise the civil fine for a willful or repeated OSHA violation to a minimum fine of $8,000 and a maximum fine of $120,000. Minimum/maximum fines for willful or repeated conduct that cause a fatality would increase to $50,000/$250,000. The maximum civil fine for a serious violation would increase from $7,000 to $12,000, while the maximum fine for a serious violation resulting in a fatality would increase from $20,000 to $50,000. PAWA also includes an inflation adjustment provision, and civil penalties would be updated at least every four years. In addition to increasing civil fines, PAWA markedly enhances criminal penalties. Currently, only a violation causing a fatality is subject to criminal sanctions under OSHA and classified as a Class B misdemeanor with a maximum sentence of six months in prison.[79] Under PAWA, a criminal OSHA violation is a felony, and the maximum penalty for a willful injury resulting in death will increase to a 10-year prison term.

Third, PAWA significantly enhances OSHA's antiretaliation provisions. Under PAWA, any employee who reasonably refuses work for health or safety reasons is engaging in protected activity. PAWA specifically requires employers to post OSHA regulations, which must be accompanied by an express prohibition of any policy or practice that discourages employees from reporting a workplace injury or illness.

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[78] http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.2067:.

[79] 29 U.S.C. § 666(e).

Finally, PAWA increases the rights and access of injured workers and their families to help ensure that OSHA violations are investigated and pursued.

PAWA has 65 cosponsors. It has been referred to the Subcommittee on Health, Employment, Labor, and Pensions, which held hearings on the bill on March 16, 2010. On August 5, 2009, a companion bill, S. 1580, was introduced in the Senate by the late Senator Ted Kennedy. It has 21 cosponsors, and has been referred to the HELP Committee.

8. Arbitration

a. Arbitration Fairness Act (H.R. 1020, S. 931)[80]

On March 16, 2009, Representative Hank Johnson (D-Ga.) introduced the Arbitration Fairness Act, which would render invalid predispute arbitration agreements in employment contracts.

Under the bill, predispute arbitration agreements would be invalid under the Federal Arbitration Act if they required arbitration of an "employment dispute," defined broadly as a "dispute between an employer and employee arising out of the relationship of employer and employee as defined [by] . . . the Fair Labor Standards Act."

The bill has 111 cosponsors, and was referred to the Subcommittee on Commercial and Administrative Law on March 16, 2009. The companion bill in the Senate, introduced on April 29, 2009, by Senator Russell Feingold (D-Wis.), has 11 cosponsors.

The bill may gain momentum after Senator Al Franken's (D-Minn.) successful amendment to the National Defense Authorization Act for Fiscal year 2010 (P.L. 111-118), which barred most defense contractors and subcontractors from requiring employees or independent contractors to sign mandatory arbitration agreements with respect to Title VII claims and tort claims arising out of sexual assault or harassment.[81]

D. State

1. Washington Voters Approve Domestic Partnership Bill[82]

On May 18, 2009, Governor Gregoire signed ESSSB 5688, the 2009 Registered Domestic Partnership Expansion Bill (often referred to as the "Everything But Marriage Act"), which expanded the rights and responsibilities of registered domestic partners in

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[80] http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1020:.

[81] http://thomas.loc.gov/cgi-bin/query/R?r111:FLD001:S10070.

[82] http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Session%20Law%202009/5688-S2.SL.pdf.

Washington State. In 2007, the Washington Legislature enacted legislation recognizing "domestic partnerships" in Washington State and setting up a state register of domestic partnerships. Between 2007 and 2009, various state statutes were amended to grant domestic partnerships various rights and responsibilities, including community property rights and those pertaining to certain health care decisions. Not all Washington laws bearing on domestic partnerships were amended.

The 2009 act was passed to categorically provide domestic partners with all rights and responsibilities possessed by married couples in Washington State. A number of employment laws are impacted. For example, the Washington Family Leave Act authorizes an employee to take leave to care for a spouse suffering from a serious medical condition.[83] Under the 2009 act, domestic partners are entitled to take such leave. Likewise, a provision requiring an employee's spouse to consent to the employee's assignation of wages also requires the approval of a registered domestic partner.[84]

Opponents of the bill initiated an effort to put the measure before the voters through the state's referendum process. After a series of legal challenges, opponents of the bill qualified the measure for the November 2009 General Election ballot as "Referendum 71." By voting yes on Referendum 71 by a vote of 53% to 47%, voters confirmed the Everything But Marriage Act.[85]

2. Employers Face Greater Penalties for Failure to Pay Wages (S.H.B. 3145)[86]

This bill amends the 2006 Wage Payment Act to increase the Department of Labor and Industries' ("L&I's) authority to investigate and penalize employers who fail to pay wages that are owed to an employee. The bill (a) establishes a civil penalty for employers who repeatedly and willfully violate wage payment requirements; (b) tolls the statute of limitations for civil actions while L&I investigates a complaint of a wage payment violation; (c) allows L&I to extend its 60-day window for completing its investigation upon providing written notice setting out good cause for the extension (and

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[83] *See* RCW 49.78.220(1)(c).

[84] RCW 49.48.100.

[85] While the act has been approved, litigation spawned by the election continues. During the campaign, opponents of the act obtained a preliminary injunction prohibiting Washington State from releasing the names of individuals who signed petitions to place the act on the ballot, pursuant to the state's public disclosure law. *Doe v. Reed*, 661 F. Supp. 2d 1194 (W.D. Wash. Sept. 10, 2009). Opponents of the act claimed that the act of signing a referendum petition is "anonymous speech" protected by the First Amendment. The Ninth Circuit then reversed the trial court's entry of the injunction. 586 F.3d 671 (9th Cir. 2009). Upon an emergency application, the U.S. Supreme Court stayed the Ninth Circuit order and then agreed to hear the case. 130 S. Ct. 133 (2010).

[86] http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Session%20Law%202010/3145-S.SL.pdf.

setting out the length of the extension); (d) creates successor liability for unpaid wages and penalties so long as the successor has actual knowledge of the outstanding citation or penalty against the employer's business, (e) increases minimum penalty amounts, and (f) expands L&I's wage bonding authority so that an employer may be required to require a bond after L&I receives a wage complaint against the employer.

3. Legislature Extends Volunteer Firefighter Job Protections to Members of the Civil Air Patrol (S.S.B. 6647).[87]

Under current law, volunteer firefighters are protected from discipline or termination related to their need to take leave to relating to an emergency call or alarm of fire. Aggrieved employees can bring an action alleging the violation with L&I within 90 days of the alleged violation. L&I then has 90 days to investigate. If it determines that the employee was wrongfully discharged or disciplined, it may order removal of the disciplinary action from the employee's file and/or reinstatement with back pay. If the employer fails to at within 30 days of L&I's notice of violation, the employee may bring an action in superior court alleging a violation and seeking withdrawal of the disciplinary action or reinstatement.

The bill extends these protections to members of the Civil Air Patrol, which is the civilian auxiliary of the United States Air Force. Under the new law, employers cannot discipline or discharge Civil Air Patrol members for taking a leave of absence to respond to an emergency service operation. Such operations include certain search and rescue missions, disaster or humanitarian relief provided at the request of the Federal Emergency Management Agency, support missions for the United States Air Force, and counterdrug missions.

4. Employers Now Subject to Penalties For Failure to Disclose Certain Information to Foreign Workers (S.S.B. 6332)[88]

This bill amends existing statutes to impose penalties on international labor recruitment agencies and Washington employers to provide disclosures about workplace rights to most foreign workers referred to or hired by a Washington employer. Among other things, the required disclosures include notification that the worker may be considered an employee under the laws of Washington and may be entitled to certain rights and protections under state and federal law.

These disclosures are now required for all foreign workers; the bill eliminates an existing exception for persons holding an H-1B visa. The bill provides that an employer or international recruitment agency need not provide such disclosures so long as the

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[87] http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Session%20Law%202010/6647-S.SL.pdf.

[88] http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Session%20Law%202010/6332-S.SL.pdf.

worker is provided with an anti-trafficking informational pamphlet developed by the federal government.

The bill provides a civil cause of action against the employer for failing to provide the required disclosure, authorizing a court to award between two hundred and five hundred dollars *or* actual damages (whichever is greater). A prevailing foreign worker is also entitled to costs and attorneys' fees.

5. Legislature Toughens Human Rights Commission Initial Intake Procedures (S.S.B. 6591[89]

This bill revises the Human Rights Commission's ("HRC's") initial intake and investigation procedures upon receipt of a complaint alleging unfair practices in violation of the Washington Law Against Discrimination.

Under the old regime, the HRC was required to investigate all complaints regardless of whether, on their face, they appeared to even potentially describe a violation of the Washington Law Against Discrimination. Under the new law, HRC staff must review and evaluate the complaint. If the facts set out in the complaint do not constitute an unfair practice, the HRC must issue a finding of no reasonable cause without further investigation. HRC will only conduct a full investigation if the complaint, on its face, does set out facts that could constitute an unfair practice.

While the ramifications of this change have yet to be seen, employers may find that the HRC more quickly disposes of truly unmeritorious complaints.

6. Public Employee Military Leave Extended to National Guard Service (S.H.B. 2403)[90]

Under existing state law, public employees are entitled to 21 days of paid leave when called to active duty or active duty training. This bill clarifies that military leave is available to employees participating in military duty, training, and drills pertaining to National Guard Service. It further clarifies that the employer may only charge military leave to employees for days on which the employee was actually scheduled to work. That is, an employer cannot "deduct" days of military activity from the leave available to an employee was scheduled to work on the day in question.

II. FEDERAL CASE DEVELOPMENTS

The pace of change in the judicial system is, of course, not often as rapid or dramatic as it is in the Executive or Legislative branch, but changing legal standards in

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[89] http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Session%20Law%202010/6591-S.SL.pdf.

[90] http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Session%20Law%202010/2403-S.SL.pdf.

the courts can effect more long term, significant, and profound change in the workplace. Recent cases reflect the continuing evolution of anti-discrimination prohibitions.

A. RACE DISCRIMINATION AND HARASSMENT

1. Disparate Treatment

a. Intentional Discrimination

In a highly publicized decision involving claims of reverse race discrimination, the United States Supreme Court in ***Ricci v. DeStefano***[91] found that before an employer may engage in intentional race discrimination for the purpose of avoiding unintentional disparate impact, it must have a strong basis in evidence to believe that it would be subject to disparate-impact litigation. The decision attracted national attention, as well as political commentary by many who considered it a test of the qualifications of the Supreme Court's newest member and the first Latina Supreme Court Justice, Sonya Sotomayor. Justice Sotomayor was on the panel of the Second Circuit that found in favor of the City.

The case was brought by seventeen white firefighters and one Hispanic firefighter who challenged the City of New Haven's refusal to certify the result of its promotional examinations because not enough minorities would be promoted. The firefighters sued the City for unlawful discrimination on the basis of race under Title VII. Finding that the City's motivation to avoid making promotion decisions based on an examination with a racially disparate impact did not constitute discrimination, the district court dismissed the case. A three-judge panel (which included then-circuit court Judge Sotomayor) of the Second Circuit affirmed. By a 7-6 vote, the Second Circuit denied a rehearing *en banc*, in part based on precedent establishing "that a public employer, faced with a *prima facie* case of disparate-impact liability under Title VII, does not violate Title VII or the Equal Protection Clause by taking facially neutral, albeit racially conscious, actions to avoid such liability."[92]

The U.S. Supreme Court reversed the lower courts by a narrow 5-4 vote, and ruled that the City's failure to certify the examination results violated Title VII because the City did not have a "strong basis in evidence" to believe that it would have been subject to disparate-impact litigation if it had accepted the test results. Writing for the majority, Justice Kennedy's opinion cited Supreme Court Fourteenth Amendment jurisprudence holding that when government acts to remedy past racial discrimination based on race, the actions are constitutional only to the extent there is a "strong basis in evidence" that they are necessary. This standard, the Court held, also applies under Title VII. The City did not meet this standard when it refused to certify the examination results because the evidence showed only that the promotional examinations had a

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[91] 129 S. Ct. 2658 (2009).

[92] *Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008), *overruled by* 129 S. Ct. 2658.

disparate impact on race, evidence which alone is insufficient to prove a disparate-impact claim. The evidence did not, for example, show that the examinations were deficient in terms of job relatedness or business necessity, or that there was an equally valid, less discriminatory alternative that served the City's needs that the City refused to adopt. In a sharply worded dissent, Justice Ginsburg (writing for herself and three other justices) argued that the record showed longstanding discrimination in promotional practices affecting City firefighters; that the City used an examination that was open to criticism on several grounds; and that the City withdrew the examination results because it sincerely feared a disparate-impact lawsuit, and not in order to discriminate against white firefighters. Instead of the "strong basis in evidence" standard articulated by the majority, Justice Ginsburg believed that a good-faith standard should have been applied (*i.e.*, did the employer have a good-faith basis to believe that the challenged employment practice was not justified by business necessity?).

On remand by the Supreme Court, the district court ordered the City of New Haven to promote the plaintiffs.[93]

In ***Martinez v. City of St. Louis***,[94] the Eighth Circuit found that hiring decisions made by the City of St. Louis pursuant to a valid consent decree intended to remedy past discrimination did not constitute unlawful intentional discrimination. The validity of the consent decree at the time of the hiring decisions constituted a complete defense to a disparate treatment claim brought by white applicants.

The case was filed by two white applicants who were rejected by the St. Louis fire department for firefighter positions. At the time the plaintiffs' applications were considered, a consent decree that had been effective since 1976 required the department to fill half of its open firefighter positions with black applicants. The white applicants challenged the city's failure to hire them under Title VII, 42 U.S.C. § 1981, 42 U.S.C. § 1983, and the Equal Protection Clause. The district court ruled that the consent decree was constitutional, but dissolved the decree "because its stated goal of racial parity had been achieved." The district court also granted summary judgment to the plaintiffs, ordered retroactive reinstatement for one of the plaintiffs, and ordered that the other plaintiff be included in the next class of firefighters. After a jury trial on damages, a jury awarded the plaintiffs emotional distress damages, lost wages, benefits, and other damages.

On appeal, the Eighth Circuit reversed the award of summary judgment and damages to the plaintiffs, finding that the consent decree's validity at the time of the plaintiffs' application constituted a complete defense to claims of unlawful discrimination for the period of time that it was effective. The court noted, however, that the plaintiffs' suits had been a proper challenge to the continuing validity of the decree (the district court's dissolution of the decree in response to the plaintiffs' suits was not disturbed on

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[93] *Ricci v. DeStefano*, No. 3:04cv1109 (D. Conn. Nov. 24, 2009).

[94] 539 F.3d 857 (8th Cir. 2008).

appeal), particularly because the consent decree had no built-in benchmarks for dissolution.

b. *Prima Facie* Case

In ***Fields v. Shelter Mutual Insurance Co.***,[95] the Eighth Circuit held that proper comparators must be similarly situated in all relevant aspects of the job. In that case, an African-American insurance adjuster alleged that white employees in the same position received higher salaries. Finding that the plaintiff had failed to produce sufficient evidence that she was treated differently than similarly-situated individuals, the Eighth Circuit noted that it was not enough for the plaintiff to establish that comparators had the same job. Rather, the comparators must be "similarly situated in all relevant aspects before the plaintiff can introduce evidence comparing herself to the other employees." The plaintiff was hired before the employer adopted a policy of offering elevated salaries to outside employees to attract top talent. Some of the employees the plaintiff identified as comparators were hired after the policy was adopted. As a result, it was possible that the plaintiff's salary would not equal that of employees hired after the policy went into effect, even after receiving nondiscriminatory pay raises.

Where a plaintiff sought to establish that she was disciplined for conduct because of race discrimination through evidence that comparators were treated differently, the Eleventh Circuit held that the plaintiff's failure to identify comparators that were engaged in "nearly identical" conduct as the plaintiff was fatal to her *prima facie* case. In ***McCann v. Tillman***,[96] a female African-American corrections officer was suspended for behaving "irrational[ly] and disrespectful[ly]" while in uniform towards officers in a neighboring county jail where her son was being held. The plaintiff filed suit, alleging race discrimination under Title VII. The Eleventh Circuit held that the plaintiff's *prima facie* case failed because the white officers she identified were not proper comparators. The court found that, to avoid "confusing apples with oranges," plaintiffs must establish that comparators were engaged in conduct of a "quantity and quality" that is "nearly identical" to the plaintiff. Here, the plaintiff identified comparators who were not "examples of white employees who violated the uniform directive, or who similarly abused the indicia or privileges of their office, but were not disciplined."

In ***Lee v. Mid-State Land & Timber, Co.***,[97] the Eleventh Circuit again considered proper comparators, this time looking at the background of two employees with similar positions but with different experience. The case was brought by an African-American employee who earned $41,000 as a deer-operations manager. A white quail-operations manager with an associate's degree and 24 years of experience in quail operations earned $70,000. The African-American manager sued under 42 U.S.C. § 1981, alleging

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[95] 520 F.3d 859 (8th Cir. 2008).

[96] 526 F.3d 1370 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 404 (2008).

[97] 285 Fed. Appx. 601 (11th Cir. 2008).

that he received unequal pay because of his race. Finding that the plaintiff and the other manager were not similarly situated, the district court granted summary judgment for the employer. The Eleventh Circuit affirmed, finding that there were relevant differences between the employees, specifically that the white employee had more education and was much more experienced than the plaintiff. The court further found that the employer's justification for the pay differential was not a pretext for discrimination.

In ***Phillips v. International Brotherhood of Electrical Workers Local 159***,[98] a union removed an African-American electrician from a union referral list and denied him work referrals during the same period of time in which nineteen white electricians were allowed to join the union and received referrals. The plaintiff sued under 42 U.S.C. § 1981 for race discrimination. The union contended that the plaintiff lacked necessary credentials and was not similarly situated to the white electricians. The district court denied the union's motion for summary judgment, finding particularly relevant evidence that the white employees were allowed to join the union while the plaintiff was told no work was available. The court rejected the union's explanation that the plaintiff did not have the necessary credentials, because the evidence showed that the union only learned of the problem with the plaintiff's credentials after it removed him from the referral list.

c. Evidence of Discrimination

(i) Circumstantial Evidence

(a) Pretext

i. Action taken in contravention of employer's policies

A federal district court found sufficient evidence of pretext to allow the plaintiff's race discrimination claims to go to trial where an employer repeatedly failed to post open positions in contravention of its own policy. In ***Burns v. St. Clair Housing Authority***,[99] a black employee who had worked for the Housing Authority for 18 years applied for several director positions, none of which had been posted, and all which were later filled by white employees. Later, when an administrator director job became available, the employee told the executive director that he was interested in the position. That job, which also had not been posted, was filled by a white woman. Three other director jobs were similarly filled. The Housing Authority's personnel policies required that job openings be posted and that all full-time employees be considered for promotion. After receiving multiple rejections, the employee resigned and sued for discriminatory failure to promote and constructive discharge. Finding that the county's failure to follow its personnel procedures was evidence of pretext, the district court

[98] No. 08-00307, 2008 WL 5423188 (W.D. Wis. Dec. 30, 2008).

[99] No. 08-0258-DRH, 2009 WL 3229791 (S.D. Ill. Oct. 2, 2009).

denied the employer's request for summary judgment. The court also found that the employee could proceed on his constructive discharge claim. Although his work conditions were not intolerable, the employer's actions (refusing to consider him for promotion) suggested he would be terminated if he did not resign. The court called this a "career-ending action."

ii. Conduct of comparators

In ***Maston v. St. John Health System, Inc.***,[100] the plaintiff, an African-American employee, was terminated for failing to cooperate in the company's investigation of unauthorized employee purchases made using a company account. The company claimed that the plaintiff was the only employee who swore during the investigation and fired her for insubordination. Three other employees were also fired as a result of the investigation: one other employee for insubordination and two others (both white) for participating in the unauthorized purchases. The white employees were later rehired after the company determined that they had paid for the purchases. The plaintiff alleged that the company's justifications for her termination were not credible and that the white employees were treated better than her because they were rehired while she was not. She sued for race discrimination under Title VII and section 1981. The Seventh Circuit affirmed summary judgment for the employer, finding no evidence of pretext. First, the plaintiff provided no evidence to refute the employer's assertion that she was the only employee to swear during the interview. Second, the court dismissed as irrelevant the fact that the two white employees were rehired, because they did not engage in insubordination or fail to cooperate as did the plaintiff and the other fired employee.

iii. Actions taken pursuant to affirmative action plans

A hiring decision made under a temporary affirmative action plan instituted for the purpose of eliminating an existing racial disparity does not constitute unlawful discrimination where it does not unnecessarily trammel the interests of white employee or create an absolute bar to their advancement. In ***Sharkey v. Dixie Electric Membership Corp.***,[101] the plaintiff, a white applicant who applied for a job with a Louisiana electric company receiving federal funds, challenged the company's failure to hire him pursuant to the company's affirmative action plan ("AAP"). The company re-evaluated and adopted the AAP on a yearly basis. The AAP in effect at the time of the plaintiff's application was designed to address the underutilization of minorities in the job group which included the position for which the plaintiff had applied. At the time of the job opening, the company projected hiring two qualified minorities into the job group. The stated purpose of the AAP was "eradicate any deficiencies that pertain to . . . minority placement." The Fifth Circuit affirmed dismissal of the plaintiff's claim. The

[100] 296 Fed. Appx. 630 (10th Cir. 2008).

[101] 262 Fed. Appx. 598 (5th Cir. 2008).

court reasoned that where an affirmative action plan is articulated as the basis for an employer's decision, the burden shifts back to the plaintiff to prove that the employer's justification is pretextual and that the plan is invalid. In such cases, an employer's voluntary affirmative action plan is not discriminatory if it does not "unnecessarily trammel the interests of the white employees," does not "create an absolute bar to the advancement of white employees," and does no more than necessary to achieve a balance. Because the employer's plan was a temporary measure that was not intended to maintain racial balance but rather to eliminate an existing racial imbalance, it did not constitute a pretext for race discrimination.

In ***Humphries v. Pulaski County Special School District***,[102] a white public school administrator was denied a promotion to assistant principal multiple times. The plaintiff sued for race discrimination under Title VII, challenging the school district's affirmative action plan ("AAP") involving efforts to promote black employees. The school district claimed that it was required to follow the AAP by a consent decree arising from a desegregation litigation settlement. The Eighth Circuit partially reversed summary judgment for the school district, finding that an employer's reliance on an AAP that discriminates based on race, even if court-sanctioned, constitutes direct evidence of discrimination, and the court must then determine whether the plan itself is valid under Title VII and the Constitution. The Eighth Circuit also held that the plaintiff raised a material dispute of fact as to whether the district's policies were required by the AAP.

iv. Actions taken pursuant to collective bargaining agreements

In ***Whitmire v. Kvaerner Philadelphia Shipyard Inc.***,[103] the Third Circuit ruled that an employer's decision to refuse minority employees advanced training opportunities was not a pretext for race discrimination where a collective bargaining agreement and past practice specifically limited certain categories of employees' compensation and advancement. Two African-Americans with no previous experience operating cranes or even working in a shipyard were hired as "indirect" shipyard workers pursuant to a collective bargaining agreement. Under the collective bargaining agreement, indirect workers were not given the same training as direct workers. When the union later renegotiated the collective bargaining agreement, the plaintiffs and several other indirect workers were grandfathered into the "direct worker" category; however, their pay was capped at "intermediate." Subsequently, they claimed that their supervisor denied them the chance to train on certain equipment, and that they were denied operating time on machines while white workers were given those opportunities. As a result of the lack of training and operating time, they claimed to have lost overtime. They sued for race discrimination. The Third Circuit affirmed summary judgment for the employer, ruling that the plaintiffs failed to provide evidence that the employer's decision not to provide them with advanced training was pretext for race discrimination. The

[102] 580 F.3d 688 (8th Cir. 2009).

[103] 340 Fed. Appx. 94 (3d Cir. 2009).

court found that the employer had two reasonable justifications for denying training: First, direct workers had priority over the grandfathered workers because of experience; second, grandfathered workers were ineligible to move beyond intermediate pay, and therefore were ineligible for advanced training. The court dismissed evidence of a remark about "darkies," because it was isolated and occurred several years before the events in question.

v. Stray remarks

In ***Reilly v. TXU Corp.***,[104] the plaintiff, a white employee with nearly twenty years' experience as a procurement specialist, was passed over for a managerial position requiring five to seven years' experience in favor of an African-American woman with less than five years' experience and lower interview scores than the plaintiff's. The plaintiff sued for race discrimination under 42 U.S.C. § 1981, citing as evidence of discrimination a comment made by a member of the hiring committee that the person in charge of hiring "had a diversity issue." The trial court granted summary judgment for the employer. The Fifth Circuit reversed, finding that the plaintiff had established a *prima facie* case of race discrimination and that fact issues existed regarding whether the employer's motive for hiring the chosen candidate was pretext for discrimination. The court noted that although the hiring committee member's remark was insufficient to constitute direct evidence of discrimination, it could provide circumstantial evidence of pretext and prevented summary judgment.

(ii) Direct Evidence

Direct evidence that an employer's fear of litigation formed the basis for its different treatment of African-American and white employees was sufficient to preclude granting summary judgment for the employer for unlawful discrimination. In ***Smith v. Waste Management of Illinois, Inc.***,[105] a white truck driver entered into a last-chance agreement with his employer after being disciplined for repeated accidents. He was discharged following an accident nearly nine months later and sued under Title VII, 42 U.S.C. § 1981, and the Age Discrimination in Employment Act for reverse race and age discrimination. The plaintiff produced evidence that he was treated less favorably than his African-American co-workers, including evidence that African-American drivers were not disciplined for comparable offenses and were given better terms and conditions of work, such as being able to take long lunch breaks. The plaintiff also introduced evidence showing that the employer had previously lost a race discrimination suit and feared another such suit. Finding that there was evidence that the employer did not impose comparable discipline on African-American truck drivers due to a fear of litigation, the district court denied summary judgment on the plaintiff's race discrimination claim but granted summary judgment for the employer on the plaintiff's age discrimination claim.

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[104] 271 Fed. Appx. 375 (5th Cir. 2008).

[105] No. 05-1284, 2008 WL 2078064 (C.D. Ill. May 15, 2008).

(iii) Statistical Evidence

Statistical evidence that demonstrated the percentage of successful black applicants was not proportional to their representation in the workforce was sufficient to establish a *prima facie* disparate treatment case. In ***Nelson v. Wal-Mart Stores, Inc.***,[106] two unsuccessful job applicants for over-the-road truck driver positions with Wal-Mart Transportation, a subsidiary of Wal-Mart Stores, Inc., claimed that the company's hiring process was discriminatory. They alleged that the company's use of a word-of-mouth hiring process, from which almost all of the potential applicants came, discriminated against and deterred black applicants. The hiring process consisted of Wal-Mart distributing "1-800" cards to prospective applicants. The plaintiffs brought suit on behalf of themselves and putative class members under Title VII and 42 U.S.C. § 1981. The court granted class certification in 2007, and the company subsequently moved for summary judgment. In denying summary judgment on the class claims, the court found the plaintiffs' statistical evidence sufficient to proceed on a disparate treatment theory, noting that significant statistical disparity may be enough to meet that burden. The evidence was also sufficient to establish potential disparate impact, and the court was not persuaded that the practice was a business necessity.

d. The Decisionmaker

(i) Same Decisionmaker

The fact that a decisionmaker who fires a plaintiff is the "same actor" who hired and promoted the plaintiff only creates a rebuttable inference that the decisionmaker did not discriminate, not a rule. In ***Harvey v. Sybase, Inc.***,[107] the same supervisor who hired and promoted an employee both terminated and failed to rehire her at a different company. The employee sued under state law, alleging that the termination and failure to rehire were due to her gender, race, and national origin. After finding that race and gender were motivating factors, the jury awarded compensatory and punitive damages. In its appeal, the employer alleged in part that the jury verdict was not supported by the evidence, because the "same actor rule" raised the inference that the decisionmaker did not discriminate. The court of appeals ruled that the issue had been properly before the jury, and noted that there is no *per se* same actor "rule." Rather, the fact that the same actor is involved in both decisions simply gives rise to a rebuttable evidentiary inference: "Evidence that the same actor conferred an employment benefit on an employee . . . is simply evidence and should be treated like any other piece of proof."

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[106] No. 2:04-00171, 2009 WL 88550 (E.D. Ark. Jan. 13, 2009).

[107] 76 Cal. Rptr. 3d 54 (Cal. Ct. App. 2008), *rev. dismissed by stipulation*, 193 P.3d 280.

(ii) "Cat's Paw" Theory

In ***Schandelmeier-Bartels v. Chicago Park District***,[108] a white park district employee sued for race discrimination under Title VII under a "cat's paw" theory, alleging that the racial animus of her black supervisor influenced the white decisionmaker who discharged her. The district court overturned a jury verdict in her favor and granted judgment as a matter of law for the employer, finding that no reasonable jury could find the decisionmaker was influenced by the supervisor. The decisionmaker had decided to discharge the employee a week before the alleged dispute between the employee and the supervisor and had consulted with three independent employees before making the decision.

In ***Clack v. Rock-Tenn Co.***,[109] the plaintiff, an African-American factory worker, filed a suit for race discrimination and retaliation against his employer under Title VII challenging his termination for refusing his supervisor's instruction to clean up debris around a machine and then walking away. Two months before the incident, the plaintiff had filed a discrimination charge against the supervisor. After management met with the plaintiff and conducted an investigation, the company's general manager discharged the plaintiff. The plaintiff was reinstated following an arbitration. The Sixth Circuit affirmed summary judgment for the employer, finding that the employee could not establish that the employer's reason for his termination (insubordination) was a pretext for discrimination. The court rejected the plaintiff's "cat's paw" argument. Although the offensive racially-based statements and conduct of plaintiff's supervisor three years earlier could give rise to an inference of discrimination, the company's independent investigation (including meeting with the employee) "sterilize[d] the termination." As to the retaliation claim, the court found that notwithstanding a close temporal link, the employee still could not demonstrate pretext to support his retaliation claim.

2. Disparate Impact

In ***Dunlap v. Tennessee Valley Authority***,[110] the plaintiff alleged that a potential employer failed to hire him because of race in violation of Title VII under disparate treatment and disparate impact theories. The plaintiff had over twenty years' experience as a boilermaker and foreman. On the technical evaluation, the plaintiff scored as well as the five candidates who were hired. He also had more experience and a better safety record than others who were hired. The interview was weighted at 70% of the applicant's final score, while technical knowledge counted toward 30% of the score. The plaintiff scored lower on the interview portion than the successful candidates and was not selected. The district court found sufficient evidence of disparate treatment, including evidence that the employer altered the assigned weight of the

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[108] No. 07-cv-922, 2009 WL 2916858 (N.D. Ill. Sept. 2, 2009).

[109] 304 Fed. Appx. 399 (6th Cir. 2008).

[110] 519 F.3d 626 (6th Cir. 2008).

interview and technical evaluation, subjectively evaluated interview questions, and altered scores in what the employer referred to as "score-balancing," in order to "exclude black applicants who were better qualified than the white applicants." There was also evidence that white applicants received higher scores for similar responses to objective interview questions and that some score sheets were altered as many as 70 times without a legitimate reason.

The Sixth Circuit affirmed the district court's finding of disparate treatment, but reversed its finding of disparate impact on the basis that the plaintiff "did not present evidence that the practices used in his interview were ever used for other hiring decisions, so no statistical proof can show that a protected group was adversely impacted." Because the plaintiff did not introduce relevant statistical data showing a neutral practice adversely impacted a specific group, he could not establish a *prima facie* case of disparate impact.

3. Adverse Action

a. Retaliation

A correction notice does not constitute an adverse employment action in a retaliation case where the notice has no effect on the employee's pay, hours, and responsibilities. In ***Littleton v. Pilot Travel Centers, LLC***,[111] a fuel truck driver who was responsible for making deliveries of fuel to retail travel centers filed a charge with the EEOC claiming that he had received too few raises. After the company investigated complaints by the employees of one of the travel centers that the driver was harassing and spreading rumors about them, the company gave the driver a "correction notice," which warned that he would be terminated if he did not cease his conduct. The driver claimed that the employer issued the correction notice in retaliation for his first EEOC charge and filed a second EEOC charge for retaliation. He later filed suit challenging both his failure to receive pay raises and the issuance of the correction notice. A trial court awarded summary judgment to the employer and, following the Supreme Court's decision in ***Burlington Northern & Santa Fe Railway v. White***, 548 U.S. 53 (2006), a second trial court also awarded summary judgment on the grounds that the driver had not suffered any materially adverse action. The Eighth Circuit affirmed under the precedent established by *Burlington Northern*, holding that the correction notice did not substantively impact the driver's employment. The driver's pay, hours, and responsibilities remained the same, and he continued to receive training and mentorship. The court rejected the plaintiff's argument that the employer issued the correction notice as a result of the plaintiff's first EEOC charge because the events did not occur close enough in time, and the manager of the travel center was not aware of the charge. Finally, the court found that the driver could not establish pretext because the company had a legitimate, non-discriminatory reason for not giving the driver raises since he was already receiving more pay than other drivers with greater seniority.

[111] 568 F.3d 641 (8th Cir. 2009).

b. Disparate Treatment

Where a plaintiff initially is denied a merit pay increase, a retroactive increase in pay will not negate the initial adverse employment action. In ***Crawford v. Carroll***,[112] the plaintiff, a black university employee, was denied a merit pay increase, after which she filed suit claiming that the university unlawfully discriminated against her on the basis of race. The university retroactively increased her pay and argued that she had not suffered any adverse action because the plaintiff was made whole by the retroactive pay increase. The Eleventh Circuit found that, despite the retroactive pay increase, the plaintiff had presented sufficient evidence of an adverse action: "Although [she] received a retroactively awarded merit pay increase, that raise could not alter the fact that she had been denied the increase or erase all injury associated with it, specifically the lost value and use of the funds during the time she was not receiving them. . . . To conclude otherwise would permit employers to escape Title VII liability by correcting their discriminatory and retaliatory acts after the fact."

The loss of a monetary bonus does not constitute an adverse employment action where the bonus is conditional. In ***Douglas v. Donovan***,[113] a black government senior executive sued his employer for race discrimination after his supervisor nominated a white female employee over him to receive a Presidential Rank Award, a presidential recognition for "sustained extraordinary accomplishment" in government service. The award came with a monetary bonus. Eligibility for the award required nomination by the employee's supervisor. The district court granted summary judgment for the employer, and the plaintiff appealed. The D.C. Court of Appeals affirmed summary judgment, finding that the plaintiff's failure to receive a nomination for the award was not a materially adverse consequence of employment. The plaintiff was not guaranteed the award even if he had been nominated, and his failure to be nominated resulted in no change in his employment. Because it was not certain whether the plaintiff would have received the award, there was no direct connection between his supervisor's failure to nominate him for the award and the plaintiff's inability to collect the bonus that accompanied the award.

Similarly, the Seventh Circuit in ***Maclin v. SBC Ameritech***,[114] found that the plaintiff's loss of a discretionary bonus was not an adverse employment action. The plaintiff's employer changed the plaintiff's job title, denied her a discretionary bonus, and did not increase her pay following her involvement in a car accident. She sued, alleging race and sex discrimination under Title VII. The Seventh Circuit held that the employer's actions did not constitute an adverse action, finding that an action "must be 'significant' to be cognizable as discrimination. The action must involve more than a mere inconvenience or alteration of job responsibilities." The actions about which the

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[112] 529 F.3d 961 (11th Cir. 2008).

[113] 559 F.3d 549 (D.C. Cir. 2009).

[114] 520 F.3d 781 (7th Cir. 2008).

plaintiff complained did not fall within any cognizable category of adverse employment action. Where a bonus is discretionary, and not an entitlement, the loss of the bonus is not an adverse employment action. Furthermore, a change in job title and duties is not adverse where the employee has the same salary, benefits, and chance for promotion. An alleged loss in prestige does not constitute a material change in pay and duties.

Notes in an employee's personnel file for unexcused absences do not constitute a materially adverse employment action where there is no resulting impact on the employee's work. In ***de la Rama v. Illinois Department of Human Services***,[115] a government employee sued for race and national origin discrimination and retaliation under Title VII, as well as for violations of the FMLA, after she received a number of notes in her personnel file for unauthorized absences. She had missed several days of work as a result of fibromyalgia and a herniated disk, conditions she never disclosed to the employer. The employer considered the absences unauthorized. The district court granted summary judgment for the employer. Finding that the unauthorized absence notes did not materially alter the employee's work conditions, the Seventh Circuit affirmed, agreeing with the district court that the employee had not suffered a materially adverse employment action.

4. Associational Discrimination

a. Disparate Treatment

In ***Ellis v. United Parcel Service, Inc.***,[116] after UPS learned about a three-year relationship between the plaintiff, a male African-American manager, and a female Caucasian hourly employee, which was a violation of UPS's non-fraternization policy, management told the plaintiff to "rectify the situation." Instead, the manager proposed to the employee several days later, and the couple married the following year. Upon learning that their relationship continued, UPS terminated the manager. He sued for race discrimination, and the trial court granted summary judgment for UPS. The Seventh Circuit affirmed summary judgment, finding that the plaintiff failed to present evidence that intra-racial couples were treated more favorably than interracial couples. The court specifically rejected as comparable relationships those situations involving different decisionmakers or where the decisionmakers were not aware of the relationships.

For a successful associational discrimination claim, the Sixth Circuit held that plaintiffs may not merely allege that minority co-workers were harassed; the severe or pervasive harassment must be directed toward the plaintiffs themselves as associates or advocates for minority employees. In ***Barrett v. Whirlpool Corp.***,[117] white employees brought suit under section 1981 and Title VII alleging that they experienced

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[115] 541 F.3d 681 (7th Cir. 2008).

[116] 523 F.3d 823 (7th Cir. 2008).

[117] 556 F.3d 502 (6th Cir. 2009).

unlawful harassment and retaliation because of their friendships with African-American co-workers. The employees had complained to management about the frequent use of racial slurs and graffiti in the workplace that depicted Ku Klux Klan initials and a noose. A federal district court dismissed the plaintiffs' claims. The Sixth Circuit reversed the district court's dismissal of the plaintiffs' association claims in part, finding that the existence of either some association between the plaintiffs and their African-American co-workers, even if not close association, or the plaintiffs' advocacy on behalf of their African-American co-workers was sufficient to establish associational discrimination. It was not sufficient to allege only that the black co-workers were harassed. However, with one exception, the plaintiffs failed to show that they experienced severe or pervasive harassment that was directed towards themselves as associates or advocates for black employees.

An Oregon district court found that a mere work friend relationship is not enough to establish an associational discrimination claim absent some advocacy on behalf of, or a significant personal relationships with, minority co-workers. In ***EEOC v. Parra***,[118] three employees (one white and two Hispanic) were discharged after the employer discovered that they were spending time at one of the co-worker's home during work hours, and reporting it as work time. The EEOC sued the company under Title VII, and the three employees intervened with their own claims for discrimination, retaliation, emotional distress and wrongful discharge under federal and Oregon law. Finding that the plaintiffs could not show advocacy on behalf of or a "significant" personal relationship" with the co-workers, the court held that there was insufficient evidence to establish associational discrimination.

b. Harassment

(i) Severe or Pervasive

The Tenth Circuit Court found that the placement of a noose in a workplace, combined with other race-based conduct, was sufficient to establish a material factual dispute regarding whether the plaintiff was harassed because of race. In ***Tademy v. Union Pacific Corp.***,[119] an African-American former employee filed suit under Title VII and 42 U.S.C. § 1981, alleging that he was subjected to racial harassment at work, which included racist graffiti and slurs, frequent selection for drug testing, and on one occasion, the placement of a noose in the workplace. The employee retired on disability for depression, post-traumatic stress disorder, and anxiety. The Tenth Circuit reversed the trial court's grant of summary judgment, ruling that the district court had erred in finding that the placement of the noose did not constitute racial harassment because a reasonable jury could find that the employer's conduct and other incidents arose from racial animus. Further, the plaintiff presented evidence that he and a co-worker complained, and that the employer's response was inadequate.

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[118] No. 05-1521-HO, 2008 WL 2185124 (D. Ore. May 22, 2008).

[119] 520 F.3d 1149 (10th Cir. 2008).

In ***Johnson v. Riverside Healthcare System, LP***,[120] a plastic surgeon alleged that other doctors harassed him because of his race, sexuality, and a mistaken belief that he had HIV/AIDS. He claimed that during one incident, another surgeon called him a "f------ n-----" after he discovered a mistake by that surgeon and had to perform emergency surgery. He also alleged that some of the nurses on staff harassed him and refused to assist with his surgeries. He sued in federal court under section 1981 and California state discrimination laws, alleging a racially hostile work environment. On rehearing, the Ninth Circuit reversed the district court's dismissal of the plaintiff's hostile work environment claim, allowing plaintiff to proceed to trial. The court noted in particular that the interaction with the other surgeon, if true, would constitute serious discrimination.

The Eleventh Circuit in ***Shockley v. HealthSouth Central Georgia Rehabilitation Hospital***,[121] found that the use of the term "you people," which the plaintiff felt referred to African-Americans, constituted sufficient evidence to allow the plaintiff's race-based hostile work environment, discrimination and retaliation claims to go to the jury. The plaintiff, an African-American hospital employee, claimed to have experienced racially-based verbal harassment from her supervisor, including the use of the term "you people." The employee asked for a transfer and complained to human resources. After she was discharged, she sued for discrimination, retaliation, and hostile work environment under Title VII. The Eleventh Circuit found that the supervisor's alleged behavior was sufficient for a jury to conclude that the plaintiff had experienced a severe and pervasive work environment.

The Seventh Circuit in ***Ford v. Minteq Shapes & Services, Inc.***,[122] held that a co-worker's repeated reference to an African-American employee as a "black African American" or "black man" for over a year did not constitute an objectively hostile work environment based on race. The plaintiff complained to human resources eight months after the remarks began, but the remarks continued to occur until six months later, when a supervisor overheard the remarks and finally reprimanded the co-worker. The Seventh Circuit found that the remarks did not constitute an objectively hostile work environment. Assuming that the employee had been subjected to name-calling, he only complained once and took no follow-up action for seven months after his complaint was allegedly ignored by his employer.

In ***Brooks v. CBS Radio, Inc.***,[123] the Third Circuit affirmed summary judgment for an employer on a plaintiff's hostile work environment and constructive discharge claims based on the distribution of a book the plaintiff found racially offensive. The plaintiff was the only African-American account executive among 25 account executives

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[120] 534 F.3d 1116 (9th Cir. 2008).

[121] 293 Fed. Appx. 742 (11th Cir. 2008).

[122] 587 F.3d 845 (7th Cir. 2009).

[123] 342 Fed. Appx. 771 (3d Cir. 2009).

at the company. His sales manager distributed a book titled "New Dress for Success." Statements in the book were found by some, including the plaintiff, to be racially offensive. After the plaintiff complained, the company collected all copies of the book. The plaintiff resigned and filed a discrimination charge. The Third Circuit held that a reasonable jury could not find that the book's distribution was motivated by racial animus or was sufficiently severe or pervasive to establish a hostile work environment.

(ii) Response by Employer

The Sixth Circuit found that plaintiffs could proceed on their racial harassment claims where the offending employees were not disciplined and the harassment continued even after the plaintiffs' complaints. In ***Bailey v. USF Holland, Inc.***,[124] two African-American employees brought Title VII and state law claims after being subjected to repeated racial harassment from co-workers over a period of several years. Among the harassing conduct, the plaintiffs were called "boy" and a noose and racial graffiti were found in the workplace. Although the employer held sensitivity training and brought in an outside attorney to investigate, the harassment continued and the responsible co-workers were not disciplined. The employer did eventually install security cameras, which curtailed the graffiti. A jury awarded $350,000 to each plaintiff on their Title VII and state law claims. The Sixth Circuit affirmed the judgment, finding not only that the employees had established a hostile work environment, but also that the employer could not demonstrate as an affirmative defense that it had responded appropriately where the employer had neither exercised reasonable care, nor acted promptly.

In ***Porter v. Erie Foods International, Inc.***,[125] the Seventh Circuit found that an employer took prompt and effective remedial action where, despite plaintiff's repeated refusals to provide the names of offending co-workers, the employer worked with the information it had and took steps to remedy the offending behavior. The plaintiff, an African-American temporary employee, filed a Title VII race harassment claim for several incidents he experienced on the night shift at a food-production facility. One night, a co-worker took him to an area of the facility where a noose was hanging. The supervisor found the noose and directed the co-worker under whose work station the noose was hanging to take it down. The plaintiff complained about the incident but refused to identify the co-worker who had taken him to the area. After speaking with the plaintiff, the supervisor left the noose on her bulletin board, further offending the plaintiff. At the end of the shift, the supervisor reported the matter to management. Human resources held a meeting the following night with the third-shift workers to emphasize the company's non-discrimination policy and informed the co-workers that workplace harassment would not be tolerated. Following the meeting, the incidents continued, including two incidents involving a noose. In the first, a co-worker showed the plaintiff and other co-workers a noose he had made; in the second, the same co-worker gave

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[124] 526 F.3d 880 (6th Cir. 2008).

[125] 576 F.3d 629 (7th Cir. 2009).

the plaintiff a noose and stated that if he showed the noose to anyone, the co-worker would "come . . . and look for him." The plaintiff complained to management again, but again refused to name the offenders, stating that he did not want anyone to lose his job. He also refused to transfer to a different shift and quit a few days later. The company fired the co-worker who gave the employee the noose.

The Seventh Circuit affirmed summary judgment, finding that the company had responded promptly and effectively to the harassment. The court noted that the company worked with the information it had and would not excuse the plaintiff's failure to cooperate because of issues he may have had with the supervisor or HR representative. The court also dismissed the plaintiff's constructive discharge claim on the basis that a reasonable employee would have given the employer further opportunity to stop the harassment.

B. NATIONAL ORIGIN DISCRIMINATION AND HARASSMENT

1. National Origin Defined

In ***Abdullahi v. Prada USA Corp.***,[126] the Seventh Circuit took up the meaning of the terms race, nationality, and ethnicity in considering the claims of a sales associate of Iranian ethnicity and concluded that while the terms race, nationality, and ethnicity are not synonymous, they coincide because Iranians are both natives of Iran and individuals with common features. The plaintiff, a former sales associate, sued Prada for discrimination. The employee checked race, national origin, and religious discrimination on her EEOC form, but in her amended complaint she checked only national origin and religious discrimination. After the trial court dismissed the race claim on grounds that it was not in the complaint, the Seventh Circuit reversed, holding that dismissal was improper.

2. Harassment

Using an employee's name in a mocking or derisive manner is insufficient, standing alone, to establish a hostile work environment claim based on national origin. In ***Eldeeb v. AlliedBarton Security Services L.L.C.***,[127] the plaintiff, an Egyptian security guard whose first name was "Osama," complained that co-workers called him by this name, which he felt was being used in a mocking or derisive manner. The company eventually removed the plaintiff from his post for violating a work rule, but informed him that it would find him another position. The plaintiff sued for discrimination and harassment based on national origin, as well as claims for constructive discharge and retaliation. The court granted summary judgment for the employer, finding that calling someone by his first name cannot form the basis of a harassment claim. The court also rejected the plaintiff's constructive discharge and retaliation claims, finding

[126] 520 F.3d 710 (7th Cir. 2008).

[127] No. 07-669, 2008 WL 4083540 (E.D. Pa. Aug. 28, 2008).

that the plaintiff had suffered no adverse actions. Specifically, the court noted that the employee's rejection of a part-time position, to which he never responded, and full time position, which he declined, indicated that there had been no termination.

A federal district court determined that an employee's constructive discharge claim was properly dismissed where the employee left her employment to work for a competitor before the company had an opportunity to investigate her complaints about national origin discrimination and harassment. In ***Ramirez v. Olympic Health Management Systems, Inc.***,[128] the plaintiff, a Latina insurance sales agent, claimed that her employer excluded her from good sales leads and that she was subjected to disparaging comments about Mexicans. When the employee complained to a supervisor, the supervisor told the plaintiff that she would report the comments to a manager, but failed to do so. The employee then complained directly to the manager, and the manager reported the comments to the Human Resources director. The employee, who left the company to work for a competitor, sued for national origin and race discrimination, retaliation, hostile work environment harassment, and constructive discharge under Title VII. The court granted summary judgment on the constructive discharge claim, but allowed plaintiff to proceed with her other claims. As to the constructive discharge claim, the court found persuasive the fact that the employees failed to make a formal complaint to the company or call the phone numbers listed in the company's Code of Conduct, and then, after she did complain, left the company before giving it a chance to investigate and address the situation. The court concluded, however, that there was sufficient evidence to establish an adverse employment action, noting the company's failure to allocate sales leads to top agents in accordance with company policy, instructing that non-Hispanic customers be directed away from the employee, and not allowing the employee to go to a retirement center because she was Hispanic. The court further found sufficient evidence of a hostile work environment, noting that the "sheer number" of insults was enough to create a hostile work environment.

3. Disparate Treatment

a. *Prima Facie* Case

A plaintiff who was terminated because he lost his security clearance could not show that he was qualified for the position where he failed to challenge the employer's objective evidence that the security clearance was a requirement of his former position. In ***Makky v. Chertoff***,[129] the plaintiff, a former Transportation Security Administration ("TSA") employee, an Arab Muslim of Egyptian descent, lost his security clearance and was subsequently discharged. He filed a lawsuit alleging that TSA discriminated against him based on his religion and national origin. The plaintiff presented no evidence to challenge the revocation of his security clearance, but rather claimed TSA

[128] No. 07-cv-03044, 2009 WL 1107243 (E.D. Wash. April 21, 2009).

[129] 541 F.3d 205 (3d Cir. 2008).

acted discriminatorily when it indefinitely suspended him without pay instead of allowing him to continue on administrative leave or transferring him to a position which did not require security clearance while final determination of his security clearance was still pending. Comparing the plaintiff's lack of security clearance to "the lack of a license in a position such as a medical doctor," the Third Circuit found that the plaintiff failed to establish a *prima facie* case of mixed-motive employment discrimination because he could not show that he was qualified for his position. The plaintiff cannot establish unlawful discrimination in situations where there is "irrefutable [evidence] that plaintiff does not meet a necessary objective qualification for the job."

b. Pretext

An employer's investigation of a plaintiff's inconsistent reasons for taking leave, combined with an employer's legitimate security concerns, are sufficient to establish a legitimate, non-discriminatory reason for an investigation into the reasons for his request for extended leave. In

In ***Qamhiyah v. Iowa State University of Science & Technology***,[130] a female Muslim university professor of Palestinian ancestry who was born in Kuwait alleged sex, national origin, pregnancy, and religious discrimination after her application for tenure was denied. The professor presented direct evidence of bias, including evidence that other faculty members had made references to her pregnancies and made other discriminatory remarks. However, she presented no evidence that the university's board of regents, which made the final tenure determination, held any discriminatory animus. The plaintiff presented her case under a "cat's paw" theory of liability, arguing that the lower levels of the tenure process tainted the entire review. The Eighth Circuit dismissed the professor's claims because she failed to show that the board of regents was a "conduit, vehicle or rubber stamp" through which someone else's discriminatory motive was achieved. Furthermore, there was evidence that the professor's tenure review was thoroughly vetted at numerous levels, and that at every level, she fell short of tenure. Because the upper levels of review were independent of the lower levels, even if the lower levels were tainted, the extensive reviews at the upper level removed any inference of discrimination.

C. SEX AND PREGNANCY DISCRIMINATION

1. Because of Sex

A plaintiff who admitted to accessing a number of pornographic sites on his work computer and was the only person logged in to the computer at the time the sites were accessed could not establish gender discrimination where he argued that his employer assumed he was the one who accessed the sites because he is male. In ***Farr v. St. Francis Hospital and Health Centers***,[131] the plaintiff, the only male hospital employee

[130] 566 F.3d 733 (8th Cir. 2009).

[131] 570 F.3d 829 (7th Cir. 2009).

in his department, sued for sex discrimination under Title VII challenging his discharge after the hospital found that pornographic and hacking websites had been accessed from the department's computer. There was evidence that the plaintiff had accessed the sites, including the fact that the plaintiff was the only person logged in at the time the pornographic sites were accessed and that the plaintiff admitted accessing a number of them. He argued the hospital's assumption that he was the one who accessed the sites because he was the only male constituted gender discrimination. The Seventh Circuit affirmed summary judgment for the employer, holding that the plaintiff failed to show that he was fired for his gender, rather than for accessing the pornographic sites. In a reverse discrimination case, the plaintiff must not only establish a *prima facie* case, but must also show "background circumstances," which show the employer discriminates against the majority or that "something 'fishy' [is] going on." Here, the court found that the evidence showed the employee was fired because the hospital's investigation established that he had accessed the pornographic sites and there was no evidence to undermine the company's explanation, such as suspicious timing or identifying a woman who accessed pornographic sites but was not fired.

A supervisor's reference to an employee as a "streetwalker," along with a workplace rumor that the plaintiff had paid for her education through prostitution, was an insufficient basis for the plaintiff's Title VII sex discrimination claim. In ***Brockie v. Ameripath, Inc.***,[132] the plaintiff was a female pathologist who was terminated after a series of misdiagnoses and failure to properly communicate those diagnoses to her superiors. The Fifth Circuit affirmed the district court's award of summary judgment for the employer. In holding that the streetwalker comments were not direct evidence of sex discrimination, the court refused to "draw[] the inference that [the supervisor] believes all women are streetwalkers, a plainly unreasonable inference not owed [plaintiff], even at the summary judgment stage." The court also found that the plaintiff failed to establish her claim through circumstantial evidence because she could not show that similarly situated men were treated more favorably.

In ***Henry v. Milwaukee County***,[133] a county's policy of staffing corrections officers at a county detention center of the same sex as the inmates was found not to be a *bona fide* occupational qualification. The plaintiffs, two female corrections officers at the detention center, sued for sex discrimination under Title VII, alleging that the county's staffing policy was discriminatory. As a result of the policy, and because six of the seven areas of the facility housed males while only one housed females, males were given far more overtime and premium pay opportunities than females. The Seventh Circuit rejected the county's argument that sex was a *bona fide* occupational qualification because the county produced no evidence that having same-sex officers on duty was reasonably necessary to the operation of the detention center. The court rejected the county's justification that same-sex officers could act as mentors because it offered no reason why opposite-sex officers could not be mentors. In rejecting the

[132] 273 Fed. Appx. 375 (5th Cir. 2008).

[133] 539 F.3d 573 (7th Cir. 2008).

county's safety justification, the court noted that there had never been a staff/inmate sexual assault and that the county had failed to explain why alternative safety measures would not work.

Subjective criteria may not properly be considered at the *prima facie* stage of a sex discrimination case when determining whether a plaintiff is qualified, according to the Ninth Circuit in ***Nicholson v. Hyannis Air Service, Inc.***[134] When the plaintiff, a female pilot, was suspended from flying as a first officer on the airline's Guam and Micronesia routes, she sued for sex discrimination, claiming that the complaints about her skills and the decision to remove her from the program were because of her gender. The plaintiff's supervisors reported that she had difficulties with her communication and cooperation skills. Four captains also reported that her crew resource management skills were inadequate. Before she was suspended from the program, the regional administrator in charge of the program planned to observe her crew management skills. Before she could be observed, the plaintiff was removed from the flight by a captain with whom the plaintiff previously had a sexual relationship, and who claimed that tension between them made flying unsafe. Following counseling and discipline, the plaintiff was removed from the program. After her failure to bid on flights for which she was eligible, she was discharged. The district court granted summary judgment for the employer, holding that the plaintiff could establish neither a *prima facie* case nor pretext.

The Ninth Circuit reversed, finding that the plaintiff established a *prima facie* case because she was qualified for the job. The plaintiff met the objective criteria, and her subjective qualifications, like crew management, were not properly considered at the *prima facie* stage. The court further found that male pilots may have been treated more favorably. Finally, the court found that the plaintiff had raised a sufficient dispute about whether the employer's stated reasons for its actions were pretext for discrimination.

2. Disparate Treatment

a. *Prima Facie* Case

In ***Galaviz v. Post-Newsweek Stations.***,[135] a district court dismissed the plaintiff's discrimination claims on the basis that the situations of four male employees, who, like plaintiff, had violated the morals clause of their employment agreements, were not comparable to the plaintiff's situation. The plaintiff, a female news reporter, was fired for violating the morals clause in her contract after a series of incidents that included an altercation with a city councilman with whom she had a romantic relationship, a fight with a boyfriend to which the police were called, and an arrest following a fight with another boyfriend. The plaintiff's behavior garnered publicity. The station fired her, purportedly because she had violated the morals clause. The plaintiff sued for sex discrimination, alleging that four male employees had been retained after

[134] 580 F.3d 1116 (9th Cir. 2009).

[135] No. SA-08-CA-305, 2009 WL 2105981 (W.D. Tex. July 13, 2009).

being arrested or involved in crimes. The court granted summary judgment for the employer, finding that the situations of the male employees were not comparable to those of plaintiff. Two of the male employees were on-air reporters with morals clauses. Although the first of these employees was arrested, it created little publicity, and it was his only incident. The second employee was also arrested, and although his arrest was embarrassing to the station, it was his only incident. The other two employees were not on-air, did not have morals clauses, and their situations involved otherwise distinguishable facts.

b. Pretext

Evidence that a supervisor made a comment that "only men" would be hired for a position was sufficient to create an inference of pretext where the supervisor had influence over the decisionmaker who chose not to hire the plaintiff for a position. In ***Gillaspy v. Dallas Independent School District***,[136] the plaintiff, a female custodian, worked as a field supervisor for the school district. After the district decided to outsource custodial work, the new management company eliminated her position and required employees formerly in the position to interview for the new position of area custodial supervisor. The plaintiff was the only female applicant for the area custodial supervisor position and was the only applicant not chosen for the position (she was instead given a position as a facility supervisor). The plaintiff claimed a supervisor said "only men" would be hired. She sued for discriminatory failure to promote and retaliation. The Fifth Circuit reversed the district court's decision to grant summary judgment for the employer, and remanded on the plaintiff's discrimination and retaliation claims. The court found that the plaintiff had established pretext because she produced evidence that the supervisor who made the alleged "only men" comment had influence over the decisionmaker who chose not to hire her. She also offered evidence to show that she had a history of good performance and that three of the selected men failed to meet the employer's minimum educational and experience requirements.

3. Disparate Impact

A plaintiff can provide sufficient evidence to defeat summary judgment where an employer's policy has a disparate impact on women, notwithstanding the plaintiff's lack of statistical proof. In ***Johnson v. AK Steel Corp.***,[137] a female crane operator was assigned to a position where equipment ran continuously and was told that she would have to urinate over the side of the crane because no bathroom breaks were permitted. After she refused to do so, the employer offered her other positions, but she wanted the crane operator position. When the employer failed to offer the crane operator position without changing the bathroom policy, she resigned. She sued under Title VII and state law, alleging that the bathroom policy had a discriminatory disparate impact on women and that she had been discriminated against as a result of the policy's application to

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[136] 278 Fed. Appx. 307 (5th Cir. 2008).

[137] No. 07-cv-291, 2008 WL 2184230 (S.D. Ohio May 23, 2008).

her, including constructive discharge. Finding that there was evidence that the policy was in place and in use, and that a reasonable fact-finder could find that it had a disparate impact on women, notwithstanding the lack of statistics, the court held that the plaintiff provided sufficient evidence to defeat summary judgment. The court, however, rejected the plaintiff's disparate treatment claims because the employer offered her alternate positions, and such an offer precludes constructive discharge. Furthermore, she failed to present sufficient evidence of a discriminatory transfer and pay differential pay.

4. Equal Pay Act

The Seventh Circuit found that an employer's decision to promote a male employee to the plaintiff's same job position at a higher wage was lawful where the male employee had a superior education. In ***Warren v. Solo Cup Co.***,[138] a female employee filed suit under the EPA and Title VII after a male employee was promoted to her same job position at a higher wage. She had a high school education and mediocre computer skills. Comparatively, the male employee had a master's degree and superior computer skills. Although the plaintiff was subsequently terminated due to the elimination of her job, she did not contest the discharge. The Seventh Circuit found that the employer's decision to pay the male employee was lawful under the EPA because it was based on factors other than sex, including the male employee's superior education and computer skills. The pay differential was also lawful under Title VII, given the male employee's education and computer knowledge. The court noted that even though the job description did not require such skills, employers may compensate employees differently based on other skills, though it must establish that it considered such skills when determining compensation.

An employer's failure to adequately explain a salary differential was found to be sufficient to deny the employer's motion for summary judgment. In ***Drum v. Leeson Electric Corp.***,[139] a female human resources manager was promoted, and her male replacement was hired and paid a salary more than $20,000 higher than she made in that position. She sued under the Equal Pay Act, Title VII and state law. The Eighth Circuit reversed the district court's grant of summary judgment for the employer, finding summary judgment inappropriate because the employer did not adequately explain the salary differential. Under the EPA, the court held, it is not enough for the employer to establish that its reason was legitimate and non-discriminatory. The employer must show the decision was based on a factor other than sex. The court did not find persuasive the employer's argument that the female employee was hired under an earlier policy in which incomes were set below industry averages, while the male employee was hired under a later, more flexible system and that he required the higher salary that he received, particularly since the employer's data did not show that the salary differential was due to a policy change.

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[138] 516 F.3d 627 (7th Cir. 2008).

[139] 565 F.3d 1071 (8th Cir. 2009).

The Second Circuit affirmed summary judgment for an employer on a plaintiff's pay discrimination claim where the plaintiff failed to show that she did substantially equal work to her comparators. In ***Byrne v. Telesector Resources Group, Inc.***,[140] the plaintiff, a female sales engineer, alleged that she received unequal pay compared to male employees performing equal work. She further alleged that she had not achieved a promotion despite having a college degree and relevant experience. She sued for sex discrimination, harassment, and retaliation, under Title VII, the Equal Pay Act and state law. The Second Circuit specifically found that, as to the equal pay claim, the employee failed to make out a *prima facie* case because the evidence did not show that she did substantially equal work to her comparators. The plaintiff's reliance on an affidavit that she had worked on projects with male comparators, without any evidence regarding the job duties of the male comparators, was insufficient. The court also affirmed summary judgment as to her other claims.

5. Adverse Action

The assignment of more hazardous or burdensome work was found to be sufficient to establish a materially adverse employment action in a disparate treatment case based on sex. In ***Davis v. Team Electric Co.***,[141] the plaintiff, the sole female electrician at her work site, alleged the company discriminated against and harassed her by giving her more hazardous and strenuous work than her male co-workers, excluding her from the main office trailer, and making sex-based comments such as "this is a man's working world out here, you know." The Ninth Circuit ruled that the lower court had erred in granting summary judgment for the employer, finding that "assigning more, or more burdensome, work responsibilities is an adverse action." Furthermore, the plaintiff had successfully rebutted her employer's proffered reason for the unequal work assignments—that work was assigned based on availability and training level—by showing other evidence of discriminatory animus, including evidence that supervisors made numerous sex-based comments to her, that she was not allowed to communicate directly with the superintendent about work issues and that she was excluded from meetings and areas males that males were not.

Refusing to permit a transfer to an objectively preferable position can constitute discrimination, just as transfer to a less desirable position can. In ***Beyer v. County of Nassau***,[142] a female police detective sued for discrimination under Title VII and 42 U.S.C. §§ 1983, 1985, and 1986, as well as New York state law after she was repeatedly denied a transfer from the serology department, a department with declining work, to fingerprinting, a busy department with new and advanced equipment. Following one attempt, during which four men and no women were hired, a police lieutenant allegedly told her that the department had "to take care of the boys." When

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[140] 339 Fed. Appx. 13 (2d Cir. 2009).

[141] 520 F.3d 1080 (9th Cir. 2008).

[142] 524 F.3d 160 (2d Cir. 2008).

the serology department shut down, she again was denied a transfer to fingerprinting and placed in a precinct job with no need for scientific skills. The Second Circuit found that fingerprinting position in question was "objectively preferable," even though the title and pay were comparable and would support a claim of discrimination.

Joining the First, Third, Sixth, Seventh, and Tenth Circuits, the Second Circuit held that non-renewal of a contract may constitute an adverse employment action for purposes of the anti-discrimination laws. In ***Leibowitz v. Cornell University***,[143] the plaintiff, a teacher with Cornell University since 1983, filed suit under the ADEA, Title VII, and state and local law after the University, which maintained five-year teaching contracts at its New York State School of Industrial and Labor Relations, failed to renew her contract. She offered proof of circumstances creating an inference of bias, including that Cornell had laid off six employees during the relevant time period and all of them were female and over 50. The Second Circuit reversed the district court's award of summary judgment to the University and rejected the district court's holding that the teacher could show adverse employment action only by offering proof that she held a tenured position, and that non-renewal of her contract was not sufficient.

6. Because of Pregnancy

The U.S. Supreme Court found that an employer does not necessarily violate Title VII when it pays pension benefits, some of which were calculated under a pre-Pregnancy Discrimination Act ("PDA") accrual rule that gave less credit to pregnancy leave than for medical leave. In ***AT&T Corp. v. Hulteen***,[144] prior to the PDA, AT&T's predecessor, Pacific Bell, adopted a policy that calculated pregnancy leave differently than other temporary disability leave by excluding it from the net "credited service" date system. The system was used to determine employees' eligibility for and the amount of pension, early retirement, voluntary termination, and other benefits. After the PDA was enacted, Pacific Bell treated pregnancy leave the same as any other temporary disability leave, and the system was carried over by AT&T. The plaintiff, who had retired in 1994, alleged that AT&T discriminated against pregnant employees each time it applied the policy in its benefits calculation for an employee affected by pregnancy, even if that pregnancy occurred before the enactment of the PDA. The Ninth Circuit held that the plaintiff could proceed with her sex bias claim based on the theory that employers offering retirement credits that include pre-PDA discriminatory acts can be held liable for continuing discrimination.

The Supreme Court reversed, finding that AT&T was not liable under Title VII. First, the Court found that AT&T's current benefit calculation rule is lawful under Title VII because it bases payments on a *bona fide* seniority system with no discriminatory terms. Second, AT&T's prior calculation method was lawful at the time it was in use prior to the enactment of the PDA. The court further held that the PDA could not be

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[143] 584 F.3d 487 (2d Cir. 2009).

[144] 129 S. Ct. 1962 (2009).

applied retroactively to AT&T's actions prior to the PDA's enactment. The court also found that AT&T had no obligation to retroactively award post-PDA credit to pre-PDA leave. The Court then held that the *Ledbetter* amendment to Title VII did not change the result, noting again that because AT&T's pre-PDA decision to award differing credit for pregnancy leave was not discriminatory at the time, the plaintiff had not been impacted by the application of a discriminatory "compensation decision or other practice."

The Eighth Circuit in ***Doe v. CA.R.S. Protection Plus Inc.***[145] allowed the plaintiff, an employee who was discharged five days after she underwent a medically-advised abortion, to proceed to a trial on her Title VII and PDA claims. The plaintiff was discharged for failing to call in each day she was on leave following the medical procedure. Noting that the PDA requires employers to treat women affected by pregnancy and "related medical conditions" no worse than similarly-situated employees, the court held that the term "related medical conditions" includes an abortion. Thus, the plaintiff had established a *prima facie* case of discrimination by showing that she had a pregnancy-related medical condition, that her employer knew about the condition, that she was qualified for her position, and that she suffered an adverse action under circumstances that gave rise to an inference of unlawful discrimination. Her employer's comments suggesting he disapproved of the abortion, as well as evidence that there were different leave rules for every employee, constituted evidence that the employer's proffered reason for the employee's termination was pretextual.

In ***Roberts v. Park Nicollet Health Services***,[146] the Eighth Circuit found sufficient evidence of pretext to preclude summary judgment to an employer on the plaintiff's pregnancy discrimination claim where the plaintiff, a medical assistant, was terminated for tardiness two days after she learned she was pregnant. The court determined that there was a material factual dispute about whether the employee told her supervisor about the pregnancy before or after she was terminated. In reversing the district court's award of summary judgment for the employer, the Eighth Circuit found that the employee had provided enough evidence to suggest that the employer's justification of tardiness was pretext for pregnancy discrimination. The court noted that the plaintiff only had to show that pregnancy bias was one motivating factor, and that a reasonable jury could find that tardiness was not the sole reason for termination.

The Seventh Circuit found that a plaintiff could state a claim under the Pregnancy Discrimination Act based on infertility. In ***Hall v. Nalco Co.***,[147] a female secretary began undergoing *in vitro* fertilization treatments after six years with the company. After the first treatment did not succeed, she requested leave for a second treatment. Before her second leave began, her supervisor informed her that her position was being eliminated

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[145] 527 F.3d 358 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 576 (2008).

[146] 528 F.3d 1123 (8th Cir. 2008).

[147] 534 F.3d 644 (7th Cir. 2008).

due to reorganization. Despite the reorganization, another secretary, who had not been able to become pregnant for fifteen years, was retained. The employee also alleged that the supervisor told her that the termination was in her "best interest" because of her "health condition." The trial court granted summary judgment for the employer, finding that infertile women are not a protected class under Title VII. The Seventh Circuit reversed and remanded, holding that the plaintiff could state a PDA claim "[b]ecause adverse employment action based on childbearing capacity will always result in 'treatment of a person in a manner which but for that person's sex would be different.'" The court further found that plaintiff had established evidence of pretext because there was a question as to whether the person who made the decision to retain the other secretary knew that plaintiff was undergoing *in vitro* fertilization.

The Fifth Circuit held that a plaintiff's request that she be allowed to take 30 minute breaks to express milk without having to use leave time or stay at work later is not required by the PDA because such treatment would be preferential. In ***Puente v. Ridge***,[148] a female border patrol agent employed by the Department of Homeland Security ("DHS") requested breaks of 30 minutes, every three to four hours, to express milk. While the DHS allowed the employee to take breaks, it required the employee to use leave time or extend her shift. She sued for retaliation and various discrimination claims under Title VII and the PDA. The Fifth Circuit affirmed the trial court's dismissal of the discrimination and retaliation claims. With respect to the discrimination claim, the Fifth Circuit held that the PDA does not require employers to provide preferential treatment, which is what the employee sought. With respect to her retaliation claim, she likewise failed to make out a *prima facie* case because what she sought was preferential treatment.

In ***EEOC v. Siouxland Oral Maxillofacial Surgery Assocs., LLP***,[149] the day after a female employee started work at the clinic, she informed her employer that she was pregnant and expected to take six to eight weeks of maternity leave. When the business manager informed the plaintiff that her expected pregnancy leave would coincide with the busy season, the plaintiff offered to take only one week of maternity leave instead. The business manager rejected the proposal, and the plaintiff was fired. When a pregnant woman applied for a job, the clinic declined to hire her, told the applicant the pregnancy was a problem, and wrote on the résumé: "4 months pregnant!" A jury found that pregnancy was a motivating factor in each of the decisions. The Eighth Circuit affirmed the judgments, and further held that the jury should have considered punitive damages because a reasonable jury could have found that the company was acting with reckless disregard to the rights of the plaintiffs. The court rejected the EEOC's request for injunctive relief.

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[148] 324 Fed. Appx. 423 (5th Cir. 2009).

[149] 578 F.3d 921 (8th Cir. 2009).

7. Sexual Orientation/Gender Identity

a. Sexual Orientation

In ***Prowel v. Wise Business Forms Inc.***,[150] a gay male employee sued for sex and religious discrimination, as well as retaliation, under Title VII, alleging that he had been subjected to harassment including being called "Princess," having sexually suggestive items left on his desk, and seeing graffiti accusing him of having AIDS and engaging in sex with co-workers in the bathroom. The employee felt that he did not fit in with the "genuine stereotypical male[s]" at the company. After the employee reported the conduct to supervisors and management, the offensive items were removed from his desk. The company did not, however, always respond to his complaints. He was subsequently terminated. The company's explanation for the termination was that the plaintiff was part of a layoff due to lack of work. The Third Circuit reversed the district court's grant of summary judgment for the employer on the plaintiff's sex discrimination and retaliation claims. Acknowledging that Title VII does not prohibit sexual orientation discrimination, the court noted that a sex discrimination claim is available if an employee is being punished for failing to comply with gender stereotypes and that a homosexual effeminate man has the same right to bring such a claim as does a heterosexual effeminate man.

b. Gender Identity

In ***Schroer v. Billington***,[151] the plaintiff, a male-to-female transsexual, was allowed to proceed with her Title VII claim under the sex-stereotyping theory. The plaintiff applied for a position as a terrorism research analyst with the Congressional Research Service, a division of the Library of Congress. She interviewed as a man, and was offered the position. The plaintiff later met the person who offered her the position for lunch to discuss the details of her employment, and the plaintiff explained that she planned to change her name and present herself as a woman. She also showed the employer pictures of herself dressed as a woman. The employer rescinded the job offer the next day, telling the plaintiff that she was not a "good fit" with the agency given the circumstances that they spoke of the day before. The plaintiff sued the agency, alleging that she was discriminated against, not on the basis of disclosing a gender dysphoria, but because, when presenting herself as a woman, she did not conform to the agency's sex stereotypical notions about women's appearance and behavior. The court agreed that the plaintiff could proceed with her case under a sex-stereotyping theory. Following a trial, the court found evidence of pretext, including evidence that the agency did not actually determine whether a security clearance previously held by the plaintiff could be recognized. The court also found evidence of sex stereotyping based on the agency's assessment of the plaintiff as non-conforming to her gender. In its holding, the court emphasized that transsexuality itself is not a protected characteristic.

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[150] 579 F.3d 285 (3d Cir. 2009).

[151] 577 F. Supp. 2d 293 (D.D.C. 2008).

Where an employer bases an employment decision on the plaintiff's lack of compliance with the company's gender-neutral dress code, and not on discrimination, the plaintiff's gender-stereotyping theory fails. When the plaintiff in ***Creed v. Family Express Corp.***,[152] a male-to-female transsexual, began working at the employer's store he had begun the gender transition, but still presented himself as a male. Over time, he began presenting himself as a woman, including wearing makeup and growing his hair long. Some of the plaintiff's conduct violated the employer's dress code, which specifically required males to keep their hair above the collar, allowed only women to wear makeup, and in general required conservative dress. The parties disputed whether customers complained about the plaintiff's appearance. Two company directors met with the plaintiff and purportedly told him that if he did not dress as a man, he would be terminated. The plaintiff sued under Title VII and state law. While the court did not allow the plaintiff to pursue a claim of transgender discrimination (which is not prohibited by Title VII), it did permit him to proceed on the theory of gender stereotyping. The court subsequently granted the employer's motion for summary judgment, finding that the employer's decision to terminate the plaintiff was based on his lack of compliance with the company's gender-neutral dress code, not on discrimination. Because the plaintiff would have to show that the employer's actions were motivated by gender (male, at the time), which he could not do, because he could not identify a similarly situated female employee who was treated more favorably, the plaintiff could not succeed on his claim. Furthermore, the statements of the company directors were insufficient to create an inference of bias.

8. Familial Status

In ***Adamson v. Multi Community Diversified Services, Inc.***,[153] the Tenth Circuit rejected the claims of plaintiffs who claimed that they were discriminated against because they were "husband, wife and daughter," finding that "familial status" is not a protected category under Title VII. The family members were discharged on the same day. The husband claimed that company terminated him because of a "discriminatory concern that he, as a man, would exercise 'undue influence' over his wife and daughter as women." The wife and daughter claimed the company terminated them because of their gender and the fear their husband/father would exert undue influence over them. The employer's stated reasons for discharging the plaintiffs included concerns about the husband's unilateral management style, questionable money transfers, potential concerns over the company's anti-nepotism policy, and that the daughter's position was eliminated. The Tenth Circuit held that "[b]ecause discriminating against [the male plaintiff] as 'husband' and 'father' is not actionable discrimination under Title VII, direct evidence of such an intent states no cognizable claim for relief." Moreover, because the plaintiffs presented no evidence that they would not have been terminated but for their respective sexes, termination based on "familial status" did not raise an inference of

[152] No. 3:06-CV-465RM, 2009 WL 35237 (N.D. Ind. Jan 5, 2009).

[153] 514 F.3d 1136 (10th Cir. 2008).

discrimination based on sex. "'Familial status' is not a classification based on sex any more than is being a 'sibling' or 'relative' generally."

The First Circuit found that, while Title VII does not prohibit discrimination based on care-giving ability, a plaintiff's claim that her sex plus an additional characteristic—her children—resulted in adverse treatment and presents a cognizable "sex plus" claim. In ***Chadwick v. WellPoint, Inc.***,[154] a working mother of young children sued her employer for sex discrimination after she was passed over for a promotion. She claimed that her employer harbored "a sex-based stereotype that women who are mothers, particularly of young children, neglect their jobs in favor of their presumed childcare responsibilities." During the interview process for the promotion, a supervisor asked the employee questions including whether she would let her kids have messy rooms, and whether she would hold them accountable. After another employee (who was also a mother of two, slightly older children) was selected for the position, a supervisor told the plaintiff that she was not selected because she had a "lot on [her] plate right now" with her kids and the classes she was taking. The First Circuit reversed summary judgment for the employer, finding that the presumption that a woman will perform her job less well due to her presumed family obligations is a form of sex stereotyping, and that adverse job actions on that basis constitute sex discrimination.

D. SEXUAL HARASSMENT

1. Hostile Environment

A supervisor's habit of staring at the plaintiff's breasts over a period of more than two years, along with other female employees' testimony that he similarly stared at them, was sufficient to create a material dispute of fact as to whether the plaintiff was subjected to a sexually hostile work environment. In ***Billings v. Town of Grafton***,[155] the former secretary of a town administrator claimed that her supervisor continually stared at her breasts at work. After she complained, she alleged that she was involuntarily transferred. The district court held that the supervisor's alleged behavior alone was not sufficient to create a sexually hostile work environment (the plaintiff did not allege any sexual propositions, crude remarks, unwelcome physical contact, or any other threatening or intimidating behavior). The First Circuit reversed the dismissal of the plaintiff's claim, holding that a reasonable jury could find that the supervisor's conduct was sufficient to create a sexually hostile work environment.

The Eleventh Circuit found that exposure to "uniquely and extremely severe" pornography on several occasions by a co-worker was sufficient to create a material factual dispute on the plaintiff's hostile work environment claim. In ***Criswell v. Intellirisk Management Corp.***,[156] a female employee who was discharged following a

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[154] 561 F.3d 38 (1st Cir. 2009).

[155] 515 F.3d 39 (1st Cir. 2008).

[156] 286 Fed. Appx. 660 (11th Cir. 2008).

company reorganization claimed that she was exposed to extreme pornography on several occasions by a co-worker and sued for sexual harassment, hostile work environment, and retaliation. The Eleventh Circuit affirmed summary judgment for the employer on the tangible employment action and retaliation claims, but reversed as to the plaintiff's hostile work environment claim because exposure to the pictures in question was "uniquely and extremely severe." The court did not discuss the content of the pictures, which were reviewed under seal.

A female supervisor's proposition of a female co-worker to have sex with her ex-husband constituted evidence of sexual harassment sufficient to survive summary judgment. In ***McClain v. TP Orthodontics***,[157] the plaintiff brought a sexual harassment claim under Title VII after the plaintiff's female supervisor asked her to date and have sex with the supervisor's ex-husband (who also worked at the company). After the plaintiff refused, the supervisor became increasingly hostile toward the plaintiff, and the plaintiff was eventually fired. The district court denied summary judgment, finding that the employee raised a material dispute of fact as to whether the supervisor's hostility and the employee's eventual termination occurred because the employee refused to date and have sex with the supervisor's ex-husband. The court further found that the supervisor's behavior, including making unwelcome requests that the plaintiff have sex with her husband, were sufficiently severe and pervasive to create a hostile work environment.

According to the Eighth Circuit, the conduct of an alleged harasser, including rubbing the plaintiffs' shoulders, calling her "baby doll," and making a one-time suggestion by long-distance telephone that she get into bed with him, was insufficient to establish a hostile work environment. In ***Anderson v. Family Dollar Stores of Arkansas, Inc.,***[158] the plaintiff's *quid pro quo* claim also failed, because she did not suffer an adverse employment action (she was actually promoted), and there was no evidence his one-time suggestion was related to her eventual termination.

2. Because of Sex

The plaintiff's same-sex harassment claim failed where the offending conduct was more like bullying behavior than sexual behavior, and where the plaintiff did not provide evidence of the alleged same-sex harasser's sexual orientation. In ***Love v. Motiva Enterprises, LLC***,[159] a female factory worker alleged that her female co-worker called her offensive names and engaged in inappropriate physical contact. The trial court granted summary judgment for the employer on the plaintiff's sexual harassment claim, and the plaintiff appealed. The court affirmed summary judgment for the employer. While *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)

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[157] No. 3:07-CV-113-JVB, 2009 WL 2381915 (N.D. Ind. July 30, 2009).

[158] 579 F.3d 858 (8th Cir. 2009).

[159] 349 Fed. Appx. 900 (5th Cir. 2009).

recognizes that the plaintiff could establish bias based on sex by showing "the alleged harasser made 'explicit or implicit proposals of sexual activity' and 'provid[ed] credible evidence that the harasser was homosexual,'" here, the incidents of inappropriate touching did not support an inference of implicit proposals for sex because the co-worker's conduct was more like "humiliating or bullying behavior." Furthermore, the plaintiff failed to present credible evidence that the co-worker is homosexual because the plaintiff testified in her deposition that she had no knowledge of the co-worker's sexual orientation.

In ***Hindman v. Thompson***,[160] two female court employees were fired after they observed a judge masturbating during court proceedings. Both employees testified about the events to the judicial complaint council. The female employees could not establish a hostile work environment because they provided no evidence that the judge's behavior was motivated by their sex. Their retaliation claims were not dismissed, however, because the evidence was sufficient to raise the inference that the firing was intended to prevent plaintiffs from reporting the judge's conduct.

A female plaintiff who complained that her employer's unisex bathrooms were often dirty and unavailable to her did not proffer sufficient evidence to establish that the bathrooms rendered the workplace "objectively hostile" to women. The plaintiff's claim that the bathrooms were "not as clean as she would like [them] to be" and "sometimes occupied" when she wanted to use them were fundamentally different than the claims in successful sexual discrimination suits involving unisex bathrooms which showed an invasion of privacy, sex-based ridicule, or threatening behavior by male co-workers. ***Dauer v. Verizon Commc'ns, Inc.***[161]

3. Employer's Response

An employer may be liable for sexual and retaliatory harassment resulting in a hostile work environment against one co-worker by another, particularly where it has knowledge of the conduct and fails to respond appropriately. In ***Hawkins v. Anheuser-Busch Inc.***,[162] a former employee claimed that she had been sexually harassed and retaliated against by a co-worker, who had repeatedly committed similar actions against other female employees. Although the employer investigated her claims and concluded that the harassing employee had behaved in a sexually inappropriate manner (and knew of previous similar conduct by him) it failed to discipline the harasser. The court further found relevant "other-act" evidence—pertaining to acts of sexual harassment not experienced by the plaintiff, but known to her—but clarified that the weight of the evidence was proportional to the distance in time from the conduct in question.

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[160] 557 F. Supp. 2d 1293 (N.D. Okla. 2008).

[161] No. 03 Civ. 05047(PGG), 2009 WL 186199 (S.D.N.Y Jan. 26, 2009).

[162] 517 F.3d 321 (6th Cir. 2008).

Complaints to non-management employees generally may not be imputed to the employer. In ***Huston v. Proctor & Gamble Paper Products Corp.***,[163] a female plant technician brought suit for hostile work environment sexual harassment and retaliation to challenge her discharge, purportedly for falsifying data. Several months before her termination, she had complained to management about an incident in which a male co-worker allegedly exposed himself. In an earlier incident, of a male employee exposed himself and someone supposedly reported the incident to two lead technicians. Upon learning of the latter incident, the company investigated the complaint, found that everyone had engaged in misconduct by using vulgar language, and either issued warnings or placed employees on a five-step disciplinary process. The Third Circuit affirmed dismissal of the plaintiff's claims on summary judgment. First, the plaintiff failed to establish that the company knew or should have known about the earlier conduct because the lead technicians who received the complaint about the earlier incident did not qualify as management-level employees, such that their knowledge could be imputed to the company. The court found significant the fact that the technicians earned hourly wages, and did not have the ability to hire, fire, or discipline. Second, the company responded appropriately to the latter incident which it did have knowledge.

In ***Chaloult v. Interstate Brands Corp.***,[164] a female supervisor at a bakery alleging sexual harassment under Title VII, contended that the company unreasonably failed to take action based on the fact that a fellow supervisor knew about the conduct and never reported it. The company's nondiscrimination policy required supervisors to report harassment. The employee herself did not complain until her resignation. The First Circuit affirmed summary judgment for the employer, finding that the employer had used reasonable care to prevent harassment and that the employee had unreasonably failed to complain. Awareness by the plaintiff's supervisor could not be attributed to the company because plaintiff's co-worker was not *her* supervisor. The court rejected the notion that adoption of an antidiscrimination policy with a reporting requirement could increase potential liability, although it acknowledged that the Sixth Circuit has followed this approach.

4. *Faragher-Ellerth* Defense

In ***Thornton v. Federal Express Corp.***,[165] a female employee who was terminated after failing to return from a medical leave sued for sex discrimination and retaliation, as well as disability discrimination. Claiming that she had taken the leave because of stress arising from sexual harassment by her supervisor, the plaintiff failed to report the harassment until two months after she went on leave, despite her acknowledged awareness of the employer's sexual harassment policy. As a result of

[163] 568 F.3d 100 (3d Cir. 2009).

[164] 540 F.3d 64 (1st Cir. 2008).

[165] 530 F.3d 451 (6th Cir. 2008).

the employee's complaint, the employer investigated and found no evidence of harassment. The plaintiff declined opportunities to return to work because her doctors had not released her to work. The Sixth Circuit affirmed the district court's award of summary judgment for the employer, finding that plaintiff had unreasonably failed to use the employer's corrective measures for sexual harassment. The plaintiff's subjective fears did not justify her failure to report the alleged harassment. The court also found insufficient evidence of either *quid pro quo* harassment or a hostile work environment. The court also rejected the disability claim, because she could not establish that she was substantially limited in a major life activity, as well as the retaliation claim, because she could not show causation.

The *Faragher-Ellerth* defense was not available to an employer where the employee's failure to report was due to more than ordinary fear or and embarrassment, given the 23 year age difference between the plaintiff and her manager, the alleged harasser. In ***Monteagudo v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico***,[166] a 22-year old female was subjected to unwanted touching from her 45-year old male manager, requests to go out with him, and attempts to kiss her. The plaintiff explained her failure to report the harassment by claiming that the people to whom she reported were all friends. She sued under Title VII and Puerto Rico law. After a jury found in her favor, the trial court denied the employer's motion for judgment as a matter of law in which it relied on a *Faragher-Ellerth* defense. The First Circuit affirmed the judgment, finding that the employer could not establish a *Faragher-Ellerth* defense because the employee's failure to report was due to "more than ordinary fear or embarrassment." In holding that the plaintiff's failure to report the harassment reasonable, the court found particularly relevant the age difference between the employee and the manager.

The plaintiff in ***Adams v. O'Reilly Automotive, Inc.***[167] unreasonably failed to report the alleged harassment for a year and a half, allowing her employer, who had reasonable anti-harassment measures in place, to avail itself of the *Faragher-Ellerth* affirmative defense. The plaintiff sued her employer, alleging that her manager sexually harassed her for more than two years. The Eighth Circuit affirmed the district court's award of summary judgment for the employer, finding that the company successfully established a *Faragher-Ellerth* defense. First, the court concluded the employer's anti-harassment measures were more than reasonable, with a zero-tolerance policy, which included investigation of every reported incident and multiple reporting channels, including an anonymous hotline. The policy was largely enforced. Second, the court found that the employee failed to report harassment for a year and a half, and that when she did, the harasser was fired within two days. The court found that this created an inference that her previous failure to report was unreasonable.

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[166] 554 F.3d 164 (1st Cir.), *cert. denied*, 130 S. Ct. 362 (2009).

[167] 538 F.3d 926 (8th Cir. 2008).

E. AGE DISCRIMINATION

1. Disparate Treatment

a. Prima Facie Case

In ***Lovell v. Covenant Homeland Security Solutions, Ltd.***,[168] the plaintiff, a 59-year-old security officer, sued for age discrimination under the ADEA, claiming that the interview scoring system used by his employer to deny him a position as a shift lieutenant and training sergeant was discriminatory and that the company failed to follow its own guidelines when it discounted his work experience. The plaintiff and six younger applicants for the position interviewed with the company's Promotion Review Board. The review board used 20-question "Screening Sheets" to rank the candidates by numerical score. The promotion was given to a 42-year old individual with comparable work experience but with a score 10 points higher than the plaintiff. Three months later, the plaintiff again applied for a promotion, this time along with two other applicants; the promotion was given to a 30-year old with a score only one point higher and much less work experience. The district court denied summary judgment for the employer and found that the plaintiff had established a *prima facie* case of age discrimination with respect to the interview scores. His interview scores created an inference of discrimination, particularly because the employer did not provide evidence of how it evaluated him or why his scores were lower than those of less-experienced candidates.

In ***Wold v. El Centro Finance, Inc.***,[169] a CEO's e-mail which was erroneously sent to the plaintiff, a job applicant for a manager position, stated that the applicant "must be old—and just looking for something to do." The applicant filed suit under the ADEA and state law after he never heard from the company again and assumed he had been rejected for the position. The district court denied the employer's motion for summary judgment. First, although the company denied that the applicant's e-mail had been forwarded to the person in charge of hiring, the state human right department's investigation summary showed that the employer had seen and evaluated his application, thereby creating a material dispute regarding this alleged fact. Second, the CEO's e-mail was sufficient to create an inference that the plaintiff had not been selected because of his age.

b. Application of the McDonnell Douglas Framework

In ***Velez v. Thermo King de Puerto Rico, Inc.***,[170] the First Circuit held that the *McDonnell Douglas* framework applies to cases brought under the ADEA. A 56-year old employee was terminated for misconduct, including allegedly receiving gifts from

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[168] No. 07-0412, 2008 WL 5378066 (S.D. Tex. Dec. 23, 2008).

[169] No. CV-08-264-S-BLW, 2009 WL 1738463 (D. Idaho June 16, 2009).

[170] 585 F.3d 441 (1st Cir. 2009).

suppliers and for stealing and selling company property. He filed suit under the ADEA. The First Circuit reversed the district court's decision to grant summary judgment for the employer, finding relevant that the company gave differing explanations for the termination and that younger workers were not fired for similar misconduct. The court also confirmed that the *McDonnell-Douglas* framework applies to ADEA cases, at least until the Supreme Court holds otherwise.

Similarly, the Third Circuit held that the *McDonnell-Douglas* burden-shifting paradigm applies in age discrimination cases brought under the ADEA. In ***Smith v. City of Allentown***,[171] a city employee brought a claim under the ADEA after being terminated at the age of 55, which the city alleged was due to performance problems. The employee claimed that his supervisor referenced his birthdate before terminating him, but admitted that his birthdate may have been brought up to ensure that he received an increase in his retirement benefits that became available at age 55. The Third Circuit affirmed summary judgment for the employer after applying the *McDonnell-Douglas* burden-shifting paradigm. Although the Supreme Court recently ruled in *Gross v. FBL Financial Services*, 129 S. Ct. 2343 (2009), that the burden of persuasion may never be shifted to the defendant in an age discrimination case, the Third Circuit reconciled its application of the *McDonnell-Douglas* to ADEA cases because only the burden of production, and not the burden of persuasion, shifts to the defendant. Because the plaintiff could not show that poor performance was a pretext for age-based discrimination, he failed to meet his burden of proof.

c. Evidence of Discrimination

(i) "Me Too" Evidence

In ***Sprint/United Management Co. v. Mendelsohn***,[172] the U.S. Supreme Court rejected a *per se* rule that would either absolutely exclude or permit "me-too" evidence, finding that the facts and arguments in a particular case are important to determining whether such evidence should be excluded. After the plaintiff, the oldest employee in her unit, was laid off in a reduction in force, she brought an age discrimination suit against her former employer. At trial, the trial court excluded "me too" evidence from other employees, none of whom worked in the plaintiff's unit or could testify regarding plaintiff's manager, and the jury found for Sprint. The Tenth Circuit reversed a jury verdict for Sprint on the grounds that the trial court erred in excluding testimony of other employees, finding the "me too" evidence to be relevant and non-prejudicial.

On appeal, the U.S. Supreme Court rejected a *per se* rule that would either absolutely exclude or permit "me-too evidence" in every case, finding that relevance determinations under Federal Rules of Evidence 401 and 403 are case specific, especially in the context of an individual age discrimination suit. The Court noted that

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[171] 589 F.3d 684 (3rd Cir. 2009).

[172] 552 U.S. 379 (2008).

relevance is "determined in the context of the facts and arguments in a particular case" and "generally are not amenable to broad *per se* rules." The Tenth Circuit had failed to give proper deference to the trial court, since the trial court was best-equipped to make such determinations and there was no indication that it had applied a *per se* rule. The Court noted, however, that any application of a *per se* rule by the trial court would have been an abuse of discretion.

(ii) Stray Remarks

A plaintiff provided sufficient evidence to defeat summary judgment on her age discrimination claim, including evidence that she was nicknamed "Grandma," was replaced by a 28-year old employee, and where she established that the company's decision to place her on a more demanding performance standard was based on her seniority. In ***McDonald v. Best Buy Co.***,[173] a 54-year-old customer service manager was demoted following a series of errors made by her staff while she was on vacation. She sued for age discrimination under the ADEA, claiming that her demotion was due to her age. Rather than accept the demotion, she resigned. The court found that a reasonable jury could conclude that the company discriminated against the plaintiff on the basis of age given the plaintiff's evidence, including the use of the nickname "Grandma," the fact that plaintiff's replacement was 28-years old, and the company's decision to place the plaintiff on a more demanding performance standard because of her seniority (which the court found to be a proxy here for age). The court noted that the company's admission that it viewed "more tenured" (*i.e.*, older) employees as having trouble with the company's new business model particularly troubling.

In ***McCranie v. Hoffman Electric Co.***,[174] comments from an employer's wife that the plaintiff was "too old and crippled" to work was direct evidence of discrimination sufficient to preclude summary judgment for the employer.

In ***Tubergen v. St. Vincent's Hospital & Health Care Center, Inc.***,[175] the company CEO's statement that he was removing the "old guard," which was made at a time near a 300-person reduction-in-force in which the plaintiff, a 65-year-old physician, was laid off, was not sufficient evidence of pretext for age discrimination. The Seventh Circuit found that the phrase "old guard" bore no relation to age in general, and particularly in the context in which it was made (referring to a specific department in which plaintiff did not work). The court also found that the plaintiff failed to establish a *prima facie* case, because he could not demonstrate that younger employees were treated more favorably.

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[173] No. 05-4056, 2008 WL 4104170 (C.D. Ill. Aug. 28, 2008).

[174] No. CV408-011, 2009 WL 667470 (S.D. Ga. Mar. 12, 2009).

[175] 517 F.3d 470 (7th Cir. 2008).

d. Pretext

In ***Arroyo-Audifred v. Verizon Wireless, Inc.***,[176] the plaintiff, a 52-year-old employee who had repeatedly tried and failed to obtain a promotion, was unable to establish pretext based on his allegations that his employer had a policy of age discrimination and that he had been denied a promotion based on his age. The First Circuit affirmed summary judgment for the employer, finding that the plaintiff could not provide evidence of pretext and specifically rejected the plaintiff's efforts to attribute discriminatory bias to an interviewer's yawn and a comment made by an interviewer to all applicants that the position was "like stepping in a train station, sometimes the doors open and sometimes they don't."

In ***Maughan v. Alaska Airlines, Inc.***,[177] a 60-year-old employee was asked about his plans during an interview for a promotion, to which he responded that he planned to retire in a year and a half. The employee did not get the promotion, received poor evaluations, and was then fired for poor performance. He sued for age discrimination. The Tenth Circuit found that the employee had established a *prima facie* case and presented sufficient evidence of pretext for discrimination to allow the case to go to trial. The court noted in particular the existence of apparent *post hoc* justification, including the issuance of a performance report criticizing plaintiff's initiative just three months after he received a performance review recognizing his initiative.

In ***Loeb v. Best Buy, Inc.***,[178] a 48-year-old sales employee was terminated following the completion of the first phase of a project. He filed a charge with the EEOC and sued under the ADEA. After inquiring into the reason for his termination, the employee received a variety of explanations from different managers, including cutting labor costs and reducing the workforce, reorganization to streamline operations, reduction of staff, that the plaintiff's part of the project was complete, that he had no interest in another available project, and that he was not qualified to perform upcoming strategic work. In its response to the plaintiff's EEOC charge, the company indicated that he was fired because of staff reduction. Despite the various inconsistent explanations, the court affirmed the district court's award of summary judgment for the employer on the basis that there was no evidence of pretext. The court found that the company had presented sufficient evidence of a legitimate, non-discriminatory reason—the elimination of his position based on the belief that he was not capable for and would not enjoy the upcoming work. Addressing the inconsistent reasons for the plaintiff's termination, the court noted that the actual decisionmakers did not give inconsistent reasons.

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[176] 527 F.3d 215 (1st Cir. 2008).

[177] 281 Fed. Appx. 803 (10th Cir. 2008).

[178] 537 F.3d 867 (8th Cir. 2008).

In ***Parks v. Lebhar-Friedman, Inc.***,[179] a 62-year-old editor who was discharged after 27 years of service filed suit under the ADEA. Although the employer claimed the termination was performance-based, e-mails by company executives suggested that the employer had targeted her for discharge. The emails included one sent by a senior manager to the human resources department, in which he asked it to start a plan to terminate her. In response to the email, a human resources employee circulated e-mails regarding possible rationales for doing so. The employer only later claimed that she was having performance issues, and stated that her termination was for "business reasons." The court found that the plaintiff had produced sufficient evidence to raise a material question as to whether the employer's reasons for her termination were pretext for discrimination. The court found particularly relevant the e-mails, which suggested that her performance was not really at issue, and the plaintiff's anecdotal evidence that all of the company's recent hires were below the age of 33.

e. Mixed Motives

In ***Gross v. FBL Financial Services, Inc.***,[180] the U.S. Supreme Court held that a "mixed-motive" theory does not apply to ADEA claims. The facts leading to the Supreme Court's consideration of the case were these: After the plaintiff was demoted by his employer, he filed suit under the ADEA alleging that he was demoted on the basis of his age. Following a trial, the jury was given an instruction to enter a verdict for the employee if he established by a preponderance of the evidence that "age was a motivating factor" for his demotion (better known as a "mixed-motive instruction"). The jury returned a verdict for the employee, and the employer appealed. The Eighth Circuit reversed and remanded for new trial, holding that under Title VII cases such as *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the district court should not have issued a mixed-motive instruction because the employee had only provided indirect evidence. The court found that *Price* required age to be *the* motivating factor for the employer's decision.

In a 5-4 decision, the Supreme Court vacated and remanded. In an opinion written by Justice Thomas, the Court held that the predicate question that must be answered was whether a mixed-motive theory applies in an ADEA case, and answered that question "no." Unlike Title VII, the Court held, the ADEA does not authorize mixed-motive age discrimination claims; employees must establish that age is the "but-for" cause of their employer's actions. In so holding, the Court reasoned that the ADEA contains materially different language than Title VII, found that *Price Waterhouse* does not apply to the ADEA, and attributed significance to Congress having addressed the mixed-motive theory with respect to Title VII in the Civil Rights Act of 1991, but not with respect to the ADEA. In a strongly worded dissent, Justice Stevens and three other justices argued that that the difference in language between Title VII and the ADEA was

[179] No. 04-7133, 2008 WL 4449345 (S.D.N.Y. Oct. 2, 2008).

[180] 129 S. Ct. 2343 (2009).

not material; that *Price Waterhouse* controlled in the case; and that the majority had rejected precedent and was engaged in "judicial lawmaking."

Upon remand from the Supreme Court, in ***Gross v. FBL Financial Services Inc.***,[181] the Eighth Circuit ordered a new trial on both the plaintiff's ADEA and state law claims. With respect to the federal claim, the Eighth Circuit reasoned that a new trial was in order because of the Supreme Court's decision that Gross retained the burden of persuasion. With respect to the state law claim, the Eighth Circuit found that state law requires the plaintiff to produce direct evidence of discrimination before shifting the burden of persuasion to an employer.

2. Disparate Impact

The U.S. Supreme Court found that an employer's use of reasonable factors other than age to defend against a disparate impact claim is an affirmative defense for which the employer bears both the burden of production and the burden of persuasion. In ***Meacham v. Knolls Atomic Power Laboratory***,[182] the plaintiffs brought disparate impact claims under the ADEA after they were laid off in a company reduction in force ("RIF"). They alleged that their employer's RIF disparately impacted older workers. To determine who would be included for layoff in the RIF, the employer rated employees based on four criteria: (1) performance; (2) years of service; (3) critical skills; (4) and flexibility. The employer selected those employees with the lowest scores for layoff. The result, however, was that 30 out of the 31 total employees selected for layoff were over age forty. At trial, the plaintiffs presented statistical evidence showing that mere chance could not account for the age-skewed results and that the two discretionary criteria (flexibility and critical skills) were heavily connected to the age-biased outcome. A jury found for the plaintiffs.

On appeal, the Second Circuit initially affirmed the lower court's decision, finding the employer failed to show a business necessity for the criteria it used, but the Supreme Court vacated and remanded the case back to the Second Circuit based on its intervening decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005), in which it had adopted a "reasonableness" standard to evaluate whether an employer is liable for disparate impact age bias resulting from employer's use of factors other than age. On remand, the Second Circuit found for the employer after applying the *Smith* "reasonableness" standard because the plaintiffs had not presented evidence that the employer's use of the discretionary factors was unreasonable, and thus had not met their burden of persuasion in rebutting the employer's assertion that it used reasonable factors other than age ("RFOA").

On appeal, the U.S. Supreme Court found that an employer's use of RFOAs is an affirmative defense for which the employer bears both the burden of production and

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[181] 588 F.3d 614 (8th Cir. 2009).

[182] 128 S. Ct. 2395 (2008).

the burden of persuasion. The Court rejected the employer's argument that it is the plaintiff's burden to show that RFOAs do not exist, noting that ADEA disparate impact cases exist because factors other than age have negatively affected older employees. While it is the plaintiffs' burden to identify the specific practices that have negatively affected older employees, the employer still bears the burden of persuading the court that those practices are reasonable in disparate impact cases.

3. Defenses

The First Circuit found that mental and emotional distress damages are not available for a hostile work environment claim brought under the ADEA. In ***Collazo v. Nicholson***,[183] an employee in his 60s claimed that he had suffered a hostile work environment due to age bias, resulting in mental and emotional distress. He did not claim economic damages. The employee claimed that his supervisor threatened him and made age-discriminatory comments to him. The First Circuit affirmed summary judgment, finding that while a hostile work environment claim under the ADEA is possible, damages for mental and emotional harm are not. Because the plaintiff did not seek economic damages, he had no basis for damages.

The Seventh Circuit upheld the dismissal of a 42-year-old state trooper's ADEA claim based on an exemption to the ADEA that permits law enforcement agencies to hire and terminate on the bases of *bona fide* plans that are not subterfuges for discrimination. In ***Davis v. Indiana State Police***,[184] the trooper in question resigned from his position to seek another job, but two months later he requested his old job back. His request was rejected according to state code hiring requirements that trooper applicants be between the ages of 21 and 40. The trooper alleged that the agency lacked a *bona fide* hiring plan. The district court dismissed the suit, finding that the rejection occurred pursuant to a *bona fide* hiring plan. In affirming the district court's decision, the Seventh Circuit clarified that to be *bona fide*, the plan only need to be real (in other words, to have existed before the decision was made). The court further noted the agency was not required to make exceptions under a *bona fide* plan, even if the exceptions are reasonable.

4. ADEA as Exclusive Remedy

In ***Ahlmeyer v. Nevada System of Higher Education***,[185] the Ninth Circuit held that the ADEA is the exclusive remedy for age discrimination in employment claims, as has every other circuit to face the issue.

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[183] 535 F.3d 41 (1st Cir. 2008).

[184] 541 F.3d 760 (7th Cir. 2008).

[185] 555 F.3d 1051 (9th Cir. 2009).

5. Human Resources Policies

a. Cash-Balance Retirement Plans

Following five other courts of appeal, the court in ***Rosenblatt v. United Way of Greater Houston***,[186] ruled that cash-balance plans do not discriminate against older workers. In that case, the plaintiff, an employee of a United Way affiliate, sued for age discrimination under the ADEA and ERISA, alleging that United Way's cash-balance retirement plan provided more favorable benefits to younger employees. The court granted the employer's motion to dismiss.

b. Retirement Health Benefits

The U.S. Supreme Court found that a state pension plan which creates an age-related disparity in pension benefits does not violate the ADEA where the plan was not intended to discriminate on the basis of age. In ***Kentucky Retirement Systems v. EEOC***,[187] the court held that the state of Kentucky's pension plan, which provides more favorable benefits for those who become disabled prior to retirement age than for those who become disabled after retirement age, did not violate the ADEA because age discrimination was not the purpose of the plan. Under the plan, unearned years of service were added for certain workers who became disabled before retirement, in an effort to provide benefits comparable to those received by one who reaches retirement age. Those who become disabled after retirement age did not receive additional years of service. The EEOC sued the plan for disparate treatment of older workers on behalf of an employee who became disabled after reaching retirement age. The Sixth Circuit initially affirmed the district court's award of summary judgment to the plan, but then reversed after reconsideration *en banc*.

In a 5-4 decision, the Supreme Court reversed. Writing for the majority, Justice Breyer reasoned that the dispositive issue was not whether the plan created a disparity in pension benefits, but whether the purpose of the disparity was age discrimination. While the plan did create a disparity in pension benefits by allowing certain employees earlier access to normal retirement benefits, it did not provide for a more generous calculation of those benefits, and therefore its purpose was not to discriminate. The Court relied on its holding in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) establishing that age discrimination requires a showing that age was not only a factor in the decision, but also an outcome determinative one. Justice Kennedy and three other justices dissented, arguing that the ADEA clearly prohibits a benefit plan that pays younger employees more than older workers on the basis of age. Justice Kennedy also objected to requiring an employee, impacted by a facially-discriminatory plan, to show motive.

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[186] 590 F. Supp. 2d 863 (S.D. Tex. 2008).

[187] 128 S. Ct. 2361 (2008).

c. Mandatory Retirement

Police officers who were required to retire in accordance with a mandatory retirement law sued to challenge the law under the ADEA and the Due Process Clause of the U.S. Constitution in ***Correa-Ruiz v. Fortuno***,[188] Puerto Rico amended a mandatory retirement law in 2003 to require policemen and firefighters to retire at age 55 and after 30 years of service. Police officers who met the requirements of the law were asked to retire. The district court granted Puerto Rico's motion to dismiss, finding that the retirement provision was exempt from the ADEA prohibition on age discrimination and that the ADEA did not require they be permitted to demonstrate fitness. The First Circuit affirmed, rejecting the plaintiffs' argument that the ADEA required they be permitted to prove their fitness. The court found that the ADEA testing provision upon which plaintiffs relied was meaningless, because the implementing regulations had never been promulgated.

In ***EEOC v. Exxon Mobil Corp.***,[189] Exxon policy required pilots flying corporate jets to retire at age 60, consistent with the FAA rule for commercial pilots. A group of pilots filed suit, alleging that the policy violated the ADEA. In reversing summary judgment for the employer, the Fifth Circuit found that the lower court erroneously failed to rule on the continuing validity of the FAA's rationale and failed to give the EEOC proper notice of the issues being litigated. At issue in the suit was: (1) whether commercial pilot jobs were sufficiently similar to corporate pilot jobs to justify the application of the FAA rule (congruity); and (2) whether the FAA's safety rationale was still valid (validity). The trial court bifurcated proceedings and ordered the parties first to focus solely on congruity for discovery and motions. In the parties' subsequent summary judgment motions, Exxon addressed the validity of the rule, but the EEOC did not. The Fifth Circuit found that the trial court had erred in two important respects. First, the trial court erred in assuming the FAA's rationale remained valid, while continuing validity was actually a determinative issue in the case. Second, the EEOC was entitled to rely on the court's order limiting the scope of the first phase of the proceeding to congruity.

6. Validity of Age Discrimination Waivers

a. Compliance with the OWBPA

(i) In General

The court in ***Ferruggia v. Sharp Electronics Corp.***[190] found a severance agreement signed by a former employee and reviewed by the employee's attorney

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[188] 573 F.3d 1 (1st Cir.), *cert. denied*, 130 S. Ct. 640 (2009).

[189] 344 Fed. Appx. 868 (5th Cir. 2009).

[190] No. 05-5992 (JLL), 2009 WL 1704262 (D.N.J. June 18, 2009), *recons. denied*, 2009 WL 2634925 (D.N.J. Aug. 25, 2009).

invalid where the agreement did not contain the job titles and ages of everyone terminated and the ages of everyone in the employee's job class who were not terminated pursuant to the OWBPA's requirement applicable to RIFs. A 60-year old employee with fourteen years of satisfactory work experience at the company was laid off in a RIF. The company, which had consolidated departments, claimed that the employee's job had become redundant. The employee was offered a severance package, which included payment in exchange for a release of all claims. He signed the agreement after his attorney reviewed it. The company thereafter placed a 37-year old individual in a position that assumed three-quarters of the employee's former duties. The court denied summary judgment for the employer on the plaintiff's age discrimination claim, finding that the severance agreement was invalid because it did not satisfy the OWBPA requirement that a release of age claims be "knowing and voluntary." To satisfy the OWBPA requirement under a RIF, a release must contain the job titles and ages of everyone terminated and the ages of everyone in the employee's job class who were not terminated. Because the employee's release did not have any of this information, it was invalid. The court found it irrelevant that the employee's attorney had reviewed the release. Second, the court found that the employee had raised an inference of age discrimination, noting in particular that the company's reassignment of 75% the employee's job duties undermined its argument that the employee's job was redundant.

b. Prospective Waivers

In ***Hamilton v. General Electric Co.***,[191] the Sixth Circuit Court of Appeals rejected an employer's argument that an employee's age discrimination charge should be dismissed pursuant to a "last chance agreement" under which the employee had agreed not to file legal action to dispute any future discharge. The case arose following the discharge of a 30-year employee of General Electric. Three months after the employee filed an age discrimination charge against the company, the company fired him, claiming that his charge violated a "last chance agreement" he had signed previously as a condition of reinstatement after a previous termination. Under the last-chance agreement, the plaintiff agreed, among other things, that he would file no legal action to challenge any future discharge. The Sixth Circuit reversed summary judgment for the employer and reinstated the employee's state law retaliation claim. The court held that an employee cannot prospectively waive his statutory right to sue for discrimination, and rejected the employer's argument that the employee's waiver of rights in the last-chance agreement was analogous to cases in which courts have compelled arbitration on statutory discrimination claims.

In ***Lerman v. City of Fort Lauderdale***,[192] the Eleventh Circuit affirmed that employees can waive their ADEA rights. Fort Lauderdale police officers participated in a program in which they could earn early retirement benefits while still employed. To be

[191] 556 F.3d 428 (6th Cir. 2009).

[192] 346 Fed. Appx. 500 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1543 (2010).

eligible, participants were required to sign an irrevocable prospective resignation letter and release of all claims. The officers sued, claiming the release was not valid because employees cannot waive their rights under the ADEA. The Eleventh Circuit affirmed the district court's grant of summary judgment, agreeing with the district court that the waiver was knowing and voluntary, and that employees can waive their rights under the ADEA.

c. Independent Cause of Action for Declaratory or Injunctive Relief

A district court found that the OWBPA does not create an independent cause of action for damages. In ***Baker v. Washington Group International, Inc.***,[193] a group of former laid-off workers filed suit under the ADEA alleging that their signed releases were invalid because they did not meet the OWBPA's requirements that the defendant provide "sufficient, correct, and proper notice." The court found that the plaintiffs failed to establish a federal age discrimination claim because the OWBPA does not create an independent cause of action for damages. While the OWBPA may act as a shield for plaintiffs in an ADEA action where an employer invokes a wavier as an affirmative action, the act cannot be used as a sword that provides plaintiffs with an independent cause of action for affirmative relief.

F. RELIGIOUS DISCRIMINATION AND HARASSMENT

1. Harassment *versus* Constructive Discharge

In ***Winspear v. Community Development, Inc.***,[194] the Eighth Circuit Court of Appeals clarified that hostile environment and constructive discharge claims are distinct causes of action with different elements that must be proved. The plaintiff quit his job after being subjected to an allegedly religious hostile environment by his boss's wife, which included the wife telling the employee that she could "speak with the dead" and that the employee's brother, who had committed suicide, was trying to speak to him and was suffering in hell and wanted the employee to "find God." The plaintiff sued, alleging a hostile environment based on religious discrimination. The district court analyzed the case under a constructive discharge theory, and found that the plaintiff had failed to establish that he was constructively discharged since he remained at work several months after the wife's offensive conduct began. The Eighth Circuit determined that the district court had erred in imposing a constructive discharge standard. In remanding the case on the employee's hostile environment claims, the court noted that hostile environment and constructive discharge claims are distinct causes of action with different elements that must be proved.

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[193] No. 1:06-CV-1874, 2008 WL 351396 (M.D. Pa. Feb. 7, 2008).

[194] 574 F.3d 604 (8th Cir. 2009).

2. Duty to Accommodate Religious Beliefs

a. Expression of Beliefs

In ***Lizalek v. Invivo Corp.***,[195] the Seventh Circuit found that an employer was not required to provide a religious accommodation for the bizarre behavior of the plaintiff. The behavior included making statements that the plaintiff was three separate beings: a "Trustee," a "Steward," and a "trust that was created by the Social Security Administration;" refusing the employer's request to stick with one identity for purposes of his employment; writing a letter to the employer asserting that as "Steward," he had entered into a covenant to give everything to the "building up of the Kingdom of God on Earth"; stating that he did not see a conflict between the covenant and the employment of the "trust" by his employer; and claims that he was exempt from tax liability. The company terminated the plaintiff because of his bizarre behavior, and he sued, claiming that his employer failed to accommodate his religious beliefs. The Seventh Circuit affirmed dismissal of his claims, holding that Title VII does not require an accommodation that would cause more than minimal hardship to an employer. The plaintiff's behavior and writing style endangered the employer's customer relations, risked conflict with the Internal Revenue Service, and consumed undue management time, and the employer was not required to accommodate his beliefs.

b. Opposition to Practices That Violate Religious Beliefs

In ***Reed v. International Union, United Auto Workers***,[196] the plaintiff, an auto worker, objected to paying union dues or agency fees to the United Auto Workers for religious reasons and filed suit under Title VII. He sought an accommodation of his religious beliefs that would allow him to pay to charities an amount not more than *Beck* objectors would pay to the union in lieu of membership dues. Although the union provided an accommodation that allowed the plaintiff to pay charities, it required him to pay an amount equal to his full union dues. The plaintiff argued that requiring a religious objector to pay an amount equal to full union dues would constitute a penalty and amount to religious discrimination. The Seventh Circuit affirmed the district court's grant of summary judgment for the employer. Noting that the plaintiff brought a claim for religious accommodation and not disparate treatment, and that an adverse employment action was necessary to establish a *prima facie* case for failure to accommodate religious beliefs, the court ruled that the union's accommodation did not constitute an adverse employment action.

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[195] 314 Fed. Appx. 881 (7th Cir. 2009).

[196] 569 F.3d 576 (6th Cir. 2009), *cert. denied*, No. 09-709, 2010 WL 1265867 (U.S. Apr. 5, 2010).

c. Work Requirements That Conflict With Religious Beliefs

In ***EEOC v. Firestone Fibers & Textiles Co.***,[197] the Fourth Circuit held that a reasonable accommodation does not include completely eliminating an employee's religious conflict with work requirements. The employer in the case provided multiple options for the employee to avoid working on his weekly Sabbath and other religious holidays, including annual leave, floating holidays, and up to 60 hours of unpaid leave. These options, the court held, constituted a reasonable accommodation of the employee's religious beliefs.

Similarly, in ***Sturgill v. United Parcel Service, Inc.***,[198] the Eighth Circuit found that, under Title VII, an employer is not required to *eliminate* a religious conflict for which an employee requests accommodation. Instead, the employer and the employee must work together to reach a compromise that reflects "bilateral cooperation." In some cases, this will mean the employee must accept a less favorable position or compromise a religious practice. Each situation should be considered individually, and consider "work demands, the strength and nature of the employee's religious conviction, the terms of an applicable CBA and the contractual rights and workplace attitudes."

In ***Webb v. City of Philadelphia***,[199] the City of Philadelphia met its burden of establishing undue hardship where the plaintiff, a female Muslim officer, requested that she be allowed to wear a khimar (a headscarf) while on duty as a religious accommodation. The Philadelphia Police Department disciplined the plaintiff for insubordination when, after her request was denied, she later appeared for work wearing the khimar and refused to remove it. The Third Circuit upheld summary judgment for the department, noting that, under Title VII, an employer is not obligated to grant an employee's request for religious accommodation if doing so would impose an undue hardship on the employer. The city established undue hardship, as it proved that impartiality, religious neutrality, uniformity, and the subordination of personal preference would be damaged by allowing the plaintiff to subvert the uniform requirements.

G. DISABILITY DISCRIMINATION

1. Disability

In ***EEOC v. Agro Distribution, LLC***,[200] the plaintiff, a truck driver whose duties occasionally included lifting barrels of cattle feed, suffered from a congenital medical condition which left him unable to sweat. As a result of this condition, the plaintiff needed to take breaks more often than his peers in order to cool himself down. On one

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[197] 515 F.3d 307 (4th Cir. 2008).

[198] 512 F.3d 1024 (8th Cir. 2008).

[199] 562 F.3d 256 (3d Cir. 2009).

[200] 555 F.3d 462 (5th Cir. 2009).

occasion, he became nauseated after lifting smelly barrels on a hot day. When the plaintiff complained to his supervisor about being assigned to lift barrels, his supervisor told him he needed to report to work or he would be fired. When the plaintiff did not report to work, and the company terminated him. He then filed a charge with the EEOC, alleging the company violated the ADA by failing to accommodate his disability. The EEOC investigated the matter and brought suit on the plaintiff's behalf. In his deposition, the plaintiff testified that he was not substantially limited in a major life activity because he maintained an appropriate body temperature with fans and "cooling" breaks. He also testified that the company had never denied his requests for cooling breaks. Despite this testimony, the EEOC continued to litigate. The company successfully moved for summary judgment and attorneys' fees and costs, arguing the EEOC had continued to pursue a groundless suit. The district court agreed, finding that, taking mitigating measures into account, the plaintiff clearly was not disabled under the ADA and, regardless, the company had not failed to accommodate him. The court further found that the EEOC failed to engage in good-faith conciliation and instead made factually inaccurate representations to, and repeatedly failed to communicate with, the defendant. The EEOC appealed.

The Fifth Circuit affirmed the district court's award of summary judgment and $225,000 in attorneys' fees and costs to the defendant. It noted that "[t]he EEOC abandoned its role as a neutral investigator and compounded its arbitrary assessment that [the defendant] violated the ADA with an insupportable demand for compensatory damages as a weapon to force settlement." Because conciliation is a precondition to the EEOC bringing suit, the district court could have dismissed the suit without considering the merits of the plaintiff's claim. However, since the district court considered the merits of the claim, the Fifth Circuit could review its determinations. On review, the court found that the ADA Amendments (which prohibit consideration of mitigating measures in determining whether an individual is substantially limited in a major life activity) were not retroactive and did not apply to the plaintiff's claim concerning events before January 1, 2009. Furthermore, even if the plaintiff was disabled, his testimony that the defendant never denied him a cooling break prevented a failure to accommodate claim. Thus, the EEOC had "no reason to proceed" after the plaintiff's deposition, and "abandoned its duties [by pursuing] a groundless action with exorbitant demands."

2. Accommodation

In a decision that starkly reinforces the importance of the interactive process in disability cases, the Fourth Circuit upheld an award of $100,000 in punitive damages to a deaf employee. In ***EEOC v. Federal Express Corp.***,[201] the plaintiff, a deaf package-handler, sued FedEx for failure to accommodate and discrimination under the ADA when, over a three-year period, the company made no efforts to respond to plaintiff's requests for an interpreter or written materials during required meetings, and eventually discharged the plaintiff.

[201] 513 F.3d 360 (4th Cir.), *cert. denied*, 129 S. Ct. 343 (2008).

The Fourth Circuit found that the district court's award of $100,000 in punitive damages was proper. Relying on *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), the court rejected FedEx's argument that the plaintiff had failed to establish facts necessary to an award of punitive damages, namely that FedEx (1) perceived the risk that its actions would violate federal law and (2) did not make a good faith effort to comply with the law. First, the court noted that the jury could have found that one of the plaintiff's managers during those three years perceived that failure to accommodate would result in federal violations. Second, the mere fact that FedEx has an ADA compliance policy does not, by itself, establish a good faith attempt to comply with the law; the employer must also take affirmative steps to implement such a policy. The court also rejected FedEx's argument that the award violated the Fifth Amendment as unconstitutionally excessive because a reasonable jury could have found that FedEx's conduct was reprehensible and that the plaintiff faced potential threats to his safety where he could not understand the content of meetings and training sessions because of the lack of accommodation. Furthermore, the 12.5-to-1 ratio of punitive damages to compensatory damages ($100,000 to $8,000) was not only well below what has previously been deemed unconstitutional, the total amount of punitive damages awarded was also well below the $300,000 statutory cap under 42 U.S.C. § 1981a.

3. Damages

The Ninth Circuit blocked a former employee from seeking punitive or emotional distress damages on his ADA retaliation claim. In ***Alvarado v. Cajun Operating Co***.,[202] the plaintiff was hired at age 65 to provide part-time maintenance work at a Church's Chicken outlet in Arizona operated by Cajun Operating Company. He performed satisfactorily for more than three years. After he called Church's hot line to complain that the store manager had made inappropriate comments about his age, he received the first of several performance counseling records. Over the next nine months, he was given six more performance warnings. The plaintiff's alleged deficiencies included his failure to complete daily chores, such as panning and rotating chicken, battering chicken, and cleaning the restaurant's walk-in refrigerator. He complained to the manager that he experienced pain in his hands when he worked in the refrigerator. The manager referred the plaintiff to a doctor. Eventually, after yet another hotline call in which the plaintiff claimed he was being wrongfully subjected to performance warnings, his employment was terminated. He filed a lawsuit presenting a variety of claims, including that he had been fired in retaliation for protected activity under the ADA.

The Ninth Circuit noted that when the Civil Rights Act was amended in 1991, it expressly authorized punitive and compensatory damages for disability discrimination but not for ADA retaliation claims. Although cases from trial courts around the country had reached various results, the Ninth Circuit found that the statute was not ambiguous. If Congress had mistakenly omitted these damages for ADA retaliation claims, then Congress must correct the situation. The court did not have the power to do so. Similarly, the Ninth Circuit found that if no damages were available to the plaintiff for

[202] 588 F.3d 1261 (9th Cir. 2009).

retaliation under the ADA, it would be up to the trial court to determine whether to order any other form of remedy. That meant the trial judge, not a jury, would consider the claim.

4. Medical Examinations

In some circumstances, a "physical capacity" evaluation may constitute a medical examination that violates that ADA. Before the plaintiff in ***Indergard v. Georgia-Pacific Corp***.[203] could return to work from medical leave to undergo knee surgery, her employer required her to participate in a physical capacity evaluation (PCE). The two-day PCE was conducted by an occupational therapist and consisted of taking information about the plaintiff's medical history, current pain level and use of medication, alcohol, tobacco, and assistance devices; measuring the plaintiff's weight, height, blood pressure, resting pulse; measuring the range of motion in the plaintiff's arms and legs; observing the plaintiff's gait, balance, and posture; physically examining the plaintiff's knees; performing manual muscle testing; and testing the plaintiff's ability to lift and carry various weights.

Based on the PCE, the therapist concluded that the plaintiff could not perform the lifting requirements of the job and recommended that she not be allowed to return to work. The plaintiff's personal physician reviewed the results and agreed with the assessment. The employer informed the plaintiff of the results and terminated her employment. The plaintiff filed a lawsuit alleging disability discrimination under the ADA. The employer argued that the PCE was not a medical examination, but was simply a mechanism for determining whether the plaintiff was able to perform all job-related functions, as specifically allowed by the ADA. The trial court agreed and dismissed the case.

On appeal, the Ninth Circuit concluded that the PCE was a medical examination and reversed the district court's dismissal. Using the EEOC's enforcement guidance on the ADA, the Ninth Circuit concluded that the plaintiff had been subjected to specific tests that the EEOC labels medical examinations. Because the occupational therapist who administered the PCE was a health care professional and the results were sent for review to the plaintiff's personal physician, the PCE suggested that the information obtained was medical in nature. Although the employer's stated purpose of conducting the PCE was to determine whether the plaintiff was capable of performing particular jobs, the PCE went well beyond that. The Ninth Circuit remanded the case back to the trial court to determine whether the PCE was job-related and justified by business necessity.

[203] 582 F.3d 1049 (9th Cir. 2009).

5. Rehabilitation Act

In ***Fleming v. Yuma Regional Medical Center***,[204] the Ninth Circuit found that independent contractors may bring discrimination claims under the Rehabilitation Act. The plaintiff, an anesthesiologist who suffered from sickle cell anemia, applied for a position at the Yuma Regional Medical Center in 2005. Upon learning of his illness, the Center told him it would not be able to accommodate his operating room and call schedules. The plaintiff sued for breach of contract and discrimination in violation of the Rehabilitation Act, which protects an otherwise qualified person with a disability from discrimination by a health care facility that receives federal financial assistance. The trial court dismissed his claim on the grounds that he would have been an independent contractor at the Center and that the Rehabilitation Act provided no protection for independent contractors.

Recognizing that other federal courts had reached varying conclusions on this question, the Ninth Circuit found a broad interpretation of the Rehabilitation Act to apply in situations involving independent contractors as well as employees. The court noted that the Rehabilitation Act provides broader coverage than the ADA because it reaches not only employees but also any "otherwise qualified individual" who has been subjected to discrimination under a program or activity receiving federal assistance. The court concluded that Congress adoption of ADA standards into the Rehabilitation Act did not appear to be designated to limit the Rehabilitation Act's broad prohibition of discrimination by covered entities. The standards of the ADA would be used to determine whether discrimination had occurred. The Ninth Circuit remanded the case to the trial court for further proceedings consistent with ADA standards.

6. Retaliation

The Ninth Circuit held that the ADA anti-retaliation provisions applied to a plaintiff who was not disabled in ***Barker v. Riverside County Office of Education***.[205] The plaintiff worked for the Riverside County Office of Education as a resource specialist program teacher for students with disabilities. She and a coworker filed a class-action discrimination complaint with the U.S. Department of Education's Office for Civil Rights, alleging that Riverside denied disabled students the free, appropriate public education to which they are entitled by federal and California law. The plaintiff alleged that after her supervisors learned of her complaint, they began to retaliate against her. She reported the alleged retaliation to the Department of Education, which issued a determination that Riverside had retaliated against the plaintiff because of her advocacy on behalf of disabled students, activity the department concluded was protected under both Section 504 of the Rehabilitation Act and the ADA. The plaintiff quit her job two months later, asserting that she had been constructively discharged. She then filed a lawsuit for retaliation in violation of Section 504 and the ADA. The trial court dismissed

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[204] 587 F.3d 938 (9th Cir. 2009), *cert. filed*, 78 U.S.L.W. 3567 (Mar. 22, 2010).

[205] 584 F.3d 821 (9th Cir. 2009).

the case, finding that the plaintiff did not have standing to sue because she was not an individual with a disability.

The Ninth Circuit reversed, holding that the language of the federal statutes indicates that the broad remedial provisions incorporated into section 504 are not limited to retaliation against only persons with disabilities. Congress' goal, the court noted, was to protect the rights of the disabled. Similarly, the ADA, while directly protecting the rights of "qualified individual[s] with a disability," also contains an anti-retaliation provision that covers "any individual" who opposes unlawful practices against persons with disabilities. The court concluded that the plaintiff's action was based on alleged retaliation she experienced because of her advocacy on behalf of disabled students. Thus, the plaintiff's complaint was within the ambit of activity for which the ADA forbids retaliation. The Ninth Circuit remanded the case to the trial court to permit the plaintiff to pursue her case under both Section 504 and the ADA.

H. WAGE AND HOUR

1. Tips

The Ninth Circuit recently held that if a restaurant pays servers above the minimum wage before tips are taken into account, a policy requiring that tips be shared does not violate the Fair Labor Standards Act ("FLSA"). In ***Cumbie v. Woody Woo, Inc.***,[206] the plaintiff worked as a food server at the Vita Café in Portland, Oregon. The café paid its servers at or above the Oregon minimum wage, which at the time was more than $2 per hour above the minimum required by the FLSA. Although the FLSA permits employers of tipped employees to count tips toward the minimum pay requirement, the café did not claim any tip credit. Servers received their set hourly pay regardless of tips. However, they were required to put all tips into a pool that was divided among servers and kitchen staff. The servers shared the remainder of the tip pool in proportion to their hours worked.

The plaintiff filed a lawsuit on behalf of herself and other servers claiming that the café's tip-pooling arrangement violated the FLSA's minimum wage provisions. While the FLSA permits employers to count tips toward a portion of the minimum wage in occupations in which employees commonly receive tips, this "tip credit" toward the minimum wage is allowed only if the employee is told about the FLSA's requirements and is permitted to keep all tips received unless shared in a pool with other customarily tipped employees. The plaintiff claimed that the employer was in violation because it did not permit her to keep all the tips and instead required her to put tips into a pool shared with kitchen workers who are not customarily tipped.

The Ninth Circuit rejected the plaintiff's argument and held that the tip credit rules did not apply. In analyzing the plaintiff's claim, the Ninth Circuit observed that the FLSA's language about employees keeping their tips was not a general rule. Instead,

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[206] 596 F.3d 577 (9th Cir. 2010).

the provision was contained in the Act's description of circumstances in which employers may claim a tip credit to meet their minimum wage obligations. Had Congress intended for employees to be permitted by law to retain *all* tips, the court said, it could have done so without reference to a tip credit. The reason for the language was apparently to define the narrow circumstances when a tip credit was permitted. Here, the employer paid all its workers an hourly wage well above the FLSA minimum and did not claim any tip credit. The court rejected plaintiff's alternative argument based on the FLSA rule that employee wages must be paid "free and clear" without kickbacks to the employer or some other person. The tips did not belong to the plaintiff in light of the explicit understanding that they were to be shared, and the plaintiff had been told of the arrangement. Because the FLSA did not expressly forbid the arrangement, the court refused to find any violation.

2. Hours Worked

When determining whether pre-work and post-work activities constitute compensable time, the FLSA and state law may require different results. In ***Rutti v. Lojack Corp***.,[207] the plaintiff, a car alarm installation technician, filed a lawsuit under the FLSA and California law claiming that his pre- and post-work activities, including commuting time, constituted compensable time. The plaintiff and other technicians performed installations at the customers' locations rather than at a company site. The technicians were required to use employer vehicles to get to their jobs, including the first and the last of the day. The plaintiff normally spent a little time before work each day getting assignments, prioritizing jobs, and mapping his routes. At the end of each workday, the technicians logged on to their home computers using a company-supplied modem and uploaded data about the jobs performed during the day. The technicians had to ensure that the daily data transmission went through successfully. More than one attempt was often necessary. The company provided instructions for what the technicians were to do if they had two or more unsuccessful attempts.

The plaintiff filed his lawsuit on behalf of all technicians claiming that they were owed compensation for their "off-the-clock" work and their commuting time in company vehicles. Although employers generally do not have to pay workers for their commuting time, travel time from job to job during a workday is compensable. The plaintiff argued that his activities before and after his scheduled workday were company work time. He claimed that his workday started and ended at home because of his pre- and postwork activities. Thus, in his view, he should be paid not only for the duties performed at home but also for travel time to his first installation job of the day and back home from the final installation.

The trial court dismissed the plaintiff's claims, finding that the FLSA does not require payment for commuting time or the minor amounts of time the technicians spent on tasks before and after their scheduled workday. It did not analyze the plaintiff's California law claims.

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[207] 596 F.3d 1046 (9th Cir. 2010).

On appeal, the Ninth Circuit found that the employer's policies relating to pre-work activities and commuting time did not violate the FLSA, found that a trial was necessary to determine whether the plaintiff's post-work activities were compensable under the FLSA, and remanded the plaintiff's state claims regarding commuting time to the trial court for further fact-finding. Because there was no evidence showing that the technicians were required to perform job duties while driving to work, the plaintiff's commute was properly classified as noncompensable under the FLSA. The court reached a similar conclusion about the plaintiff's pre-work activities. While the FLSA requires pay for preliminary activities if they are an "integral and indispensable part of the principal activities" for which a worker is employed, the plaintiff's pre-work activities did not appear integral to his principal activity—installing car security systems. The plaintiff accomplished the morning tasks in a minute or two, and therefore constituted incidental activities that are regarded as *de minimis*. However, because the plaintiff's post-work activities—logging on and reporting on the jobs accomplished during the day—seemed related directly to the technicians' primary work and might exceed the *de minimis* level, the Ninth Circuit decided that a trial would be necessary to decide whether the time should be paid.

The court rejected the plaintiff's argument that he should be paid for his entire "continuous workday." The court's conclusion that the prework tasks and morning commute were not compensable undercut his theory. Even though the postworkday transmission of data might be compensable, the court decided that fact did not extend the plaintiff's workday to the extent that he should be paid for his homebound commute because the employer permitted technicians to transmit their data anytime between 7:00 p.m. and 7:00 a.m. the following day. Thus, when the plaintiff drove home from his last installation, he was off-duty and did not need to be paid for his commute.

Finally, the court found that California law (under which employees are compensated for commuting time if they are "subject to the control" of their employers during the commute), required a different result than the FLSA. The court found that the technicians were subject to the company's control and had a viable claim for commuting time pay under California law and remanded the case to the trial court for further fact-finding on the post-work tasks under both federal and state law, and on the commuting time under California law.

III. FAMILY AND MEDICAL LEAVE ACT

A worker fired for taking Family and Medical Leave Act ("FMLA") leave may be entitled to an award of back pay, front pay, and liquidated damages. In ***Traxler v. Multnomah County***,[208] the plaintiff worked for the Multnomah County Sheriff's Office for 18 years, eventually rising to the level of HR manager. She took medical leave under the FMLA, first in 2002 and then again in 2005. She never exceeded the 12-week maximum permitted under the statute.

[208] 596 F.3d 1007 (9th Cir. 2010).

The plaintiff filed a lawsuit claiming that the county dismissed in 2005 her because of her FMLA leave. A jury found for the plaintiff and awarded her $250,000 in back pay and $1,551,000 in front pay. Agreeing with the county that front pay decisions should be made by the court, the trial court reduced the front-pay award to $267,000. Without explanation, the trial court declined to award liquidated damages.

The Ninth Circuit upheld the trial court's findings and award, noting that any award of front pay is up to the court, not to the jury, in part because of concern for potential abuse. The Ninth Circuit remanded the case to the trial court for an explanation of its ruling in refusing to award liquidated damages.

IV. WASHINGTON STATE CASE DEVELOPMENTS

A. Internal Investigations

In ***Federal Way School District No. 210 v. Vinson***,[209] the court of appeals reaffirmed the importance of honesty in the workplace under Washington law. Plaintiff was an openly gay teacher at Federal Way High School. Several years earlier, he had taught at nearby Thomas Jefferson High School until he and another teacher filed cross-complaints of harassment against each other and plaintiff was transferred to Federal Way High School. In May 2007, plaintiff was eating at a restaurant when a former student approached him and taunted him. Plaintiff responded by saying, "Don't talk to me ever again, you fucking bitch." The school district commenced an investigation using the same investigator it had used for the earlier investigation who plaintiff apparently did not think had been fair. When questioning plaintiff, the investigator got his dates mixed up and rather than correcting the investigator's obvious mistake, plaintiff answered "no" to the questions. The school district found that it had probable cause to terminate plaintiff's employment, in part because he lied during the investigation.

Plaintiff challenged the decision in an administrative hearing and the hearing officer determined that he "presented plausible reasons for his lack of candor", therefore, there was insufficient evidence of probable cause for firing plaintiff. The Washington superior court affirmed the hearing officer's decision and the school district appealed. The court of appeals determined that the key issue was whether Vinson's dishonesty during the course of the investigation was a valid reason for his termination. Unlike an at-will employee, a teacher in Washington may be discharged only when "the teacher has materially breached his promise to teach so as to excuse the school district in its promise to employ." As the court of appeals explained, that can occur when a teacher commits on-duty misconduct that does not involve classroom deficiencies. Accordingly, "lying during the course of an official investigation of professional misconduct lacks any professional purpose and is sufficient cause for termination." The court's decision provides guidance for at-will employers facing termination lawsuits from

[209] 154 Wn. App. 220 (2010).

disgruntled former employees. In short, it reaffirms the importance of honesty in the workplace under Washington law

In ***Valdez-Zontek v. Eastmont School District***,[210] the court of appeals acknowledged the importance of controlling rumors during internal investigations. Plaintiff, the special programs director for Eastmont School District, had a school-year employment contract that did not include summer work. During the summer of 2001, she submitted time sheets to the district's payroll officer and when the superintendent approved the time sheets, one of the assistant superintendents suggested that he was motivated by an affair he was allegedly having with plaintiff. The school board investigated the matter and submitted an audit request to the State Auditor's Office specifying a potential misuse of public funds. The board president also began an investigation into a possible inappropriate relationship that could present a conflict of interest in the spending of public funds. During the investigation, rumors were spread about the alleged relationship.

Partly because of the controversy, the district demoted plaintiff in the spring of 2002 and she ultimately resigned and sued the school district for discrimination based on her race and sex, retaliation for her transfer to the lower-paying position, outrage, negligent infliction of emotional distress, defamation, and invasion of privacy. After a jury trial, the district was found liable for discrimination and defamation, and plaintiff was awarded $100,000 in damages and more than $200,000 in attorneys' fees and costs. On appeal, the evidence showed that the school board took no steps to stop the rumor of an affair between the superintendent and plaintiff. In analyzing plaintiff's defamation claim, the court stated that the issue was whether there was substantial evidence that any district official made a provably false statement about the alleged affair. The court of appeals held that because there was no evidence that established the existence of a relationship, the affair rumor was provably false. The court concluded that the jury could have found that district officials knowingly spread the affair rumor well beyond the scope of any common-interest privilege for investigating a possible conflict of interest and that they did so with a high degree of awareness that the rumor was probably false.

B. Sexual Harassment

In ***Collins v. Clark County Fire Dist. No. 5***,[211] plaintiff worked at a regional center that provides emergency medical training programs to fire districts in Vancouver, Washington. The center was set up under an agreement between Clark County Fire District No. 5 and the city of Vancouver and ran by a retired assistant fire chief Marty James, who was the center manager, chief administrator, and human resources specialist. Plaintiff and several other women who worked at the center found that working with James meant exposure to a steady stream of sexually oriented comments. He would frequently observe women and make comments such as "nice legs" or "nice

[210] 154 Wn. App. 147 (2010).

[211] Case No. 36968-1 (Wash. Ct. App., Mar. 11, 2010).

rack" and referred to women at the center as "stupid bitches" or "lying bitches." Plaintiff reported James' comments to the city's fire chief and nothing changed. Plaintiff also informed the fire district's board chairman, who replied, "Well, that's Marty. . . ." Although he spoke with James about his behavior, the misconduct worsened. The center later hired a degreed candidate to head the paramedic program and James told Larwick that the center could not afford both her and the new paramedic director and she was fired.

Plaintiff and three other women filed a lawsuit against the fire district, Clark County, the city of Vancouver, and James individually, under the Washington Law Against Discrimination (WLAD). The jury placed a hefty price on the work environment the women had endured and plaintiff was awarded $626,000 in economic damages and $875,000 in noneconomic damages. Awards for the other women totaled approximately $835,000 in economic damages and $887,000 in noneconomic damages. The court of appeals found there was ample evidence in the trial record to support the jury's damages awards. As the prevailing parties in a WLAD claim, the women were entitled to an award of attorneys' fees and costs in excess of $500,000.

C. Unfair Labor Practices

A recent court of appeals decision reaffirmed the caution employers must exercise in attempting to resolve unfair labor practices. In ***Yakima Police Patrolmen's Association v. City of Yakima***,[212] plaintiff, a Yakima police officer, entered into a three-year "last-chance agreement" with the city after being charged with driving under the influence of alcohol. Two years later, Rummel was involved in an alcohol-related domestic dispute. The day after the dispute, his supervisor ordered him to have no contact with his girlfriend. He then violated the order by contacting his girlfriend at work. Before the city could investigate the violation, plaintiff was placed on leave for depression and alcohol abuse. At the end of his leave, he was found fit for duty, but the evaluating doctor recommended 90 days of random urinalysis. During the same time, the union representing the police officers filed an unfair labor practice complaint against the city for requiring a different police officer to submit to six months of random urinalysis as a condition of returning to duty. The union alleged that the city had unilaterally changed its drug-testing policy. Against this backdrop, the city discussed with the union how to implement the 90-day urinalysis recommendation for plaintiff and the union agreed to develop a proposal allowing the 90-day urinalysis.

While the city awaited the union's proposal, it completed its investigation into plaintiff's alleged no-contact violation and found him guilty of insubordination. Around the same time, plaintiff violated policy again by using his police badge to enter a bar without paying the cover charge. The city continued its investigation into plaintiff's misuse of his badge and subsequently terminated him based on his violation of the last-chance agreement. In response, the union filed a second unfair labor practice charge with the Public Employment Relations Commission (PERC) alleging that plaintiff was

[212] 153 Wn. App. 541 (2009).

terminated because the union refused to dismiss its first unfair labor practice claim. The PERC hearing examiner found for the union. The commission reversed and the union appealed the decision to superior court and then to the Washington Court of Appeals; both courts held that the city's evidence was sufficient to establish that plaintiff was terminated for violating his last-chance agreement. Although the union established a prima facie case of discrimination, it was countered by the city's legitimate reason for its actions: the officer's violation of his last-chance agreement.

D. Arbitration

The Washington Supreme Court recently affirmed the legal proposition that generally an arbitrator's decision is final and not to be reviewed by courts. In ***Kitsap County Deputy Sheriff's Guild v. Kitsap County***,[213] plaintiff was disciplined several times during his 14 years as a Kitsap County deputy sheriff. In May 2000, after being assigned to a child pornography task force, he became increasingly "obsessive" and "fixated" on this work and on his role in "protecting the children." That fall, plaintiff was reassigned and instructed to return all equipment and uncompleted task force cases. By then, he had developed "delusions of persecution." He failed to return his case files and equipment as instructed and eventually was briefly suspended pending an internal investigation. In January 2001, it was discovered that plaintiff had failed to secure a pistol issued to him, leaving it in an unlocked desk drawer rather than returning it to the department as he had reported. He also had files that had not been closed out despite his confirmation to the contrary. The county terminated plaintiff's employment based on 29 documented incidents. The Kitsap County Deputy Sheriff's Guild filed a grievance and requested arbitration. According to the arbitrator, the county failed to show that "the degree of discipline administered was reasonably related to the seriousness of the proven offenses." The arbitrator found that plaintiff suffered from a mental disability and that the county should have recognized that and referred him for counseling and fitness-for-duty exams. The arbitrator reduced the discipline and permitted plaintiff to return to duty upon passing independent a physical fitness-for-duty examinations.

The guild believed that the county was dragging its feet in implementing the award and went to court to enforce it. The county asked the trial court to throw out the arbitration award, claiming that the arbitrator had violated public policy by ordering reinstatement of a law enforcement officer who had so clearly violated his duties. The trial court refused, and the county went to the Washington Court of Appeals, where it found support for its position. The guild then escalated the matter to the Washington Supreme Court. The Washington Supreme Court began its analysis by acknowledging a long-standing principle: A court will review an arbitrator's decision only when there is evidence that the arbitrator exceeded his legal authority. The county argued that the arbitrator's ruling that Plaintiff should be eligible for reinstatement was against public policy. The court refused to second-guess the arbitrator, which was within the scope of his authority to disallow back pay and to require plaintiff to pass fitness-for-duty exams

[213] 167 Wn.2d 428 (2009).

before resuming his role as a deputy sheriff. The arbitrator was found to be within his authority, and his decision was upheld.