FOLEY EXECUTIVE BRIEFING SERIES

Employment Law Developments from 2007 (And, what is coming next)

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Purpose:

- Look back at the development of employment law in 2007 to see the big picture
  - Mainly court decisions
- Assess impact on current practices
  - Maybe too risky; maybe too risk averse
- Anticipate where the law is going
  - Be proactive, not just reactive

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Caveat:

- This is an overview, not a set of rules that apply in every case
- Employment law cases are highly fact-specific
  - That's why employment lawyers add value ☺
- Judges try to do justice, so unfairness often loses (bad facts make bad law)
  - Determine "fairness" by how that facts would sound to the jury when explained by a skilled advocate

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What is the "law"?

- Starts with statutes
  - Title VII, ADA, ADEA, FMLA, FLSA, ERISA, NLRA, WFEA and other WI statutes
  - Sometimes administrative regulations or rulings
- Develops with court decisions that interpret and apply the statutes
  - Arise in fact-specific cases, but provide guidance and interpretation
  - Establish precedent that guides claims and defenses in future cases

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What is the "law"?

- Court decisions, usually on appeal from trial judge rulings:
  - Sometimes after trial
  - But very often before trial
- "Summary Judgment" = pretrial challenge to the legal sufficiency of plaintiff's claim and evidence
- If successful, avoids trial, but still after much cost, effort and "pain"
  - Appealed very often (*de novo* review at marginal cost)

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2007 Highlights

- Harassment claims – was plaintiff in the zone of danger?
  - Claims less compelling if acts not directed at plaintiff
  - Employers must have a good complaint mechanism
- ADA claims – just how disabled does the plaintiff have to be?
  - Plaintiffs held to exacting proof standards
  - Wave of pro-employer rulings
- FMLA – a mixed bag of case results; expansion
- Labor law – Board sets back organizing
  - But beware the biggest organizing tool ever is close at hand
- Wage litigation is everywhere; and is expensive

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Wage Litigation Overview

- More W&H class (collective) actions than any other kind of employment litigation
  - Opt in rate for FLSA claims = 10% - 30%
  - State law claims (opt out) are booming
- Types of claims (per the FLSA and/or state wage laws):
  - Overtime claims of employees treated as "exempt" by employer (especially the duty test for administrative)
  - "Hours worked" claims from pre- and post- work activities
  - "Off-the-clock" and missed break claims
  - Calculation of overtime ("regular rate")
  - Prompt final pay (under state laws)

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Wage Litigation Overview

- Wage claim liabilities:
  - Citigroup Global Markets - $98 million
  - UBS Financial Services, Inc. - $89 million
  - Wal-Mart - $78.5 M ***plus*** $62 M liquidated ***plus*** over $30 M in fees
  - UPS - $87 million
  - IBM - $65 million
  - Morgan Stanley - $42.5 million
  - Staples - $38 million
  - 24 Hour Fitness - $38 million
  - Merrill Lynch - $37 million
  - Siebel Systems - $27.5 million
  - Sears Roebuck - $15 million

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Class Action Liabilities Overview

- Snapshot view: the top 10 private plaintiff settlements in each category
- Employment discrimination: $282.1 M
  - Up from less than $100 M in 2006
- Wage and Hour: $319.3 M
  - Plus the DOL recovered a record $212.5 M
- ERISA: $1.818 B!
  - Unilateral changes to retiree benefits
  - Misclassification as independent contractors
  - Breach of fiduciary duty in relation to 401(k)

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Title VII

- ***Ledbetter v. Goodyear Tire,*** *(U.S. Sup. Ct.)*
- Facts:
  - Female area manager for Gadsden, AL plant since 1979 paid progressively less than male counterparts over the years
  - Plaintiff pointed to references by plant manager to the effect that he did not want women in the plant
  - Plaintiff filed EEOC charge in mid-1998
- Jury awarded $224K back pay, $5K compensatory and $3.3M punitive damages (reduced by judge per caps in Title VII)

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Title VII — *Ledbetter v. Goodyear*

- Supreme Court decision (5-4):
  - Plaintiff could not recover for decisions made more than 180 days before the filing of the charge
  - Overturned jury verdict because no evidence of discrimination in the pay decisions made in 180 days before the charge
- Upshot: less pay now based on a pay decision made outside the statute of limitations does not support a claim

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Title VII — *Ledbetter v. Goodyear*

- Impact:
  - Employee advocates disturbed, and vocal
    - Claiming this gives historically unfair employers a free pass to continue the effects of historical discrimination in pay
  - Employer groups calling decision a “victory for employers” that limits liability
  - Some members of Congress are advocating an amendment to Title VII to reverse this
    - “Lily Ledbetter Fair Pay Act”

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Title VII

- ***Sims-Fingers v. Indianapolis,*** (7th Cir.)
  - Female park manager claimed sex discrimination because her pay was 2% lower than a male park manager
  - Claim dismissed; affirmed on appeal
  - For Equal Pay Act claim, the jobs of the plaintiff and the comparator employee must require equal skill, effort and responsibility
    - This high standard leaves employers with much flexibility in using different pay levels where any real differences can be shown

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Title VII

- ***Hossack v. Floor Covering Assocs.,*** (7th Cir.)
  - Female who had an extra-marital affair with a male co-worker alleged sex discrimination when she was fired but the man was not
  - Female's husband contacted co-worker and threatened him; employer took female's comments as a resignation
  - Evidence of much office romance (12 of 17!)
  - Jury awarded plaintiff $200k; App. Ct. reversed
  - No valid claim because plaintiff not similarly situated to the male (he did not have a spouse making threats, etc.)

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Title VII — Case Law Potpourri

- *Nichols v. Southern Ill. Univ.*, (7th Cir.)
  - Placing employee on admin. leave during investigation is not a materially adverse employment action
- *Edelman-Reyes v. St. Xavier Univ.*, (7th Cir.)
  - Typical "pretext" analysis; suggests layers of decision making will insulate employer from discrimination claim based on alleged bias of any particular person with input
- *Grossman v. South Shore P.S. Dist.*, (7th Cir.)
  - Emphasizes need to focus on conduct, even if that relates to a protected characteristic

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Title VII – Miscellaneous

- EEOC Guidance on Employment Tests and Selection Procedures (Dec. 2007)
  - Addresses Title VII, ADA and ADEA issues implicated by testing and selection procedures
- EEOC Guidance on Unlawful Disparate Treatment of Workers With Care Giving Responsibilities (May 2007)
  - Provides some "watch outs" for employers in the treatment of these types of employees

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Title VII — Pending Legislation

- Civil Rights Act of 2008 (H.R.2159/S.2554)
  - Sponsors cite need to restore worker's rights that have been limited by Supreme Court decisions
  - Would eliminate damages caps in Title VII and ADA claims
  - Would make void pre-dispute arbitration clauses
  - Would allow state employees to sue under ADEA and FLSA
  - Would expand remedies for women under EPA

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Title VII — Pending Legislation

- Employment Nondiscrimination Act
  - Would make sexual orientation protected
  - Passed the House (235-184) on Nov. 7
  - Now in Senate; Senator Kennedy (D-Mass.) promises to move the legislation forward
- Arbitration Fairness Act
  - Would ban pre-dispute arbitration agreements in many employment contexts
  - Supported by Senators Dodd (D-Conn.), Durbin (D-Ill.) and Kennedy (D-Mass.)

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Harassment

- Cases turn on how direct was the harassment, and contain some lessons for employers
- ***Yuknis v. First Student, Inc.***, (7th Cir.)
  - Female plaintiff raised sex harassment complaint based on manager's vulgar story told to all in the workplace, his reference to another woman as a "fat ass," and his viewing of pornography on his computer
  - Court affirmed the summary dismissal
  - "It wasn't any of the plaintiff's business what the manager was looking at on his computer."

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Harassment – Quote of the Year

"The American workplace would be a seething cauldron if the workers could with impunity pepper their employer and eventually the EEOC and the Courts with complaints of being offended by remarks and behaviors unrelated to the complainant except for his having overheard, or having heard of, them. The pluralism of our society is mirrored in the workplace, creating endless occasions for offense. Civilized people refrain from words and conduct that offend the people around them. Title VII is not a code of civility."

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Harassment

- ***Coolidge v. Cons. City of Indianapolis and Marion County,*** (7th Cir.)
  - Crime lab employee who once successfully sued for sex harassment failed to establish a new claim based on video tapes depicting necrophilia left behind by retired supervisor
  - New claim made after plaintiff failed in her attempt to get the retiree's job
  - Case dismissed; court concluded the indirect harassment not severe and pervasive; particularly in the context of a crime lab (where pornography depicting necrophilia should be less shocking)

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Harassment

- ***EEOC v. V & J Foods, Inc.,*** (7th Cir.)
  - Dismissal of sex harassment claim by then 16-year old fast food worker; reversed by appellate court
  - In depth discussion of the inadequacies of the employer's complaint procedures and describes proper procedures
  - Easy to understand and easy to use complaint procedure, with options, is essential for employers to have a defense to harassment claims

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Harassment

- ***Jackson v. County of Racine***, (7th Cir.)
  - Employer defeated sex harassment claim because of prompt and effective response to the complaint, but court emphasized that a workplace need not be "hellish" to be an illegal hostile work environment
- ***Boumehdi v. Plastag Holdings LLC***, (7th Cir.)
  - Dismissal reversed
  - Purely sexist comments may support a viable sex harassment claim even if not overtly sexual
  - Here, 18 sexist comment in less than a year could be "pervasive"

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Retaliation — Inconsistent Rulings

- ***South v. Illinois EPA***, (7th Cir.)
  - Plaintiff fired after refusing employer's request for a physical evaluation in connection with his request for medical leave
  - Claimed retaliation for earlier filing of charge
  - Dismissal affirmed
    - Court applied a high standard for proof of a "similarly-situated" co-worker, saying South did not did not present evidence of another employee who in similar circumstances behaved in a similar was but was not discharged.
    - This is the high burden reflected in many 7th circuit cases in recent years
    - But wait ....

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Retaliation

- ***Humphries v. CBOCS West, Inc.,*** (7th Cir.)
  - African American associate manager at a Cracker Barrel restaurant claimed firing was racially discriminatory
  - Compared self to white associate manager who claimed he left the safe open after plaintiff had complained about treatment of black server
- Appellate court reversed dismissal
  - Called trial judge's analysis too rigid and inflexible
  - "Similarly-situated" analysis must be a flexible one that considers "all relevant factors, a number of which depend on the context of the case"
  - Here, white associate manager was similarly-situated and was not fired for a similar alleged infraction, so this supported a valid discrimination claim; *and more*

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Retaliation

- *Humphries* court also ruled that a race retaliation claim can be asserted under 42 U.S.C. §1981
  - This continues a trend of expanding the application of section 1981 and raises the stakes for employers
- Unlike a claim under Title VII, a race discrimination claim under Section 1981:
  - Can be filed in court right away without any need for administrative processing
  - Has a four-year, rather than a 300-day, statute of limitations
  - Has no caps on damages—the sky is the limit (almost)
- Supreme Court has accepted the case
  - And heard oral argument on Feb. 20, 2008

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Retaliation

- ***Kodl v. Board of Ed.,*** (7th Cir.)
  - Generalized complaints of harassment, without connection to a particular protected category, are not "protected activity" that can support a later retaliation claim

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Retaliation

- ***Roney v. Ill. Dept. of Transp.,*** (7th Cir.)
  - Despite litany of alleged retaliatory acts, claim failed because none was an adverse employment action
    - Assignment without adequate training; refusal to create specialized performance plan; refusal to allow use of state vehicle, etc.
    - Especially interesting after last year's US Sup. Ct. decision in *Burlington Northern* Retaliation

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Disability Discrimination

- ***Kampmier v. Emeritus Corp.,*** (7th Cir.)
  - Nurse effected by endometriosis absent from work to obtain a hysterectomy
  - Employer asked for but did not receive medical verification, and treated absence as a resignation
  - Nurse sued for disability discrimination (and sex harassment)
  - Court affirmed the dismissal of the ADA claim;
    - Plaintiff did not prove that she had an ADA-protected condition because the evidence showed she led an active life and cared for herself and her family.

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Disability Discrimination

- ***Williams v. Excel Foundry & Mach.,*** (7th Cir.)
  - Spinal injury resulting in inability to stand for more than 40 continuous minutes or to stand on one leg was not a protected disability because it did not "substantially" limit Williams in a major life activity (assessed in relation to the abilities of the average person)
- ***Squibb v. Memorial Med. Ctr.,*** (7th Cir.)
  - Nurse who sustained multiple back injuries that prevented her from working again in patient care did not prove that she was disabled enough for an ADA claim

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Disability Discrimination

- ***EEOC v. Schneider Int'l, Inc.,*** (7th Cir.)
  - Trucking company fired driver with great driving record diagnosed with nervous system disorder that might cause loss of consciousness
    - But encouraged him to apply for a non-driving position
  - Prior employee with that disorder drove truck off bridge and was killed, so new policy prohibited any person with the disorder from driving
  - Court approved dismissal; not seen as "regard as" disabled, but instead simply an employer exercising the right to be risk averse;
    - If safety risk was not zero, the employer need not take it

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Disability Discrimination

- ***Huber v. Wal-Mart Stores, Inc.,*** (US Sup. Ct.)
  - Presented for ruling the issue of whether the ADA required an employer to assign a vacant position to an employee with a disability (as an accommodation) irrespective of the merits of other candidates for the position
  - App. Ct. affirmed dismissal of claim
  - Supreme Court accepted the case
  - Parties just recently settled so case is dismissed.

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FMLA

- ***Taylor v. Progress Energy, Inc.,*** (4th Cir.)
  - Plaintiff signed a release of claims in exchange for compensation upon termination
  - Then she sued anyway on an FMLA claim
  - App. Ct. ruled that the release could not waive FMLA claims (which need DOL or court approval)
- So, in Md., N.C., S.C., Va., and W.Va., no FMLA releases w/o DOL or court approval
- Supreme Court has accepted the case

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FMLA

- ***Repa v. Roadway Express, Inc.***, (7th Cir.)
  - Injured employee approved to receive STD benefits under union's national master agreement covering employer's employees
  - Employer required to substitute paid leave (vacation) for FMLA time
  - Trial court granted SJ for Repa; App. Ct. affirmed
  - Substitution of paid leave benefits only for ***unpaid*** leave time covered by FMLA

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FMLA

- ***Stevenson v. Hyre Elec. Co.,*** (7th Cir.)
  - Receptionist freaks out when dog enters warehouse; went home "too ill to work"
  - Went to hospital ER; no physical problems
  - Filed OSHA complaint; called police
  - Out on leave; sent Dr. note that employer did not accept as proper FMLA cert.; termination
  - Trial court dismissed; App. Ct. reversed:
  - Behavior "so bizarre" that it amounted to "constructive notice" of need for FMLA leave

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FMLA

- ***Hendricks v. Compass Group***, (7th Cir.)
  - Lower pay for light duty work does not violate FMLA's guarantee of "substantially equivalent position"
  - So, if ee not yet able to perform her job, then not yet entitled to FMLA protection for return to her job or substantially equivalent position
- ***Downey v. Strain***, (5th Cir.)
  - Exception to *Ragsdale* (S.Ct.): if employee is "prejudiced" by lack of notice that FMLA is being counted, then employer may not run out employee's FMLA entitlement

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FMLA — Legislation

- National Defense Authorization Act:
  - First expansion of 1993 FMLA
  - Passed Senate (90-3) on Dec. 14, 2007
  - Expands FMLA benefits to spouses, children and parents of service members called to active duty and anyone who cares for a spouse, child or parent of next of kin injured during military service
  - Expected to be signed into law by President
- Continued rumblings about paid leave and FMLA leave for school activities

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Wages and Hours (FLSA)

- ***Long Island Care at Home v. Coke,*** (S. Ct.)
  - Supreme Court reversed the 2d Circuit, twice, and ruled that the DOL's interpretation of its companionship services exemption as inclusive of caregivers employed by third parties (not just by the person receiving care) is binding
  - Very deferential to DOL interpretative guidance

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Wages and Hours (FLSA)

- ***Yi v. Sterling Collision Centers,*** (7th Cir.)
  - Auto mechanic lost claim for overtime pay
  - Court viewed compensation plan that was dependent on sales as essentially a commission-based plan
- ***Reyes v. Remington Hybrid Steel,*** (7th Cir.)
  - Employer responsible as "joint employer" for FLSA violations at its workplace even though workers hired by a labor contractor

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Age Discrimination

Happy Birthday!

- ADEA turned 40
- So, in a way, the ADEA is now in its own protected class.

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Age Discrimination

- EEOC Final Rule issued on Dec. 26, 2007:
  - Permits employer-sponsored retiree health benefits to be altered, reduced or eliminated when recipient becomes eligible for Medicare or comparable state health benefits program
    - Employers can offer "bridge" plans to provide retiree health benefits until age 65
    - Employers can offer "wrap around" plans to Medicare-eligible employees
- EEOC permits favoritism for older workers
  - So, no "reverse" age discrimination claims

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Age Discrimination

- ***Hemsworth v. Quotesmith.com,*** (7th Cir.)
- Simplistic statistical argument fails; court requires comparison statistics to reflect similarly-situated employees
  - Statistical proof is only relevant "when the plaintiff faithfully compares one apple to another without being clouded by thoughts of apple pie a la mode or Apple iPods."

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Employee Benefits — ERISA

- ***Beck v. Pace Int'l Union,*** (US Sup. Ct.)
  - Decision of whether to terminate an ERISA plan is a "settlor function" immune from ERISA fiduciary obligations
  - Pro-employer decision that rejected a union's attempts to hold employer to a higher responsibilities when terminating a plan
- ***Nelson v. Hodowall,*** (7th Cir.)
  - In 401(k) case, no breach of fiduciary duty for failure to tell employees that officers and directors sold stock just prior to corporate merger

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Employee Benefits — ERISA

- *Bonus coverage*: U.S. Supreme Court ruled on Feb. 20, 2008 in:
- ***LaRue v. Dewolff, Boberg & Assocs., Inc.***
  - A 401(k) participant can sue for losses to an individual account resulting from a breach of fiduciary duty
  - S. Ct. distinguished prior ruling (1985) that only allowed for claims seeking recovery for losses to the entire plan as applicable to defined benefit plans; here, with a defined contribution plan, individuals can sue for losses to their individual account

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Labor — NLRA

- Board delivers severe blows to organizing
  - ***Oil Capital Sheet Metal, Inc.***, (NLRB)
    - Back pay for wrongful refusal to hire in "salting" case limited
  - ***Toering Elec. Co.,*** (NLRB)
    - For employer to be liable for refusal to hire organizer, union must carry the burden to prove that applicant genuinely desired to be employed by the employer
- Board allows employers to restrict union information on company email system
  - ***Guard Publishing d/b/a Register Guard,*** (NLRB)

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Labor Law — NLRA

- BEWARE! The Employee Free Choice Act
  - Would permit certification of Union without secret ballot election simply based on card count
  - Would establish tight timelines for first CBA and authorize a government appointed arbitrator to bind parties to a two-year deal
  - Would create big penalties and fines for unfair labor practices, like triple back pay and fines up to $20,000 per violation

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Miscellaneous, but noteworthy

- WARN Act: Court uses very literal interpretation to apply liability for an employment loss due to short gap between employment by seller and buyer of the business assets
  - ***Phason v. Meridian Rail Corp.,*** (7th Cir.)
- Independent Contractor Status:
  - FedEx hit with $319,000,000 fine by IRS

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Miscellaneous, but noteworthy

- Trade secrets: Wis. trade secret law may protect customer information if list reflects business insights
  - ***Am. Family Mut. Ins. Co. v. Roth,*** (7th Cir.)
- Fair Credit Reporting Act: Supreme Court lowers the liability standard by concluding that a "willful failure" includes reckless, not just intentional, violations of the FCRA
  - ***Safeco Ins. Co. of America v. Burr,*** (US Sup. Ct.)

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FEDERAL AND WISCONSIN EMPLOYMENT LAW UPDATE

2007 IN REVIEW

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TITLE VII

Ledbetter v. Goodyear Tire & Rubber Co. (US Sup. Ct.)

Closely divided Supreme Court made it harder for employees to challenge the continuing and cumulative effects of past discriminatory pay decisions by ruling that employees must file a charge within 180 or 300 days (depending on the state) after each allegedly discriminatory pay decision or forever lose the claim.

Facts: Plaintiff Ledbetter began working for Goodyear at its plant in Gadsden, Alabama in 1979, and she was one of a few female area managers ever employed there. Over the years, Ledbetter was paid progressively less than the men in the same position. She presented evidence that all of the women who held her position were paid less than their male counterparts and that the plant manager made comments to the effect that he did not want women in the plant.

Ledbetter completed an EEOC questionnaire in March 1998, filed a formal charge of sex discrimination four months later, accepted early retirement later that year to avoid being laid off, and then sued Goodyear in November 1999.

Trial Court Disposition: The district judge allowed Ledbetter's Title VII claim to go to trial, and allowed her to present evidence of sex discrimination in pay throughout her 19-year career at Goodyear. The jury ruled in Ledbetter's favor on her pay discrimination claim and awarded $223,776 in back pay, $4,662 in compensatory damages, and $3,285,979 in punitive damages (which the trial court reduced in accordance with Title VII's $300,000 statutory damages cap).

Appellate Court Ruling: The appellate court overturned the verdict, concluding that the operative act of discrimination is the decision about what to pay the employee, not the subsequent acts of issuing the paychecks. The appeals court looked only at Goodyear's decisions in 1997 and 1998 not to grant Ledbetter a pay raise, and found no evidence of sex discrimination in those particular circumstances.

Supreme Court Decision: In a 5-4 decision, the Supreme Court affirmed the appellate court's decision that overturned the jury verdict in favor of Ledbetter. The Court explained that the time limitation for filing a discrimination charge with the EEOC is "triggered when a discreet unlawful employment practice takes place," and it further explained that "a new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from past discrimination." Therefore, Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her. The Court rejected the idea that discriminatory intent associated with prior pay decisions could simply be shifted to and applied to the 1998 pay decision.

Justice Ginsberg authored a dissenting opinion in which she emphasized that each paycheck, if lower because of a discriminatory bias, was a new act of discrimination. She reasoned that as with a hostile environment claim, pay disparities of the kind Ledbetter experienced reveal

themselves as discriminatory as they accumulate over time, rather than being easily identifiable like a single episode of discrimination.

Impact: Employee advocates, including Senator Tom Harkin (D-Iowa), have expressed extreme disappointment with the Court's decision, saying it "further cements a woman's disadvantage in the labor marketplace by ensuring a safe harbor for employers who have paid female workers less than men over a long period of time—basically giving the worst actors a free pass to go on with systemic gender discrimination." On the other hand, business groups like the National Chamber of Commerce have called the ruling "a victory for employers because it limits how far back in time an employee may go when making a discrimination claim involving pay."

Employers are protected from liability for discriminatory pay decisions made years ago, even if the consequences of those decisions are still playing out. Some anticipate that this decision will prompt the filing of more charges, more often. The decision has prompted heated debate and may well result in federal legislation amending Title VII and other statutes so as to reverse the effect of the decision.

Sims-Fingers v. Indianapolis (7th Circuit)

Female park manager failed to prove that a 2% difference in her salary from that of a higher-paid male park manager violated the Equal Pay Act or Title VII because the male had responsibility for a larger and more active park facility.

Facts: Plaintiff Kimberly Sims-Fingers was employed by the Marion County, Indiana Park System as the manager of a six-acre public park. She was paid more than seven of the park system's 16 male managers, while another female manager outranked all but one of the males in the compensation system. Among the various parks in the system, the one managed by Sims-Fingers was a small park without revenue-generating facilities such as swimming pools. Of the nine male managers who earned more than Sims-Fingers, eight managed parks that were larger and that either had water facilities or generated more revenue than her small six-acre park. She sued for sex discrimination under the Equal Pay Act and Title VII, focusing her claim on the ninth male manager who was paid at a rate 2% higher than her salary, before his assigned park even opened.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed the case.

Appellate Court Ruling: The appellate court affirmed the summary dismissal. The court noted that the EPA requires an employer to pay male and female employees at the same rate for "equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions." In this instance, the male employee's park assignment did eventually open, and it included 100 acres of land, along with a swimming pool, athletic fields, fitness center and game and computer rooms. As a result, the court concluded there was simply no basis from which a jury could conclude that the male employee's job involved no more skill, effort and responsibility than plaintiff's job of running a very small, established park that had limited facilities. The court further explained that the proper domain of

the EPA is standardized jobs in which a man is paid significantly more than a woman and there are no skill differences.

Impact: This case continues a trend in the 7th Circuit to require compelling proof that two jobs are very similar, requiring equal skill, effort and responsibility, in order to support a comparison between the pay of the female employee and the male employee in order to support a discrimination claim.

Hossack v. Floor Covering Associates of Joliet, Inc. (7th Circuit)

Female plaintiff had no claim for sex discrimination when she was fired after having an extramarital affair with a male coworker who was not fired.

Facts: Defendant FCA employed 17 persons at its Joliet, Illinois store. The company's sole owner testified that at least 12 of those 17 employees engaged in romantic relationships with other employees in the past. He testified that none was fired or disciplined for those affairs, he testified, and the company had no policy forbidding employee relationships. Plaintiff Vicki Hossack had an extramarital affair with coworker Nick Cladis. When Hossack's husband discovered the affair, he contacted Cladis and threatened him. Hossack told managers that her husband did not want her to work at the store where she would have contact with Cladis. Management interpreted her statements as a resignation, but Hossack later denied that she resigned. Cladis was neither discharged nor disciplined for his role in the affair. Hossack sued alleging that her employment was terminated because of her gender.

Trial Court Disposition: The case proceeded to trial and a jury viewed the situation as a termination and awarded Hossack $200,000 for unlawful sex discrimination. The trial judge disagreed with the jury and vacated the award. Hossack then appealed.

Appellate Court Ruling: The appellate court agreed with the trial judge that Hossack did not submit sufficient proof of sex discrimination to support the jury award. The court noted that the evidence established that Hossack was terminated not because she had a workplace affair, but because management feared that her husband might cause workplace disruption. Also, she did not prove that she was similarly situated to, and therefore, comparable to Cladis because Cladis was a top salesman and producer at the Joliet store. Ultimately, after reviewing the entire trial record, the appellate court concluded that the plaintiff did not produce sufficient evidence for a rational jury to conclude that she was discriminated against and discharged because she is a woman.

Impact: Both the district court judge and the three judges on the appellate court panel decided that the jury was entirely irrational in its conclusion that the termination of Hossack occurred because she is a woman. This case is a good reminder that two employees who are each involved in a workplace problem need not be treated exactly the same in all circumstances. In this instance, continuing Hossack's employment raised concerns about workplace violence because of the threat made by her husband, whereas continuing Cladis' employment raised no similar security concerns.

Nichols v. Southern Illinois University - Edwardsville (7th Circuit)

Placing an employee on paid administrative leave during an investigation does not constitute a materially adverse employment action, and therefore cannot support a claim of discrimination.

Facts: Plaintiff Nichols, an African-American, was employed by the University as a campus police officer. He and three other employees sued the University alleging that they were assigned disproportionately to the East St. Louis Campus, denied temporary upgrades, and retaliated against because of their race. They claimed that the Police Chief said that the East St. Louis Campus administration "wanted to see more black faces among its police force." Some time after Nichols raised a complaint about race discrimination, the University placed him on paid administrative leave during an investigation of an incident in which Nichols used force to restrain a mentally unstable woman, placing her on the ground and handcuffing her after a commencement ceremony.

Trial Court Disposition: The district judge granted the University's motion for summary judgment and dismissed the case.

Appellate Court Ruling: The appellate court affirmed the summary dismissal. As to the discrimination claims, the court concluded that the assignment of the officers to the East St. Louis Campus was not a "materially adverse employment action" because there was no evidence that it affected their salary, benefits, or opportunities for future advancement. The plaintiffs' complaint, rather, merely reflected their purely subjective preference for one assignment over another, and that was insufficient to support a discrimination claim. The comment made by the Police Chief was a "stray remark" that was not made as part of the process of making the specific assignments challenged complaint. The retaliation claim also failed because being placed on paid leave during an investigation of workplace conduct is not a materially adverse employment action.

Impact: This is a pragmatic and employer-friendly court decision that supports the general practice of placing employees on paid administrative leave during an investigation that may lead to discipline. This is an acceptable practice even with respect to an employee who has already raised a complaint of discrimination. Although employers have to be concerned about any actions taken against employees who have raised complaints, for fear that these may lead to viable retaliation claims, numerous court decisions like this one show that employers still can, and must, follow their regular and fair practices when managing employees who have raised claims.

Edelman-Reyes v. St. Xavier University (7th Circuit)

Employee cannot prove that the employer's stated reasons for an adverse employment decision are pretextual unless the plaintiff demonstrates that the reasons were invented to cover up an underlying discriminatory animus.

Facts: Plaintiff Edelman-Reyes accepted a faculty position in the School of Education at St. Xavier University in 1998, and she applied for tenure in the fall of 2003. The university's process for evaluating tenure at locations involved several layers. In this instance, the initial committee reviewing Edelman-Reyes' application gave a favorable recommendation, but the School of Education dean recommended against tenure, citing various factors. Ultimately, Edelman-Reyes was not granted tenure. She pursued a grievance, but later filed a lawsuit alleging religious discrimination.

Trial Court Disposition: The district judge granted the university's motion for summary judgment and dismissed the case.

Appellate Court Ruling: The appellate court affirmed the summary dismissal and provided an instructive review of the indirect, burden-shifting burden of proof model applied by courts to evaluate the validity of discrimination claims. In this case, plaintiff's religious discrimination claim was supported by her assertion that a colleague once overheard the dean refer to her as a "liberal union-oriented Jew" and that the dean also complained that she took time off from work to observe Jewish holidays. The court emphasized that these comments were stray remarks which could not overcome the fact that the tenure application process was multi-layered and overseen by a number of decision makers.

Impact: The ruling suggests that an employer can better avoid liability for discrimination if it employs a multi-layer decision-making process that will insulate it from any liability for the alleged discriminatory bias of any particular participant in the process.

Note: This issue seems particularly relevant in light of the fact that the Supreme Court was poised to address the validity of the "cat's paw" theory of proving a discrimination claim, but the case before it was resolved.

Grossman v. South Shore Public School District (7th Circuit)

A Wisconsin public school district did not discriminate against a guidance counselor whom it discharged because she prayed with students and discarded school materials relating to contraceptives.

Facts: The defendant's school district hired Plaintiff Grossman in 2002 to serve as a guidance counselor at the public school in Fort Wayne, Wisconsin. It gave her a three-year employment contract that, if renewed, would guarantee lifetime tenure preventing any termination without just cause. Shortly after beginning her job, and without consulting her superiors, Grossman threw out the school's literature relating to contraceptives and replaced it with pamphlets advocating sexual abstinence. She also, on several occasions, asked students to join her in prayer, which they did. The school district decided not to renew Grossman's contract, and she filed a lawsuit alleging that this decision represented religious discrimination in violation of Title VII.

Trial Court Disposition: The district judge granted summary judgment in favor of the school district and dismissed the case.

Appellate Court Ruling: The appellate court affirmed the summary dismissal. The decision turned on the distinction that plaintiff was let go because of her conduct rather than her beliefs. The case could have been different, the court noted, if Grossman could show that her religious conduct "tipped off" school officials that she held religious beliefs they found repulsive, and if school officials then terminated her employment because of those beliefs. Ultimately, however, the court concluded that there was too little evidence to support such a claim.

Impact: This decision gives employers more leverage when making an adverse employment decision based on an employee's conduct, even if that conduct is motivated by some religious belief of the employee.

Legislative Developments

- Employment Nondiscrimination Act (H.R. 3685)—prohibits employers from discriminating against workers based on their sexual orientation. Passed the House by a vote of 235-184 on November 7 and now has moved to the Senate. Senate Health, Education, Labor and Pensions Committee Chairman, Edward Kennedy (D-MA), vowed to work quickly to move the legislation as soon as possible.

Regulatory Update

- In December 2007, the EEOC issued new guidance entitled Employment Tests and Selection Procedures addressing the Title VII, ADA and ADEA issues implicated by testing and selection procedures. The guidance includes the following statement of Employer Best Practices:

  > Employers should administer tests and other selection procedures without regard to race, color, national origin, sex, religion, age (40 or older), or disability.
  >
  > Employers should ensure that employment tests and other selection procedures are properly validated for the positions and purposes for which they are used. The test or selection procedure must be job-related and its results appropriate for the employer's purpose. While a test vendor's documentation supporting the validity of a test may be helpful, the employer is still responsible for ensuring that its tests are valid under UGESP.
  >
  > If a selection procedure screens out a protected group, the employer should determine whether there is an equally effective alternative selection procedure that has less adverse impact and, if so, adopt the alternative procedure. For example, if the selection procedure is a test, the employer should determine whether another test would predict job performance but not disproportionately exclude the protected group.

To ensure that a test or selection procedure remains predictive of success in a job, employers should keep abreast of changes in job requirements and should update the test specifications or selection procedures accordingly.

Employers should ensure that tests and selection procedures are not adopted casually by managers who know little about these processes. A test or selection procedure can be an effective management tool, but no test or selection procedure should be implemented without an understanding of its effectiveness and limitations for the organization, its appropriateness for a specific job, and whether it can be appropriately administered and scored.

For further background on experiences and challenges encountered by employers, employees, and job seekers in testing, see the testimony from the Commission's meeting on testing, located on the EEOC's public web site at: http://www.eeoc.gov/abouteeoc/meetings/5-16-07/index.html.

For general information on discrimination Title VII, the ADA and the ADEA see EEOC's web site at:

http://www.eeoc.gov/abouteeo/overview_practices.html and

http://www.eeoc.gov/abouteeo/overview_laws.html

- In May, 2007, the EEOC issued new guidance on Unlawful Disparate Treatment of Workers With Care Giving Responsibilities

  HTTP://www.eeoc.gov/policy/docs/caregiving.html

HARASSMENT

Yuknis v. First Student, Inc. (7th Circuit)

Conduct not targeted at the plaintiff did not amount to illegal harassment.

Facts: Plaintiff Yuknis, a female, claimed that she was subjected to a sexually hostile work environment based on conduct that was not directed at her, including her manager's story about a male cat raping a female cat, his reference to a female co-worker as a "fat ass," and his alleged viewing of pornography on his office computer. The only conduct that plaintiff complained about that was allegedly directed at her was that her manager had told her about his teenage daughter seeing him naked, and his request for the plaintiff to join him in his office and shut the door to discuss a product called "Sensual Moments."

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed the case.

Appellate Court Ruling: The appellate court affirmed the summary dismissal. It concluded that the only two comments targeted at the plaintiff fell far short of being actionable harassment, and that other conduct of co-workers, no matter how offensive, does not amount to harassment if the plaintiff is not within the target area of the offending conduct. With respect to the pornography on the manager's office computer, the court stated, "It wasn't any of the plaintiff's business what the manager was looking at on his computer. It is not as if pornographic pictures were exhibited on the walls of the workplace or emailed to the plaintiff." The bottom line is that the more remote or indirect an act claimed to make a hostile work environment, the more attenuated the inference that the worker's working environment was actually made unbearable as the worker claims. The court noted the following philosophy:

> "The American workplace would be a seething cauldron if the workers could with impunity pepper their employer and eventually the EEOC and the Courts with complaints of being offended by remarks and behaviors unrelated to the complainant except for his having overheard, or having heard of, them. The pluralism of our society is mirrored in the workplace, creating endless occasions for offense. Civilized people refrain from words and conduct that offend the people around them, but not all workers are civilized all the time. Title VII is not a code of civility."

Impact: This ruling provides employers an excellent tool in defending against harassment claims based on misconduct that was not directed at the complaining party. More and more often, employees believe that they possess valuable harassment claims for which they should be paid handsomely when in fact those claims are based on conduct not directed at them, or perhaps not even in their presence. This case shows that such claims will not be persuasive in court.

Coolidge v. Consolidated City of Indianapolis and Marion County (7th Circuit)

Indirect harassment is less likely to support a valid claim. Employee who previously successfully sued her employer for sexual harassment by her supervisor failed to establish a new claim of sexual harassment based on "ghastly" pornographic video tapes involving corpses left behind by the supervisor upon his retirement.

Facts: Plaintiff Kelly Coolidge was employed in a crime lab by the Consolidated City of Indianapolis and Marion County. She sued her employer for sexual harassment and proved her claim that the head forensic scientist, David Willoughby, subjected her to coarse propositions and unwelcome fondling. A jury awarded her $300,000 in damages, and that first case settled.

Willoughby retired, but according to Coolidge he continued to sexual harass her. Specifically, she claimed, he left two pornographic videotapes behind in the crime lab's video evidence cabinet for her to discover, which she did discover when she was reorganizing the cabinet. The

tapes were marked "Special" and "X" in Willoughby's handwriting, and one of them was titled "Nekromantik 2" and depicted necrophilia and "other violent and disturbing images." After viewing the tapes briefly to determine their contents, Coolidge reported what she saw to a colleague and took the tapes to her attorney who made copies to preserve the suspected evidence of harassment. She later returned the tapes to the crime lab and reported the incident to a supervisor who questioned Willoughby, who in turn denied any knowledge of the tapes.

Coolidge also applied for Willoughby's head forensic scientist job upon his retirement, but the county instead chose Sammi Mekki for the job. The employer later fired Coolidge when it discovered that she had removed from the crime lab and had taken to her lawyer for photocopying a page from the file for a case in which Mekki fingerprinted the wrong corpse. Prior to that incident, she had already been written up for taking the pornographic video tapes from the crime lab to her attorney and for failing to take a bloodstain sample from evidence obtained during a "rape kit" examination. Ultimately, she sued for sexual harassment and retaliation.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed all claims.

Appellate Court Ruling: The appellate court agreed with the district court and affirmed the summary dismissal. As to the sexual harassment claim, the court decided that the found videos did not create a hostile work environment. Coolidge's encounter with them was brief and not particularly severe, with the Court noting that crime lab employees frequently worked with corpses, so pornography depicting necrophilia might not have the same shocking overtones in that workplace as it would in another setting. Plus, the court noted that it would be onerous to require employers to conduct a thorough search of the premises to make sure that a retiring employee did not leave anything distasteful behind for others to find. As for the retaliatory failure-to promote claim, Coolidge's claim failed because she had only two years experience as a forensic scientist, whereas Mekki had a bachelor's degree and post-graduate certifications and nine years' experience as a forensic scientist.

Impact: This case seems to demonstrate that courts sometimes recognize those persons who attempt to make a career out of raising claims and seeking damage awards. Harassment claims based on conduct of people that no longer work for the employer in the same workplace are certainly more difficult for plaintiffs to prove. This is another case where the indirect nature of the harassment undermined the plaintiff's claim.

EEOC v. V & J Foods, Inc. (7th Circuit)

Harassment policy complaint procedures must be clear and effective. Teenage employee who was fired after she resisted a manager's sexual advances could proceed to trial with claims of sex harassment and retaliation where employer's policy was unclear.

Facts: Samekiea Meriwether, a female, was hired to work part-time at one of the defendant's Burger King restaurants in Milwaukee. Meriwether was only 16 at the time and had never held a paying job before. The store's general manager was Tony Wilkins, a 35-year-old bachelor who

was having sexual relations with several of the female employees. Wilkins made suggestive comments to Meriwether, rubbed up against her, attempted to kiss her, and offered to pay her to go with him to a hotel room. Meriwether resisted the manager's advances and Wilkins became hostile, ultimately firing the teen claiming that she missed an afternoon of work. Meriwether had complained to shift supervisors and an assistant manager about Wilkins' behavior, but received no assistance. The assistant manager gave her a company phone number that he said was to be used for lodging harassment complaints, but Meriwether claimed that she found that it was the wrong number. After being fired, Meriwether filed a charge with the EEOC and ultimately pursued a lawsuit in federal court in Milwaukee.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed the case.

Appellate Court Ruling: The appellate court reversed the summary dismissal, concluding that the evidence was sufficient to establish the sexual harassment and retaliation claims. Specifically, the appellate court rejected the employer's arguments that the teenager acted unreasonably by failing to use company procedure to report the harassment. The court reviewed the employer's policy and concluded that the complaint procedure was confusing and ineffective because it was not tailored to the understanding of the company's teenage workers, and it did not describe a "clear path" for harassment complaints. It concluded that V & J's complaint procedures were "likely to confuse even adult employees" because the employee handbook informed employees that harassment complaints should be directed to the employee's district manager, but workers were not told the identities of their district managers or given instructions on how to call their district managers. Also, employees were directed that even if a complaint involved a store's general manager, as Meriwether's did, the complaint was to be directed through the general manager. The appellate court said "a policy against harassment that includes no assurance that a harassing supervisor can be bypassed in the complaint process is unreasonable as a matter of law." Furthermore, the company's hotline number given to employees was described as the number to be used to comment about the company. The court stated that "a complaint is not well described as a 'comment'," and "an employee might think the hotline number was like a suggestion box."

The court did provide guidance on what it believed to be a more effective complaint procedure. It stated that the employer could post in the employees' break room a notice that an employee who has a complaint about sexual harassment or other misconduct can call a toll-free number specified in the notice, that the number would ring in the office of a human relations employee, and the receptionist would identify the office as the company's human relations department. Ultimately, because an employer seeking to avoid liability for sexual harassment has the burden of proving that it established "effective complaint machinery," in this case V & J failed to make the required showing and the sexual harassment claim was improperly dismissed.

Impact: This case is a reminder that harassment complaint mechanisms have to be clear, easy to use, and effective. Also, they should always allow for a bypass around a harassing supervisor. Employers who do not heed these warnings and implement clear and effective complaint mechanisms that are easy to use will lose their opportunity to defend sexual harassment claims (and probably deserve any liability assessed).

***Jackson v. County of Racine* (7th Circuit)**

Workplace need not be "hellish" to be an illegal hostile environment, but employer that responded properly to harassment complaints saved from liability.

Facts: Plaintiff Jackson, a female, and two other employees of the Racine County Child Support Division claimed that the division manager subjected them to constant sexual harassment consisting of unwelcome touching, sexual jokes, offensive remarks about their bodies, comments about his sexual exploits with his wife, simulated masturbation, and sticking his finger in their ears. One employee said that the manager kissed her on the lips and offered her a promotion if she would engage in sex.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment on the grounds that the alleged misconduct was not sufficiently severe or pervasive to create an actionable hostile environment.

Appellate Court Ruling: The appellate court affirmed the summary dismissal, but on other grounds. The court emphasized that the workplace need not be "hellish" in order to support a viable claim for harassment. Instead, the focus should be on whether a protected group is experiencing abuse in the workplace, on account of their protected characteristic, to the detriment of their job performance or advancement. However, dismissal still was proper because the employer demonstrated that it took reasonable care to prevent or correct any harassing behavior. It had a comprehensive anti-harassment policy posted in every department. And, the manager of the human resources department responded promptly to every complaint that reached her. The investigation was thorough and resulted in a significant disciplinary measure for the harassing manager, and a demotion. Finally, the court also concluded that the employees had unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer. Specifically, the employees waited about four months before complaining to HR about the manager's harassing conduct.

Impact: The affirmative defense articulated by the Supreme Court in the *Faragher* and *Ellerth* cases is alive and well. Employers can defeat harassment claims if they maintain good anti-harassment policies, publish those effectively to the entire workforce, and promptly and effectively investigate and remedy any complaints of workplace harassment.

***Boumehdi v. Plastag Holdings LLC* (7th Circuit)**

Purely sexist comments may support a viable hostile work environment claim, even if the comments are not sexual.

Facts: Plaintiff Boumehdi, a female, worked as a feeder in Plastag's lithographic press department in January 2002 when Ed Vega became the supervisor of the department. Boumehdi had worked in the lithographic department since 1999. In February 2003, Boumehdi complained to Plastag's human resources director about a series of sexist comments made by Vega over the prior 10 months. Although she acknowledged that she could not specifically recall all of the sexist comments, those that she did recall included:

- Telling her many times that women did not belong in the press room and that women think they know everything;
- Telling her, when she was bending over, to remain in that position and that it was perfect
- Saying that women should work in flower shops;
- Telling her that she should wear low-cut blouses and shorter shorts;
- Asking her, when she was pregnant, if she had gotten a breast enlargement over the weekend;
- Asking her, after she had a miscarriage, what business she had getting pregnant at her age;
- Telling her that he did not ask male employees to clean because women were supposed to clean.

After Boumehdi complained, Vega confronted her and said "you're complaining about me aren't you," and warned her that she would be scrubbing the floors and doing the toilets. Boumehdi also received some short paychecks and Vega refused to talk to her about those. Vega then gave her the worst rating of her career, causing her to miss out on her annual raise. Ultimately, Boumehdi left a note for the human resources director saying that her work environment had become intolerable and she resigned some five months after first raising her complaints.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed the case.

Appellate Court Ruling: The appellate court reversed the decision. It concluded that the district court was wrong in its conclusion that Vega's comments were not sufficiently severe or pervasive to be objectively offensive because they were not unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature. In essence, the appellate court determined that a series of sexist comments, even if not sexual in nature, can support a viable claim for sex harassment. The Court emphasized that there is "no magic number" of incidents necessary for a hostile environment claim, but in this instance the evidence showed that Vega made at least 18 sexist comments in less than a year and that similar comments were made "very often." This evidence was sufficient to allow the case to survive the summary judgment stage and proceed to trial.

The court also agreed that the evidence established Boumehdi's claim that she suffered a constructive discharge. Boumehdi had complained to the HR Department numerous times, but the harassing behavior did not stop and the complaints apparently "fell on deaf ears."

The court also agreed that Boumehdi presented enough evidence to proceed to trial on her claim of retaliation. Her negative performance review and paycheck shortages followed closely on the heels of her first complaint to the HR Department and Vega's confrontation of Boumehdi regarding that.

Impact: This case confirms what all good employers already know. Any comments about employees that are derogatory or demeaning in relation to their protected characteristics,

including gender, race, national origin, religion, and others, should be prohibited and may be sufficient to cause the employer to be liable for workplace harassment.

Bernier v. Morningstar Inc. (7th Circuit)

Harasser's claim "I was harassed too" fails. Employee fired after sending an anonymous electronic message to a gay coworker who he claims was sexual harassing him failed to prove a claim of discrimination.

Facts: Plaintiff Todd Bernier was employed as an Equity Analyst by Morningstar. His coworker, Christopher Davis, was openly gay. Davis complained to the Human Resource Department about an anonymous electronic message that he received on the company's computer system stating "Stop staring! The guys on the floor don't like it." Davis reported that he believed the message was threatening and represented anti-gay harassment. The company investigated and the computer network administrator traced the message back to Bernier. When confronted with the message, Bernier denied sending it, but Morningstar disbelieved his denial and decided to terminate his employment. Faced with termination, Bernier changed his story, acknowledged sending the message and then claimed that he sent it because he felt harassed by Davis. Specifically, Bernier claimed that in January, 2004, Davis took "an overt, purposeful and glaring look" at Bernier's penis while they were both standing at the urinals in the men's bathroom at their workplace.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed Bernier's claims of sexual harassment and retaliation.

Appellate Court Ruling: The appellate court affirmed the summary dismissal. The court stated that the mere sending of the cryptic and anonymous email message to a coworker by Bernier did not put the employer on notice that Bernier was complaining about sexual harassment, and therefore did not trigger the employer's obligation to investigate any claim by Bernier. As a result, that message cannot be the "protected activity" that can form the basis of a valid claim of retaliation. Basically, especially given the fact that Bernier initially lied and denied sending the message, the district court and appellate court alike seemed to simply disbelieve his theories.

Impact: Cases like this one are helpful because many times the harassing employees defend their own behavior by claiming that they too were victims of harassment. But unless those employees followed the employer's policies and made good faith reports of the harassment in a timely manner, they probably will not prevail on their theory that the best defense is a good offense.

Hill's Pet Nutrition, Inc. v. Isaacs (US Sup. Ct. cert. denied)

In the same "chain of command," all harassment events can be considered in support of the claim, even those outside of the 300-day statute of limitations period.

Supreme Court declines to review Seventh Circuit decision which held that when assessing the strength of a plaintiff's evidence in support of a hostile environment claim, all events complained

of, including those before as well as after the date 300 days before the filing of a charge, could be considered.

The Seventh Circuit stated "as long as the employee remains within a single chain of command, and the same people control how the employer addresses problems in the workplace, there is only one employment practice, and all events may be considered … to determine whether that employment practice violates Title VII."

RETALIATION

Pantoja v. Am. NTN Bearing Mfg. Corp. (7th Circuit)

Firing one day after it was discovered that plaintiff filed a charge with the EEOC was suspicious enough to allow retaliation and discrimination claim to go to a jury trial.

Facts: Plaintiff Pantoja, who is Hispanic, began working at NTN in 1993 as a machine operator and became a mechanic in 2002. Starting in 2001, Pantoja began expressing concerns to management about possible discrimination, most of it relating to the promotion of a white man who moved up the ranks more quickly than did Pantoja. Shortly after complaining, Pantoja applied for a promotion and was denied. He was given a lower evaluation rating than he had received in the past. He again complained about possible discrimination and asked a new human resources employee to review his file because he feared there were discipline notices in it. HR found notice of a verbal warning that had not been signed by management, as well as other procedurally flawed warnings. Pantoja soon received final warnings for safety violations and low productivity, which he viewed as harassment and which prompted another complaint that he was being treated differently from non-Hispanic employees. In early August 2002, Pantoja was allegedly absent without permission, and a company official wrote in his diary that he learned that Pantoja had filed an EEOC charge. That same day, a decision was allegedly made to terminate Pantoja for the unapproved absence. When company officials met with Pantoja the day after the EEOC charge was uncovered, the officials did not focus on the unapproved absence. Instead they talked generally about a number of failures in his performance. Later, the company's story changed during the EEOC investigation when it asserted that absenteeism was the reason for the discharge decision.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed both the discrimination and retaliation claims, concluding that Pantoja was fired for numerous reasons including negligence, absences and dishonesty.

Appellate Court Ruling: The appellate court disagreed and reversed the dismissal of the retaliation claim. The appellate court said that the company's shifting explanations for the discharge decision could provide the basis for a jury to find that the employer's stated reasons are pretextual. The court also stated that the temporal proximity of the discovery of the EEOC charge and the termination decision was certainly suspicious and, although this was not itself

sufficient to prove retaliation, it would be enough if combined with other evidence such as the employer's shifting reasons for the discharge decision.

Impact: This case is a reminder that employers can be sued for retaliation if adverse employee actions are taken shortly after learning of an employee's protected acts, such as filing a discrimination charge. Furthermore, this case shows the need for careful descriptions of the reasons for a discharge decision, both at the time of discharge, in responding to an EEOC charge, and in defending a lawsuit. Consistency is important.

South v. Illinois EPA (7th Circuit)

Retaliation claim fails where plaintiff cannot identify other employees who were "similarly situated" in "important matters" and were treated more favorably than plaintiff who engaged in protected activity.

Facts: Plaintiff John South was employed as a chemist by a state agency and was fired for insubordination. He sued the employer for retaliation, alleging that he was fired because he filed an employment discrimination claim with the EEOC and testified in a coworker's discrimination case. When South had asked for a medical leave, the agency required a physical evaluation. Arguing that he wanted to keep the irrelevant part of his medical records private, South refused to sign off on the disclosure of his records. The agency fired him for insubordination.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed case.

Appellate Court Ruling: The appellate court agreed and affirmed the summary dismissal. It said that to establish a case of retaliation, South had to show he engaged in statutorily protected activity, he performed his job to his employer's legitimate expectations, he was performing satisfactorily, sustained an adverse employment action, and he was treated less favorably than similarly-situated employees who did not engage in statutory activity. In this case, South had presented evidence that other employees with similar employment responsibilities and the same supervisor were not fired, but the court concluded that this was insufficient, stating that South did not describe how these coworkers were similarly situated "in any other relevant respects." For example, although South had stated that none of these coworkers were required to submit to a health evaluation, he did not submit evidence showing that they had asked for a similar type of medical leave in similar circumstances as he did.

Impact: The high burden of proving who is a "similarly situated" coworker for purposes of a discrimination or retaliation claim analysis remains alive and well. Thus, it is not necessarily true that absolute consistency in treatment of employees, even those who are not similarly situated, is absolutely required by the EEO laws. While smart employers continue to treat similarly situated employees consistently in similar situations, this good practice need not be taken to the extreme where it can impose substantial and unnecessary burdens on the company.

But wait….

Humphries v. CBOCS West, Inc. (7th Circuit)

Plaintiff can assert a claim of retaliation under Section 1981; and court calls for a looser assessment of who is "similarly-situated" for purposes of analyzing a discrimination or retaliation claim.

Facts: Plaintiff Humphries, an African-American male, was an associate manager at a Cracker Barrel restaurant in Bradley, Illinois. Associate managers are supervised by a general manager, who in turn is supervised by a district manager. Humphries had three different general managers during his three-year tenure. His performance during the first two and one-half years was generally rated as excellent. When the second general manager took over, that manager routinely made racially derogatory remarks (such as stating that all African-Americans are "drunk or high on drugs"), and he issued to Humphries five disciplinary reports. Humphries ultimately complained to his manager's supervisor, the district manager, however, the district manager apparently conducted no investigation of Humphries' claims. Later, Humphries complained about a fellow associate manager, who was white, because the colleague fired an African-American food server for allegedly failing to show up for work. Humphries claimed that the firing was discriminatory, but was berated by his new general manager for raising this complaint. Ultimately, the other white associate manager complained that Humphries left the store safe unlocked during the evening (a charge that Humphries disputes) and the general manager fired Humphries. Humphries then brought claims of discrimination and retaliation under both Title VII and Section 1981.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed all of the claims.

Appellate Court Ruling: The appellate court affirmed the summary dismissal of the discrimination claim, but reversed the decision with respect to Humphries' retaliation claim under Section 1981, and it remanded the case for trial on that claim. The appellate court first engaged in a comprehensive and thoughtful analysis of whether retaliation claims could be asserted under Section 1981, and ultimately it concluded that Section 1981 does protect individuals against retaliation.

Then, it turned to the merits of Humphries' retaliation claim and determined that he presented sufficient evidence to survive the summary judgment motion and proceed to a jury trial. In this regard, the appellate court determined that the district judge's view of the degree of similarity needed between the plaintiff and any comparator employee was "too rigid and inflexible." The court held that the similarly-situated requirement "should not be applied mechanically or inflexibly." It acknowledged that some of its prior decisions stated that similarly-situated comparators "must" have the "same supervisors, the same job duties, the same work performance histories, and must have engaged in the same bad conduct as the plaintiff," but it stated that "a more sensitive reading of our cases indicates that we have often stated that the similarly-situated requirement "normally" entails a showing of these similar circumstances along with the absence of any differentiating or mitigating circumstances that would distinguish the conduct of the plaintiff from the comparator. In other words, the court now emphasizes that the similarly-situated inquiry is a flexible one that must consider "all relevant factors, the number of which depends on the context of the case." The court emphasized that the law does not provide

"any magic formula for determining whether someone is similarly situated." Instead, courts have to apply a "common-sense" factual inquiry asking whether there are enough common features between the individuals to make a meaningful comparison. It also instructed that the degree of similarity necessary may vary in accordance with the size of the potential comparator pool, as well as to the extent to which the plaintiff cherry picks would-be comparators.

In this case, the white associate manager was a sufficient comparator because he held the same associate manager position as Humphries, with the same duties, including the responsibility for ensuring that the safe was locked at all times. Like Humphries, the white manager had received past negative performance evaluations, including low ratings on "asset protection" categories, but had not been fired. If anything, the record seemed to show that Humphries generally performed slightly better than the white manager, who was not fired. The court concluded by confirming that a single comparator will due to support a retaliation claim.

Impact: This case has two important consequences. First, unlike the *South* case and numerous other cases from the Seventh Circuit in recent years, this decision shows a much more flexible and employee-friendly approach to the assessment of who is a "similarly-situated" employee for purposes of asserting a discrimination or retaliation claim. In recent years, many cases have been dismissed on the ground that plaintiff compared himself or herself to somebody that wasn't sufficiently similar to be comparable for discrimination purposes. Now, the court backtracks and announces a more flexible analytical approach. Good plaintiffs' attorneys should be able to use this court decision to defeat motions for summary judgment and allow a claim to survive for trial.

Second, the court's conclusion that retaliation claims can in fact be asserted under Section 1981 in addition to Title VII (at least with respect to race discrimination) significantly raises the stakes for retaliation claims related to race. A claim under Section 1981 is much more problematic for an employer than a claim asserted under Title VII because:

1. The statute of limitations on a Section 1981 claim is four years instead of 300 days as on a Title VII claim;

2. A plaintiff need not file a charge with the EEOC before suing in court on a Section 1981 claim; and

3. There are no caps on compensatory and punitive damages on Section 1981 claims like there are on those under Title VII.

Due to these substantially higher stakes, employers should be even more diligent when dealing with issues of race in order to avoid discriminatory or retaliatory conduct.

Kodl v. Board of Education School District 45, Villa Park (7th Circuit)

Generalized complaints of harassment, without a reference to a protected category, are not themselves protected activity that can support a retaliation claim.

Facts: Plaintiff Karen Kodl is employed as a physical education teacher by the defendant school district. In 2004, the employer transferred her to a particular elementary school within the district. Following the transfer, Kodl sued the school district alleging age discrimination (she was 47 years old), sex discrimination and retaliation.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed the case.

Appellate Court Ruling: The appellate court agreed and affirmed the summary dismissal. As to the retaliation claim, it concluded that Kodl had not engaged in any statutorily protected activity that could form the basis of a retaliation claim. Specifically, Kodl's prior grievance under her collective bargaining agreement about a division of a prior job position had nothing to do with age or gender discrimination. Additionally, Kodl had participated in a coworker's written complaint about harassment, but that harassment complaint did not assert claims of age or sex discrimination. Rather, it raised a concern only about harassment "in general." Similarly, Kodl had made an informal complaint about some inappropriate comments made by a coworker that Kodl characterized as "silly." Again, because none of these activities specifically related to any protected characteristics, they were not the types of protected activities that could support a retaliation claim.

Impact: This case reminds us that valid retaliation claims only flow from statutorily protected activity, such as complaints about or participation in complaints about alleged misconduct based upon protected characteristics such as sex, age, race, national origin, religion and others.

Roney v. Illinois Department of Transportation (7th Circuit)

Despite litany of alleged retaliatory acts, plaintiff's retaliation claim failed because none of those acts was an adverse employment action.

Facts: In his first lawsuit against his employer, IDOT, filed in 1995, a jury found that Plaintiff Roney had not been the subject of unlawful retaliation. The appellate court affirmed that ruling in a 1999 decision. While that appeal was pending, Roney filed a second lawsuit against IDOT asserting retaliation for filing the first claim, as well as other allegations. His retaliation claim was based on the following claims that IDOT:

1. Sent him into a dangerous inspection for which he had not been trained;

2. Refused to create a performance plan for him;

3. Refused his request to use a state vehicle;

4. Prevented him from getting a merit raise by ignoring a positive letter of recommendation;

5. Threatened him with termination because he did not file an economic interest statement; and

6. Disciplined him based on fabricated grounds.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed case.

Appellate Court Ruling: The appellate court agreed and affirmed the summary dismissal. It confirmed that a plaintiff asserting retaliation must prove as part of his case that he suffered an adverse action. The court, citing the Supreme Court's decision in the *Burlington Northern* case from 2006, confirmed that the adverse action need not be limited to those which affect the terms and conditions of one's employment, but can include any action "that a reasonable employee would find to be materially adverse such that the employee would be dissuaded from engaging in the protected activity."

The court proceeded to analyze each of Roney's numerous claims of retaliation and concluded that each either did not rise to the level of a materially adverse action, or had no support in the evidentiary record. For example, regarding being assigned to a dangerous inspection job, the evidence showed that the inspection assignments were routine and the court concluded it was unlikely that a reasonable employee would view the inspection assignment as materially adverse. Similarly, his claim about the lack of a performance plan was not materially adverse because the employer had completed four performance evaluations for Roney between 1996 and 1999. The court summarily concluded that the refusal to use a state vehicle would not deter a reasonable employee from making a charge of discrimination, even though it may result in an inconvenience. Roney's other claims were similarly unsupported by sufficient evidence in the record. Moreover, the court analyzed Roney's retaliation claim relating to conduct which occurred after he left IDOT. It confirmed that an employer's truthful report to the police is not an adverse employment action.

Impact: This case is interesting because it is one of the first Seventh Circuit opinions after the Supreme Court's decision last year in the *Burlington Northern* case, which many feared had substantially loosened the standards for proving a retaliation claim. Here, the court thoughtfully analyzed each of very many acts that plaintiff claimed were retaliation, and ultimately found that none of plaintiff's claims was both a materially adverse action and supported by any sufficient evidence.

DISABILITY DISCRIMINATION

Kampmier v. Emeritus Corp. (7th Circuit)

Disability discrimination case dismissed because endometriosis, "while undoubtedly painful," was a disability for some individuals, was not shown with specific evidence to limit plaintiff in her ability to engage in major life activities.

Facts: Plaintiff Shannon Kampmier worked as a nurse at an assisted living facility for six months. Even prior to taking that job, Kampmier was effected by endometriosis, a condition where tissue similar to the lining of a uterus was found elsewhere in the body. She underwent surgery a number times from the age of 16, but did not inform Emeritus of her condition when

she was hired. She missed no time from work and did not require any accommodation during the first five months of her employment. In August 2003, her physician recommended that she remain off work until a hysterectomy could be scheduled. Prompted by her employer, she asked her doctor's office to contact Emeritus to confirm the need for leave. However, the employer did not receive any information from Kampmier's doctor, so they phoned and left word at Kampmier's home with her mother that a medical note was still needed, but the nurse did not return the call. Kampmier proceeded with her scheduled surgery. After she missed several days of work, Emeritus informed her that her failure to appear for work, or call in, was considered to be a resignation from employment. She then complained to Emeritus that during her employment she had been sexually harassed by a lesbian manager who allegedly made offensive comments and had grabbed, hugged and kissed Kampmier, as well as jumped in her lap and rubbed up against her. Kampmier ultimately filed the lawsuit contending that Emeritus discriminated against her based on her disability, it failed to accommodate the effects of her endometriosis, and that the manager's sexual harassment violated Title VII.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed all of the claims.

Appellate Court Ruling: The appellate court reversed the decision with respect to the sexual harassment claim, ruling that Kampmier's claim of unsuccessfully protesting the manager's harassing behavior created a factual dispute that justified sending the claim to trial for decision by the jury. As to the disability discrimination claim, the appellate court affirmed the summary dismissal. The court emphasized that Kampmier did not show that she had a disabling impairment because the evidentiary record demonstrated that she led an active life and cared for herself and her family. Even though endometriosis has been found to be an ADA-protected disability in other cases, the court noted that the assessment of a condition as a disability was a determination to be made on an individualized, case-by-case basis. In this case, plaintiff's own testimony "leaves no doubt that she is able to perform the tasks central to most people's lives, and this dooms her claim that she is suffering from a disability cognizable under ADA."

Impact: This case is an example of a disability discrimination claim that failed because the plaintiff did not prove that the particular impairment limited her major life activities in any significant way.

Williams v. Excel Foundry & Mach., Inc. (7th Circuit)

Inability to stand for as long as one hour or to balance on one leg is not a substantial limitation that can support a claim of disability discrimination.

Facts: Plaintiff Williams, a foundry employee who frequently performed heavy lifting in his job, fell from a tree stand while hunting and fractured his spine in several places. He was off work for two and one-half months while recovering from his injuries until his physician released him for light duty work, with instructions to avoid bending, stooping or lifting more than 20 pounds. He had difficulty standing for more than 30 or 40 minutes, and he needed to take breaks, either seated or lying down. Upon his return to work, Excel assigned Williams to the shipping and receiving department where he was able to take periodic breaks from his duties of

removing items from crates and sorting them. He worked without problem for approximately eight months until he was terminated for starting a false rumor that a disabled employee had been fired. Williams claimed that the rumor was started by another employee and that he was therefore unfairly disciplined. He sued Excel under the ADA, claiming that he was terminated because of his disability.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed the case.

Appellate Court Ruling: The appellate court agreed and affirmed the summary dismissal. The principal issue presented was whether Williams had a disability protected by the ADA and, more specifically, whether his impairment "substantially" limited him in a major life activity. The court noted that this definition requires that a person be "significantly restricted as to the condition, manner or duration under which he can perform a major life activity as compared to the average person." In this case, Williams' difficulty in standing for more than 30 or 40 continuous minutes was not considered by the court to be a significant restriction as to the duration under which the average person could perform the same activity. Similarly, the court concluded that Williams' inability to balance on one leg was not a substantial limitation compared to the average person.

Impact: This is another case in which the court rejected an ADA claim because the plaintiff's impairment, although serious, did not limit him enough to merit protection under the ADA.

Squibb v. Memorial Medical Center (7th Circuit)

Nurse who sustained multiple back injuries that prevented her from working again in patient care nursing did not prove that she was disabled enough to maintain a claim under the ADA for disability discrimination.

Facts: Plaintiff Mary Squibb was employed as a nurse. She sustained three back injuries while lifting patients during the course of her employment, and she was placed on light duty tasks. Ultimately she was terminated for failing to return from leave after she did not accept an alternative position that she had been offered. Squibb sued the hospital employer claiming disability discrimination under the ADA and violations of the Illinois Worker's Compensation Act. She argued that her back injuries left her substantially limited in her ability to work, sleep, care for herself, walk, sit or engage in sexual intercourse, all of which she argued were major life activities. She further claimed that the hospital did not accommodate her and terminated her because of her disability.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed the case.

Appellate Court Ruling: The appellate court agreed and affirmed the summary dismissal. With respect to Squibb's claim that her limitations precluded her from performing all nursing jobs involving patient care, the court decided that she did not show that she was significantly restricted in performing a "class of jobs." A "class of jobs" is the job from which a claimant was

disqualified, as well as all other jobs utilizing similar training, knowledge and skills within the geographical area to which the claimant has reasonable access. In this case, plaintiff admitted that she was qualified for RN positions at certain of the employer's affiliated clinics where lifting was not an essential function. As for plaintiff's claim that her back pain prevented her from sleeping longer than three or four hours a night, the court ruled that these generalized assertions about inability to sleep for substantial periods time, unsupported by additional medical evidence, were insufficient to create a claim that was entitled to proceed to trial. Furthermore, while she cited some activities with which she had difficulty, she admitted she could perform a variety of tasks such as driving, bathing, brushing her teeth and dressing herself, and therefore her limitations did not prevent or severely restrict her in caring for herself. With respect to sitting and walking, plaintiff's claim that she needs breaks every 30 minutes similarly did not show that she was restricted enough to support a disability discrimination claim. Finally, the court declined to decide whether or not sexual relations is a major life activity because the plaintiff did not present sufficient evidence of her limitations in this regard to make the issue material and, there must be some causal connection between the major life activity that is limited and the accommodation sought. In this case, the employer cannot accommodate a disability that restricted plaintiff's ability to engage in sexual relations.

Impact: This case shows that a plaintiff's self-serving testimony about a variety of ways in which her impairment limits her life activities may not be sufficient to establish a disability discrimination claim. Especially with respect to claims for alleged failure to accommodate, the limitations imposed by the particular disability have to be related to the accommodation that is sought by the plaintiff. Simply having a disability in one regard does not entitle an employee to any manner of accommodation.

EEOC v. Schneider International, Inc. (7th Circuit)

The employer did not regard the individual as disabled and violate the ADA by setting a higher safety standard than that required by the Department of Transportation and by terminating the individual's employment because his health condition created a risk.

Facts: Schneider National is the nation's largest trucking firm, employing some 13,000 drivers. In 2002, the company gave the individual driver at issue an award for driving 1,000,000 miles on the job without causing an avoidable accident since he started his job in 1989. However, the driver experienced a fainting spell in October 2002 while off work, and he was diagnosed with neurocardiogenic syncope, a nervous system disorder that can cause a sudden drop in blood pressure, reducing the flow of blood to the brain. The condition is treatable with medication. Two years earlier Schneider had experience with this condition because it was suffered by one of its other drivers. That person had recently been diagnosed with neurocardiogenic syncope, and he drove his truck off a bridge and was killed. Investigators never specified the cause of the accident, but Schneider instituted a "zero tolerance" policy barring any driver with neurocardiogenic syncope from employment. The company fired the individual at issue in this case pursuant to the policy, and it encouraged him to apply for a non-driving job with the company. The supervisor even stated in a letter that "we simply cannot take the risk that while driving, you would lose consciousness." The EEOC filed suit on the driver's behalf alleging that the employer violated the ADA's "regarded as" provision by deeming the driver disabled.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed the case.

Appellate Court Ruling: The appellate court agreed and affirmed the summary dismissal. It drew the distinction between an employer's assessment of the risk from a medical condition, with an employer's chosen level of risk aversion. In this case, the court said that the risk that a person afflicted with this disorder will faint while driving is small (in fact another trucking company hired the driver with full knowledge of his medical history). However, an employer "is entitled to determine how much risk is too great for it to be willing to take." "Two companies might each correctly believe that the risk of a particular type of accident was one in 10,000," but one of them might have reasons for being unwilling to assume the risk, while the other would not. In this case, there simply was no evidence to suggest that Schneider had a mistaken understanding of neurocardiogenic syncope, or that it considered the driver unable to work in a "broad range of jobs." The safety risk posed by this driver's condition was not zero, and the court respected the employer's right to choose to avoid even the small risk.

Impact: This is a fascinating holding that may have broader application for employers. For example, with respect to certain mental health conditions, psychiatrists would say that the risk of workplace violence is small, but not zero. Armed with this case decision, the employer may be able to articulate a compelling explanation for why it is simply unwilling to accept even the small risk of workplace violence presented by an individual with a certain type of mental disability.

Szleszinski v. LIRC (Wis. Sup. Ct.)

Trucking company violated the Wisconsin Fair Employment Act by terminating a driver who was diagnosed with Wilson's Disease when the medical evidence between the driver's physician and the company's physician was in dispute.

Background: A fired truck driver sued for disability discrimination under the Wisconsin Fair Employment Act. The ALJ found in the driver's favor, but LIRC reversed, primarily on the ground that the driver had failed to challenge the medical evaluation of the company's doctor under the Department of Transportation's dispute resolution procedures. The circuit court affirmed LIRC, but the court of appeals reversed. Then the case went to the Wisconsin Supreme Court.

Supreme Court Disposition: In a 4-3 decision, the Supreme Court reinstituted the decision in favor of the driver. It concluded that when a dispute exists between the physician for the driver and the physician for the trucking company regarding the driver's physical and medical qualifications to be an over-the-road truck driver, the employer cannot simply rely on its physician's information. Rather, the employer bears the burden of seeking a determination under the DOT dispute resolution procedure if it intends to take an adverse employment action based on the driver's physical condition and to defend against the disability discrimination claim by offering a qualification-based defense.

Three justices dissented. They noted that this employment dispute involved the safety of the public, and the effect of the majority opinion was to punish a trucking company that discontinued the services of an over-the-road commercial truck driver whom it believed posed an unreasonable risk on the highway.

Impact: This case stands in conflict with the *Schneider National* case and shows the difference between the application of the Wisconsin Fair Employment Act's prohibition on disability discrimination versus the ADA. Here the Wisconsin employer violated the state law even though it had medical evidence that the truck driver's condition posed a risk to the general public. The Wisconsin Supreme Court thought that the individual employment rights of the driver prevented the employer from simply acting on that evidence in the interest of public safety.

SUPREME COURT CASE (THAT ALMOST WAS):

Huber v. Wal-Mart Stores, Inc. (formerly pending in the U.S. Sup. Ct.)

United States Supreme Court recently agreed to accept this case and will likely decide whether the ADA required the employer to assign an employee with a disability to a vacant job that was equivalent to her regular job, irrespective of the merits of the other candidates for the position, or whether the company satisfied its duty to reasonably accommodate the employee by placing her in a lower-paying job. In other words, does the disabled employee get "super priority" to a vacant position because of the reasonable accommodation requirements of the ADA?

Facts: Plaintiff Huber worked as a dry grocery order filer for Wal-Mart in Clarksville, Arkansas. when she sustained a permanent injury to her right arm and hand that left her unable to perform the essential functions of her usual job. She requested a reassignment to a vacant "router" position that she could perform and that was equivalent in pay to the order filler job. Wal-Mart declined Huber's request, citing its policy of hiring the most qualified applicant for every job, but assigned Huber to another vacant position that was lower-paid. Huber sued Wal-Mart under the ADA and the Arkansas Civil Rights Act.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed the case.

Appellate Court Ruling: The appellate court affirmed the summary dismissal. It stated that "the ADA is not an affirmative action statute and does not require an employer to assign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate." In other words, Wal-Mart was not required to reject a superior applicant to give the job to Huber. The court concluded that the maintenance position offered by Wal-Mart to Huber was a reasonable accommodation even though that job paid less than her prior position.

Supreme Court Procedures: Huber filed a petition for Supreme Court review. In it, she argued that the ADA specifically lists "reassignment to a vacant position" as one example of a reasonable accommodation that an ADA-covered employer must provide to an employee with a disability. Huber argues that this provision of the ADA cannot be satisfied merely by permitting a disabled incumbent employee to compete with the rest of the world for a vacant, equivalent position," but rather that the employee should be assigned to that vacant position. The Eighth Circuit Court of Appeals decision in this case stands in conflict with other appellate court decisions, including the Tenth Circuit Court of Appeals decision in *Smith v. Midland Brake, Inc*.

In opposition to the petition, Wal-Mart cited the Supreme Court's decision in *U.S. Airways v. Barnett* to argue that the ADA does not require an employer to assign a disabled worker to a position that another employee was entitled to hold under an employer's bona fide seniority system. In essence, it argued that the Eighth Circuit's decision was fully consistent with decisions in other circuits holding that the ADA does not require an employer to give preferential treatment to disabled employees under legitimate and nondiscriminatory policies. The Supreme Court accepted the case on December 7, 2007 and is expected to issue a decision by or before June 2008.

Impact: Usually, when the Supreme Court accepts a case for review, it is interested in potentially changing the appellate court ruling. It typically does not accept cases where it believes on the front end that the appellate court ruling was correct. This case can have important consequences in terms of determining how much, if any, preferential treatment a disabled employee seeking a reasonable accommodation is entitled to in terms of being assigned to a vacant position, even when the employee is not the most qualified person available for that position.

FMLA

Taylor v. Progress Energy, Inc. (4th Circuit)

Regular release of claims did not effectively release FMLA claims.

Facts: Plaintiff Barbara Taylor, a former employee of Progress Energy, Inc., signed a release of all claims in return for additional compensation upon her termination. She then sued her employer for allegedly violating her FMLA rights.

Appellate Court Ruling: The Fourth Circuit Court of Appeals concluded that the general release signed by Taylor did not waive her right to bring an FMLA suit against the company because, as with claims under the Fair Labor Standards Act, employees can only waive FMLA claims with prior Department of Labor or court approval.

In this case, the Department of Labor argued that its regulation which states "employees cannot waive, nor may employers induce employees to waive, their rights under FMLA," prohibited only agreements between an employer and employee under which the employee prospectively

waives her rights under the FMLA. However, the court rejected that argument and said that there is nothing within the text of the regulation that distinguishes between prospective and retrospective waivers of rights. Here, Congress explicitly granted in the FMLA the "right to bring and action" or claim for violation of a right under FMLA. However, the court concluded that the FMLA regulation follows the FLSA model by prohibiting the waiver of all FMLA rights, unless of course approved by the DOL or the court.

Impact: This decision creates significant problems for employers. In the ordinary circumstances where there is no administrative complaint with the DOL pending, a general release of claims, such as in a severance agreement, may not effectively waive FMLA (like FLSA) claims. The employer should not assume that it has effectively precluded through a general release all possible claims that the employee might raise in a lawsuit against it. This decision of the Fourth Circuit Appeals conflicts with other Court decisions regarding FMLA waivers, but certainly is the governing rule of law in Maryland, North Carolina, South Carolina, Virginia and West Virginia, and may be persuasive to courts in other parts of the country where there is no controlling legal authority yet. Employers should understand as a general matter that even a "comprehensive, full and final complete release of all claims" might not effectively prevent an employee from accepting a severance payment and suing the employer anyway unless that release is approved by the court or the DOL.

Repa v. Roadway Express, Inc. (7th Circuit)

Employer violated the FMLA by requiring absent employee to substitute any accrued paid leave for unpaid medical leave because the employee had already been approved to receive short term disability benefits.

Facts: Plaintiff Alice Repa was employed by Roadway Express. She suffered an injury, not related to work, requiring surgery and a six-week absence from work. Repa was approved to receive during her absence weekly payments of $300 from a short-term disability plan provided by her union's national master agreement covering Roadway employees. Repa also requested her employer to grant her six weeks of leave under the FMLA. Roadway approved the request for leave, but advised Repa that she would be required to substitute any accrued paid leave for any unpaid FMLA leave. Ultimately, when Repa returned to work, Roadway paid Repa for a total of seven days of sick and vacation time. Repa filed a lawsuit under the FMLA, contending that the company violated the law by requiring her to use sick and vacation leave days for an FMLA absence already covered by disability benefits.

Trial Court Disposition: The district judge granted Repa's motion for summary sudgment, and Roadway appealed.

Appellate Court Ruling: The appellate court agreed with the district judge and affirmed the judgment in favor of the employee. The appellate court recognized the FMLA substitution provision that permits an employer to require an employee to substitute "any of the accrued paid vacation leave, personal leave or family leave of the employee" for FMLA granted by the employer (29 U.S.C. § 2612(d)(2)). The court noted that the employer's right to require a substitution is limited by DOL regulations. One of those regulations states that "because the

leave pursuant to a temporary benefit plan is not unpaid, the provision for substitution for paid leave is inapplicable." (29 C.F.R. § 825.207(d)(1)).

Impact: This case demonstrates an often overlooked limitation on the employer's right to require substitution of paid leave for unpaid medical leave – an employer cannot require such substitution if the employee is receiving some replacement pay benefits during the leave. This is perhaps more likely to occur in a unionized workforce, or perhaps where employers provide some paid leave in relation to certain events like the birth of a child.

Stevenson v. Hyre Elec. Co. (7th Circuit)

Court expands employer's duty to explore employee's need for FMLA leave based on employee's bizarre behavior.

Facts: Plaintiff Stevenson was a receptionist in Hyre's purchasing department for eight years. In February 9, 2004, a stray dog climbed through a window of the warehouse where Stevenson worked and approached her in the office area. Stevenson claimed that she immediately felt a headache, a rush of blood to her head, and a tightening of her neck and back. Her supervisor entered the office area and observed that Stevenson was very agitated and was spraying a deodorizer. Stevenson began yelling and cursing at the supervisor, screaming that "fucking animals shouldn't be in the work place." Two hours later, Stevenson told the manager that she was too ill to work and needed to go home. The following morning Stevenson called in sick and went to the hospital for an unrelated medical test. On February 11, she went to the office to speak to the company's president. She began yelling at him, complaining that it was wrong for her to be subjected to "fucking dogs" running by her desk and threatening her. She continued to yell and scream for eight to ten minutes despite the president's attempts to calm her down. Stevenson then told the accounting manager that she could not work, and she left the warehouse.

Later that day, Stevenson filed a complaint with OSHA regarding the stray dog. She went to a hospital emergency room complaining of a headache, insomnia, anxiety and loss of appetite for three days following what she described as an "emotionally stressful incident at work." After her EKG test and CAT scan showed no physical problem, she was diagnosed with "anxiety and stress" and prescribed a medium dose of Ativan. Stevenson called in sick on February 12 and met with representatives from her union, the IBEW, to discuss the dog incident. She called in sick on February 13 and Monday, February 16. When she went to work on February 17, she discovered that the supervisor had moved the contents of her desk to another room. She became agitated, was unable to complete much work, and called the police, saying she was being harassed. She placed a report about her emergency visit on the accounting manager's desk and left work at about 10:00 a.m., telling the manager that she did not feel well.

The company president then gave the manager permission to change the locks on the office doors, and send Stevenson a letter by overnight mail stating that she had used up her paid leave, and that she would need to provide a medical certification from her doctor by February 24 in order to qualify for FMLA leave. The letter warned that she would be fired for unexcused absences if she did not submit an FMLA certification. Stevenson came back to work on February 24 and discovered that the locks had been changed. Her doctor's office had faxed to

the company a note excusing her work absences from February 9 through February 20. However, the company told Stevenson that it would not accept the note as a proper FMLA certification and gave her a box containing her personal belongings. Stevenson's doctor then provided a second note excusing her work absences through February 24. In a March 9 letter, the company told Stevenson she was terminated effective February 25.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed the case.

Appellate Court Ruling: The appellate court disagreed, reversed the summary judgment and remanded the case to district court for trial on Stevenson's FMLA claim. The court referenced an earlier decision (*Burn v. Avon Products* (7th Cir. 2003)), and emphasized that an employee's "inability to communicate his illness to his employer or clear abnormalities in the employee's behavior may constitute constructive notice of a serious health condition." In this case, the appellate court concluded that a jury "could find that [Stevenson's] behavior was so bizarre that it amounted to constructive notice of the need for leave." In particular, "lengthy encounters of yelling and swearing at one's superiors is so severe that a company locks out an employee with a previously unblemished record for safety concerns, coupled with that employee's calling the police because her belongings had been moved to another desk, are undeniably unusual and could be viewed by a trier of fact as unusual enough to give Hyre notice of a serious health condition."

Impact: This case ruling is a problem for employers. The more unusual or goofy an employee acts, the greater chance that a court will rule that an employer was on "constructive notice" that the employee was entitled to FMLA leave. While the court did not conclude that Stevenson should win the case, it decided that there was at least a triable issue about whether she suffered from a serious health condition that precluded summary judgment and required a jury trial. This case reminds employers to be particularly careful in termination decisions for absenteeism when there remain unanswered questions about the reasons for the absences, and the employee's behavior has been unusual.

Hendricks v. Compass Group USA, Inc. (7th Circuit)

FMLA does not require any particular wage rate for an employee on medical leave of absence who is offered a "light duty" assignment.

Facts: Plaintiff Hendricks suffered a work injury to her shoulder that required surgery. Subsequently, under her worker's compensation program, plaintiff was returned to work on "light duty." The employer paid Hendricks $3.23 per hour less while she performed the light duty assignment, and she was not happy about that. She sued her employer and argued that because she substituted light-duty work in lieu of traditional FMLA leave, she was entitled to her full salary because the FMLA guarantees placement in an equivalent position upon the employee's return from FMLA leave.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed the case.

Appellate Court Ruling: The appellate court agreed with the summary dismissal. It stated that "there is no such thing as 'FMLA light duty' whether pursuant to the statutes or their corresponding regulations." The FMLA regulations that do acknowledge light duty work under worker's compensation programs do not address the rate of pay an employee is to receive while on such light duty assignments, recognizing that this is a matter covered by worker's compensation and not by the FMLA. The court acknowledged that the FMLA requires an employee to be returned to the same or equivalent position and pay rate upon return from FMLA leave, but pragmatically acknowledged that the requirement only applies if the employee is able physically to perform the functions and duties of that position. In this case, Hendricks was not yet able physically to perform the duties of her prior position as a utility driver, and thus she was not entitled to return to the same or equivalent position at the same rate of pay.

Impact: This case confirms what most employers already assumed – that an employee returning from an FMLA leave, but to a light duty position, need not be paid at the higher rate of pay of the employee's prior position. The FMLA's obligation to place a returning employee in the same or equivalent position does not apply until the employee is physically able to perform the functions of that position.

Downey v. Strain (5th Circuit)

Appellate Court creates exception to *Ragsdale:* Employee wins FMLA case where employer failed to tell employee that time was counted as FMLA because employee was prejudiced by the lack of notice.

Facts: Plaintiff Downey worked for the sheriff's office in Tammany Parish, Louisiana. She sustained various injuries and was absent for several distinct periods of time within the same one-year period. The first time the employee was out, for 53 days, the employer gave her written notice that it was counting the leave toward FMLA. This left the employee with seven more days of FMLA leave in that one-year leave period. The employee then went out again for another surgery during the same one-year period, and the employer counted the leave toward her FMLA, though it did not inform her that it was counting the leave as FMLA. Because the additional leave period exhausted all of her FMLA time, when the employee returned to work she was assigned to a different department. In her new position, she did not have some of the fringe benefits she enjoyed in her previous position, like overtime pay and use of a car. She sued her employer for failing to return her to her same position as required by the FMLA.

Appellate Court Ruling: The Fifth Circuit Court of Appeals ruled that the employer failed to properly notify the employee that her second absence was being counted as FMLA leave. It acknowledged the Supreme Court decision from 2002 (*Ragsdale*) but concluded that where an employee can show that she was prejudiced by not receiving notice from the employer that her leave time was being counted as FMLA, then she can state a claim for interference with her FMLA rights. In this case, Downey argued that had she known the second leave would be counted as FMLA, and it would exhaust her FMLA entitlement and would not protect her right to return to the same job, she could have postponed the second surgery until a time when she had more FMLA leave available to her.

Impact: This case creates an exception to the very employer-friendly ruling by the Supreme Court in the *Ragsdale* case. As a practical matter, employers should do the following:

7. Employees should be still given the FMLA notice once the company learns an employee is going on a leave that qualifies for FMLA. Give the notice as soon as possible and count the time as FMLA.

8. Be sure the Department of Labor FMLA poster is posted and that your employee handbook includes information of employee rights and obligations under the FMLA.

9. Remember that this case demonstrates a limitation on the ability of the employer to count leave as FMLA in cases in which the company has failed to give timely notice – that is when an employee can somehow show that he or she was prejudiced by the company's failure to give notice. For example, an employee might claim that he or she would have worked rather than staying out on leave if he or she knew that the leave was being counted as FMLA leave.

LEGISLATIVE DEVELOPMENT

Congress votes to expand FMLA for the first time.

Summary: In December 2007, Congress signed off on an expansion of the FMLA that would give protected leave to workers who care for wounded soldiers and to family members of those called to active duty from the Reserves. Assuming President Bush signs the bill into law as is expected, the provision in HR1585 would represent the first expansion of the FMLA since its 1993 enactment.

Under the family leave aspects of the pending legislation, service members, children, parents, spouses and next of kin of members of the military Reserves and the National Guard who are called to active duty will get 12 weeks of job-protected unpaid leave from their jobs. They will also receive up to 26 weeks of protected leave to care for wounded relatives who have returned from service.

WAGES AND HOURS (FLSA)

***Long Island Care at Home v. Coke* (US Sup. Ct.)**

One million low-paid home care workers across the country are not entitled to overtime pay under the FLSA because this work falls within the DOL's regulation exempting "companionship services" from the overtime requirements, even though the workers are employed by a third party and not by the recipient of the services.

Facts: Evelyn Coke, a 73-year-old home care attendant employed by Long Island Care at Home, sued her employer under the FLSA alleging that she was paid less than the minimum wage and given no overtime compensation for her 20 years of service.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed the case.

Appellate Court Ruling: The Second Circuit Court of Appeals initially ruled in Coke's favor and reversed the dismissal. However, in 2006 the Supreme Court vacated that Appellate ruling and ordered the Second Circuit to reconsider the case in light of the Department of Labor's position that its regulation exempting "companionship services" from the FLSA requirements was binding on home healthcare workers not employed by the "client," but by a third party.

In August 2006, the appeals court upheld its earlier finding, rejecting the Department of Labor's interpretation as unpersuasive and ruling that the regulation was merely an interpretive, but not a legislative (and therefore binding), rule. The court stated "courts need not defer to an agency's interpretations of its own regulations when those regulations are ambiguous."

Supreme Court Decision: The Supreme Court overturned the appellate court for a second time, concluding that the DOL's interpretation fell within the principle that an agency's interpretations of its own regulations were binding unless "plainly erroneous or inconsistent with" those regulations. At the oral argument, Justice Breyer expressed concern about the consequences of any contrary ruling, telling Coke's lawyer "if you win this case it seems to me suddenly there will be millions people who will be unable to [afford home care] and hence millions of sick people who will move to institutions."

Impact: The broader point is that the Court respected and deferred to the Department of Labor's broad authority to dictate the meaning of FLSA regulations. Although the Department of Labor's leadership may be more employer friendly under the current administration, that certainly could change after the November election, and a newly-appointed DOL leadership team might issue other interpretive guidance that, under this decision, would presumably be respected by the courts as legally binding.

Yi v. Sterling Collision Centers, Inc. (7th Circuit)

Broad view of commission-based pay saves employer from overtime claim.

Facts: Plaintiff Yi, an auto mechanic employed by the defendant, sued for overtime pay under the Fair Labor Standards Act. The employer paid Yi and its other auto mechanics based on a formula related to job performance and hours worked.

Trial Court Disposition: The district judge ruled in favor of the employer and dismissed the FLSA claim for overtime pay.

Appellate Court Ruling: The appellate court agreed and affirmed the dismissal. It analyzed the compensation scheme and determined that it was essentially a commission because "the faster the team works, the more it earns per number of hours." The court differentiated between

commissions and piecework – while commissions are exempt under the FLSA, piecework is not. The difference is that pieceworkers are compensated based on each product produced, and individual pieceworkers can make as many products as they want to without being affected by sales. On the other hand, where the worker is paid based upon the sales, these are dependent on buyer's decisions and are unpredictable. Although the employer's formula was not actually called a commission by the employer, the Seventh Circuit explained that the FLSA does not define commission but only uses examples to illustrate a commission. The court determined that "the essence of commission is that it bases compensation on sales, for example a percentage of a sales price, as when a real estate broker receives as his compensation a percentage of the price at which the property he brokers is sold." In this case, even though the mechanics used their book hours as a factor in divvying up the commission, it did not alter the character of the compensation which was in fact dependent upon the sale and the sale price.

Impact: This case provides employers with a creative strategy that might be applicable in certain circumstances in order to avoid an hourly pay scheme which would require overtime pay. In this case, it certainly helped the employer that its compensation scheme was standard in its industry and had been for many years, but the reasoning of the decision, which seemed to apply even more broadly than just circumstances where a commission-type compensation plan, is the industry standard.

Reyes v. Remington Hybrid Seed Co. (7th Circuit)

Employer is responsible for FLSA violations that occurred at its workplace even though the workers were hired by a labor contractor.

Facts: Defendant Remington engaged contractor Braulao Zarate to supply farm workers. Zarate recruited members of the Reyes and Garcia families in Texas to de-tassel and remove unwanted corn plants in Remington's fields in Indiana. Zarate apparently told workers they could expect to work between six and eight weeks – or between 72 and 84 hours a week – as well as work in Remington's plant sheds. He promised free housing in Indiana during that time. The families accepted the offer and traveled from Texas to Indiana, but they discovered Zarate had only dilapidated and overcrowded housing available, and that they would only have about 20 hours of work per week for five weeks. The workers filed suit against Zarate and obtained a default judgment of $100,000. The workers then tried to collect on that judgment from Remington.

Trial Court Disposition: The district judge granted the defendant's motion for summary judgment and dismissed the case.

Appellate Court Ruling: The appellate court reversed the summary dismissal, concluding that the trial court's analysis regarding whether Remington was a joint employer was improper. Specifically, the trial court had analyzed the eight factors for determining who is an employer pursuant to regulation (29 C.F.R. § 500.20(h)(5)(iv)(A)), and had it that the claim must fail because five of the factors favored the defendant, while three factors favored the plaintiff-employees. The appellate court said that the 5-3 score was more appropriate for baseball and that the significance of the various factors had to be weighted in the analysis.

The court analyzed the relationship between Remington and Zarate, noting that Zarate was hired by Remington to provide the workers, and that Zarate had no business independent of his work for Remington. Remington had advanced the money that Zarate needed to secure workers' compensation insurance, and Remington advanced funds so that Zarate could pay the crew. In addition, Remington supplied the tools and portable toilets. The court concluded that Remington would be liable as a joint employer for what occurred once the workers got to Indiana, but the court stopped short of finding Remington liable for any guarantee Zarate may have made to the workers about the amount of work available and the kind of housing they would receive.

Impact: Employers must not believe that they can simply avoid all FLSA liabilities by hiring a third party to hire and pay their workers. The co-employer doctrine requires a fairly nuanced analysis of the realities of situation and provides courts leeway to find that the company for whom the workers are providing services is at least a joint-employer with the third party who technically hired and pays the workers.

AGE DISCRIMINATION (ADEA)

REGULATORY UPDATE

More than four years after announcing a proposed rule to do so, on December 26, 2007, the EEOC issued a final rule creating an exemption to the ADEA regulations that permits employer-sponsored retiree health benefits to be altered, reduced, or eliminated when the recipient becomes eligible for Medicare or a comparable state health benefits program.

Impact: This rule means that employers will not face ADEA consequences if they reduce or eliminate health benefits of retirees who become eligible for Medicare or comparable state-sponsored health benefits. This also applies to coverage for spouses and dependents of retirees.

This ruling concerns only the ADEA and does not affect any non-ADEA obligation that employers may have to provide health benefits under any other law (such as ERISA) or other obligations (such as a collective bargaining agreement). The ruling applies only to retiree health benefits and no other retiree benefits such as life insurance or disability programs.

Under this final ruling, employers and labor organizations may, among other things:

- Offer "bridge" plans providing retiree health coverage only to retirees under the age of 65 who are not yet eligible for Medicare or a state equivalent;

- Offer "wrap around" plans supplementing health benefits to Medicare-eligible retirees (retirees age 65 and older) without having to demonstrate that the coverage is identical to that of non-Medicare eligible retirees; and

- Take advantage or tax-free subsidies for certain employer-provided retiree health benefits created by the Medicare Prescription Drug, Improvement and Modernization Act without

comparing whether the benefits provided to Medicare-eligible retirees are identical to those offered to early retirees.

EEOC revises age discrimination rules to allow employers to favor older workers over younger ones. (29 C.F.R. Part 1625)

This regulatory revision simply harmonized the EEOC rules with the 2004 Supreme Court decision, *General Dynamics Land Systems, Inc. v. Cline*, which established that the ADEA only prohibits discrimination against older workers and does not expressly prevent discrimination against younger workers. In other words, there is no claim for "reverse age discrimination."

Impact: Employers can discriminate against younger workers in favor of older workers based on age. This is true even if the younger individual is at least 40 years old and therefore "protected" from age discrimination. Note, this rule clarification interprets only federal law, not state or local law. States and local governments remain free to offer greater legal protection to younger employees than that provided by the ADEA.

Hemsworth v. Quotesmith.com Inc. (7th Circuit)

Statistical proof must show that it compares apples to other apples in order to support an age discrimination claim.

Facts: Quotesmith.com hired Plaintiff Hemsworth as Senior Vice President of Marketing at age 53 with a two-year contract. Before Hemsworth was hired, the company's president and CEO handled marketing. When Hemsworth's contract expired, the employer did not renew it, explaining that it let Hemsworth go because it was experiencing financial losses and had to cut costs significantly by firing a large number of employees and reducing operations. Hemsworth supported his age discrimination claim with the argument that 84% of the employees laid off by the company in 2001 were over the age of 40.

Trial Court Disposition: The district judge granted the employer's motion for summary judgment and dismissed the case.

Appellate Court Ruling: The appellate court agreed and affirmed the summary dismissal. With respect to Hemsworth's statistical evidence, the court ruled that in order to be relevant, the statistics must look at the same part of the company where the plaintiff worked and include employees who were similarly-situated to the plaintiff with respect to performance, qualifications and conduct, and the treatment of other employees must have occurred during the same RIF as when the plaintiff was discharged. In other words, statistical evidence is only relevant "when the plaintiff faithfully compares one apple to another without being clouded by thoughts of apple pie ala mode or Apple iPods." In this case, Hemsworth's statistical lacked the necessary context needed for a meaningful comparison, and therefore, was rejected by the Court.

Impact: This case reflects a thoughtful analytical approach to statistical evidence by the court. Very often plaintiffs, especially those in age discrimination cases, offer crude statistical analysis

(sometimes simple mathematical calculations taken from the OWBPA information supplied with their separation agreement and release). The court will require much more evidence establishing the context of the other workers being compared before determining that the proffered statistical evidence has any relevance. Simply saying that most of an employers terminations were of employees in the age-protected class does not establish any proof of age bias.

EMPLOYEE BENEFITS (ERISA)

Beck v. Pace International Union (US Sup. Ct.)

ERISA does not require employer to consider merging its plan with the union's plan as a method of terminating a retiree defined pension benefit plan because the decision whether to terminate an ERISA plan is a "settlor function" immune from ERISA's fiduciary obligation.

Facts: Crown Paper and its parent company operated a defined benefit plan for their employees. After Crown filed for bankruptcy, it sought to terminate the plan and focused on purchasing annuities as a method of termination. Its employees' union, however, urged Crown to merge its plan with the union's plan. Crown rejected that as a consideration, and it proceeded to purchase annuities because that transaction allowed it to retain a projected $5,000,000 reversion from the overfunded plan for its creditors, and because the PBGC agreed to withdraw its proofs of claim in the bankruptcy proceedings if Crown purchased the annuities. The union and two plan participants filed a claim against Crown in the bankruptcy proceeding, arguing that Crown breached its fiduciary duty under ERISA by not giving full consideration to the merger proposal.

Supreme Court Decision: The Supreme Court reversed an appellate court ruling against Crown (that it breached its fiduciary duty by not seriously considering the merger proposal). The Supreme Court decided that the employer's decision whether to terminate an ERISA plan is not a fiduciary function as plan administrator or otherwise, but instead is a "settlor function" that is immune from ERISA's fiduciary obligations.

Impact: Because the determination of whether to hold on to an ongoing plan or terminate the plan through proper channels is not a fiduciary decision, employers have greater flexibility and leeway in the making of those decisions.

Nelson v. Hodowall (7th Circuit)

No breach of fiduciary duty by failure to tell employees directly that the officers and directors decided to sell their stock in the company just prior to a corporate merger.

Facts: Utility company IPALCO maintained a 401(k) retirement plan. IPALCO was sold to AES Corp. in 2001, and at the time held $228,000,000 in assets in the 401(k) plan. Approximately $145,000,000, or 64% of the plan assets, were invested in IPALCO stock that

was exchanged for AES stock in the purchase transaction. When AES' stock value declined in the months following its acquisition of IPALCO, the IPALCO plan participants saw a dramatic drop in the value of their plan accounts. Eventually AES' stock lost 90% of its value. The participants sued IPALCO and its former officers and directors alleging that they breached their ERISA fiduciary duties by failing to remove IPALCO and then AES stock as a 401(k) plan investment option. The participants also alleged that the defendants breached their duties by failing to disclose to participants such information as the individual officers and directors personal sales of their IPALCO stock around the time of the transaction with AES.

Trial Court Disposition: After a bench trial, the district judge dismissed all claims against the officers and directors. The district court found that while many of the IPALCO officers and directors took steps to sell their own IPALCO stock "as soon as they could," they did so because many of them were losing their jobs at IPALCO as a result of AES' acquisition. The court concluded that they did not breach their fiduciary duties when they approved the stock-for-stock of IPALCO to AES.

Appellate Court Ruling: The appellate court agreed and affirmed the decision in favor of the defendants. The court rejected the employees' argument that the officers and directors had a fiduciary obligation to tell the plan participants that the fiduciaries were selling their IPALCO stock. The court rejected the notion that an ERISA fiduciary has a duty to disclose directly to a pension plan participant even non-material information that might affect the participants' investment decisions. The court was impressed that IPALCO had hired an investment advisor for the participants, and this advisor was aware of the defendants' sale of their IPALCO stock as a result of the sales being reported in filings with the Securities and Exchange Commission.

Impact: As ERISA claims proliferate, this is an employer-friendly decision which constrains the fiduciary duty to disclose in relation to 401(k) plans.

Central Illinois Carpenters Health & Welfare Trust Fund v. S & S Fashion Floors, Inc. (Central District Illinois)

Moneys withheld from employee paychecks that were to be contributed to pension fund qualify as "plan assets" under ERISA, even before being forwarded to the benefit funds, and therefore, the employer operated as a "functional fiduciary" and violated her fiduciary duties when she decided to pay other creditors with those moneys before paying the benefit funds.

Impact: Even before employee contributions are submitted to the benefit plans, they may have the attributes of plan assets and impose fiduciary obligations on those responsible for handling and forwarding those moneys.

Pending Supreme Court Decision:

LaRue v. Dewolff, Boberg & Associates, Inc.

The Supreme Court will decide whether or not a 401(k) plan participant can sue under ERISA to recover losses to an individual's account resulting from a breach of fiduciary duty. It will also determine whether a provision of ERISA which allows a participant to sue for "equitable relief" for ERISA violations, permits a plaintiff to seek monetary relief as compensation for losses stemming from a breach of fiduciary duty.

***Impact*:** This case, and the determination of what ERISA remedies plan participants can sue for, has the potential to have a huge impact on the scope of ERISA litigation in the coming years.

NATIONAL LABOR RELATIONS ACT

Oil Capital Sheet Metal, Inc. (NLRB)

NLRB announces a new (and employer-friendly) method of determining duration of back pay "salting" cases.

Background: Prior to this decision, the remedy for an unlawful discharge or a refusal to hire (based on activities protected by the NLRA) included the employer's payment of back pay to the employee for the period from the unlawful act until the employer made a valid offer of reinstatement (or instatement, in the case of an unlawful refusal to hire). Basically, the board applied a presumption that, if hired, the "salt" would have stayed on the job for an indefinite period. Even if the job was a construction job, the board applied a further presumption that the employer would have transferred the employee to other job sites when the job from which he was discharged (or for which he should have been hired) came to an end.

Board Ruling: In a 3-2 decision, the Board majority declined to continue to apply those presumptions. The board reasoned that they are inconsistent with the reality of salting. The reality is that when the salt is hired, he or she will typically stay on the job only until successful in the union organizational effort or reach a point where such efforts are deemed to be unsuccessful. In either situation, the union typically then sends the salt to seek to organize the employees of another non-union employer.

Impact: This decision reflects a pro-business bias. In fact, the issue of whether the board should reverse its prior holdings was not even raised or sought by the parties in the case. The board simply did this on its own initiative, saying that it was its responsibility to ensure that its remedies are compensatory and not punitive.

The board has recognized that for determining back pay liability, there is a difference between a union organizer, who does not in reality intend to work in the job indefinitely, and a regular job

applicant. This decision will reduce employers' potential liabilities in instances where they refuse to hire salts.

Toering Electric Co. and Local Union No. 275, IBEW (NLRB)

NLRB has raised the bar for filing hiring discrimination lawsuits in order to prevent job applicants who are not generally interested in seeking a position with the company from bringing unfair labor practice allegations if they do not gain employment.

Board Ruling: By a slim 3-2 majority, the Board concluded that a job applicant must actually be trying to seek employment with a company in order to be protected against hiring discrimination based on union affiliation or activity. The Board Chair wrote, "One cannot be denied what one does not genuinely seek," and said that the new requirement will "prevent those who are not in any genuine sense real applicants for employment from being treated by the board as if they were." Essentially, this holding places the burden of proving whether an individual applied for employment and was generally interested in getting a job on the General Council who presents the case against the employer, not on the employer.

Impact: This case is a very pro-business development that makes it less likely that an employer will be liable for refusing to hire a union salt.

Guard Publishing d/b/a Register Guard (NLRB)

A business can prohibit its workers from using the office email system to spread information about union activities.

Facts: In 1996, the employer issued a policy stating that its communication systems and equipment "are not be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." The company was aware that employees use the email system to send and receive personal messages including birth announcements, party invitations, offers of sports tickets, and requests for services such as dog walking. There was no evidence, however, that employees had used the email system "to solicit support for or participation in any outside cause or organization other than the United Way, for which the employer conducted a periodic charitable campaign."

The Eugene Newspaper Guild represents a unit of approximately 150 of the employer's workers. The parties began bargaining in January 1999 for a new contract to replace the new set to expire at the end of April 1999. They had not reached agreement during the relevant time period involved in the case. At issue were three emails sent in 2000 by Suzi Prozanski, a unit employee who was also the union president. The company then proposed in bargaining a new rule that would prohibit the use of the email system for union business. The union refused to bargain over that proposal and filed an unfair labor practice charge alleging that making the proposal violated Section 8(A)(5).

Board Ruling: The board noted that the issue was one of first impression – whether employees have a specific right under the Act to use an employer's email system for Section 7 activity. The

court adopted prior Seventh Circuit case law to determine the question of whether an employer discriminatorily enforced its email policy. The question is whether the employer treated all communications "of a similar character" the same, and therefore would not be guilty of discriminatory enforcement simply because it permitted personal communications differently than communications on behalf of organizations, including unions. The court concluded that the law "confers no additional right on employees to use the employer's equipment for Section 7 purposes regardless of whether the employees are authorized to use that equipment for work purposes."

Impact: This is another employer-friendly board decision that gives unionized employers more leeway in regulating the use of its email system for union activities.

MISCELLANEOUS

Employee Privacy Rights

United States v. Jeffrey Brian Ziegler (9th Circuit)

Employees may expect some right to privacy in their offices and on their computers, but employers ultimately have the power to monitor those workplace areas if their policy allows them to do so.

Facts: Jeffrey Ziegler was employed as the Director of Operations at Frontline Processing Corp. when, in 2001, the company alerted the FBI that Ziegler had visited child pornography websites on his office computer. (The company's internet technology department constantly monitored employees' internet searches and activities through its firewall.) Around 10 o'clock p.m. one night, two company managers got a key from the CFO, entered Ziegler's private office, opened his computer and made two copies of the hard drive. Ziegler was later in indicted in August 2004 for receiving and possessing child pornography and for receiving obscene material. He filed a pre-trial motion arguing that without a warrant, the FBI had violated his Fourth Amendment rights by prompting company executives to invade his privacy. His argument that he had a legitimate expectation of privacy was supported by the evidence that his computer was password protected, was locked, and was maintained inside a locked office, but his claim was weakened by the company's open monitoring rules and the fact that the employer owned both the space and the computer. The court decided, "we are also convinced that [the employer] could give valid consent to a search of the contents of the hard drive of Ziegler's workplace computer because the computer is the type of workplace property that remains within the control of the employer [even if the employee has placed some personal items in it.'"

Impact: If this invasive search resulted in the permissible use of evidence in a criminal proceeding, it provides even more leeway for employers in relation to employment law decisions outside of the criminal law arena. As always though, a good policy stating that employees should not have any expectation of privacy in their work computers is a best practice.

WARN Act

Phason v. Meridian Rail Corporation (7th Circuit)

Court applies a literal interpretation of the WARN Act to conclude that terminating employees before a sale of the business can lead to WARN Act liability if there is any gap between the termination and the hiring of those employees by the buyer of the assets.

Facts: On December 31, 2003, Meridian Rail Corp. notified its staff that it was closing its Chicago Heights, Illinois operations, effective immediately, and invited them to apply for jobs at NAE Nortrak, Inc., which had agreed to buy the assets of Meridian. Nortrak issued this invitation in mid-December, when Nortrak and Meridian agreed to the deal. Due to a delay, however, the transaction did not close until January 8, 2004, after Meridian had terminated its employees. Plaintiff, Phason, on behalf of himself and other employees of Meridian, filed a class action lawsuit under the Warn Act (WARN).

Trial Court Disposition: The district judge concluded that the WARN Act did not apply because Nortrak hired all but 40 to 45 of the displaced workers. The plaintiffs argued that there was a "plant closing" which resulted in an employment loss of more than 50 employees.

Appellate Court Ruling: The appellate court disagreed and instead applied a more literal interpretation of the statute. It concluded that an "employment termination" occurred on December 31, 2003, and on that date a statutory "plant closing" occurred. Because the sale did not take place until January 8, 2004, more than a week after Meridian severed its employees, none of those employees severed by Meridian were considered to be employees of Nortrak on the date of the transaction. Accordingly, there was an "employment loss" and WARN Act notice should have been provided.

Impact: Timing is important. Sellers should retain their employees at least until the transaction is closed, or they will risk substantial penalties and damages implicated by the WARN Act if there is any gap in employment.

Independent Contractors: FedEx Corp.

Summary: FedEx suffered a $319 million fine imposed by the IRS because the company's delivery driver should have been classified as employees for federal employment tax purposes, rather than independent contractors. According to the International Brotherhood of Teamsters, "it's game over for FedEx's independent contractor scam."

Impact: This matter demonstrates the potentially large stakes at issue when an employer classifies individuals as independent contractors instead of employees. The IRS, among others, will be interested in investigating and challenging that classification.

Employer Trade Secrets

American Family Mutual Insurance Co. v. Roth (7th Circuit)

Customer list of insurance company met the definition of a trade secret under Wisconsin law because the names in the insurer's database were filtered for their suitability to buy insurance, resulting in "a defined, manageable and economically viable universe of uniquely receptive potential customers."

In other words, American Family's customer list deserved protection under the trade secret statute because it was not merely a list of potential customers or a Christmas card list, but rather as a sophisticated database that resulted from years of effort by the company.

Impact: Especially because Wisconsin law is so unfavorable for employers in terms of enforcement of post-employment restrictions like non-compete agreements, this is a welcome decision for employers because it extends the protections of the Wisconsin Trade Secrets statute to a customer list where that list reflects the employer's work product and is not merely a Christmas card list.

Fair Credit Reporting Act

Safeco Ins. Co. of America v. Burr (U.S. Supreme Court)

The Supreme Court lowers the liability standard by concluding that a "willful failure" includes reckless conduct and not just knowing intentional efforts to violate the FCRA.

Impact: This case serves as a reminder to employers that they can have liability under the Fair Credit Reporting Act if they rely on third-party reports to make employment decisions without providing the proper notices to the individuals involved.

The U.S. Equal Employment Opportunity Commission

Employment Tests and Selection Procedures

Employers often use tests and other selection procedures to screen applicants for hire and employees for promotion. There are many different types of tests and selection procedures, including cognitive tests, personality tests, medical examinations, credit checks, and criminal background checks.

The use of tests and other selection procedures can be a very effective means of determining which applicants or employees are most qualified for a particular job. However, use of these tools can violate the federal anti-discrimination laws if an employer intentionally uses them to discriminate based on race, color, sex, national origin, religion, disability, or age (40 or older). Use of tests and other selection procedures can also violate the federal anti-discrimination laws if they disproportionately exclude people in a particular group by race, sex, or another covered basis, unless the employer can justify the test or procedure under the law.

On May 16, 2007, the EEOC held a public meeting on Employment Testing and Screening. Witnesses addressed legal issues related to the use of employment tests and other selection procedures. (To see the testimony of these witnesses, please see the EEOC's website at http://www.eeoc.gov/abouteeoc/meetings/5-16-07/index.html.)

This fact sheet provides technical assistance on some common issues relating to the federal anti-discrimination laws and the use of tests and other selection procedures in the employment process.

Background

- Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act of 1990 (ADA), and the Age Discrimination in Employment Act of 1967 (ADEA) prohibit the use of discriminatory employment tests and selection procedures.
- There has been an increase in employment testing due in part to post 9-11 security concerns as well as concerns about workplace violence, safety, and liability. In addition, the large-scale adoption of online job applications has motivated employers to seek efficient ways to screen large numbers of online applicants in a non-subjective way.
- The number of discrimination charges raising issues of employment testing, and exclusions based on criminal background checks, credit reports, and other selection procedures, has been increasing since FY 2003, although the absolute number of such charges is still small. In FY 2003 there were 26 such charges, and in FY 2006 the number had risen to 141.

Types of Employment Tests and Selection Procedures

Many employers use employment tests and other selection procedures in making employment decisions. Examples of these tools, many of which can be administered online, include the following:

- Cognitive tests assess reasoning, memory, perceptual speed and accuracy, and skills in arithmetic and reading comprehension, as well as knowledge of a particular function or job;
- Physical ability tests measure the physical ability to perform a particular task or the strength of specific muscle groups, as well as strength and stamina in general;
- Sample job tasks (e.g., performance tests, simulations, work samples, and realistic job previews) assess performance and aptitude on particular tasks;

- Medical inquiries and physical examinations, including psychological tests, assess physical or mental health;
- Personality tests and integrity tests assess the degree to which a person has certain traits or dispositions (e.g., dependability, cooperativeness, safety) or aim to predict the likelihood that a person will engage in certain conduct (e.g., theft, absenteeism);
- Criminal background checks provide information on arrest and conviction history;
- Credit checks provide information on credit and financial history;
- Performance appraisals reflect a supervisor's assessment of an individual's performance; and
- English proficiency tests determine English fluency.

Governing EEO Laws

- Title VII of the Civil Rights Act of 1964
  - Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin.
  - With respect to tests in particular, Title VII permits employment tests as long as they are not "designed, intended or used to discriminate because of race, color, religion, sex or national origin." 42 U.S.C. § 703(h). Title VII also imposes restrictions on how to score tests. Employers are not permitted to (1) adjust the scores of, (2) use different cutoff scores for, or (3) otherwise alter the results of employment-related tests on the basis of race, color, religion, sex, or national origin. *Id*. at § 703(l).
  - Title VII prohibits both "disparate treatment" and "disparate impact" discrimination.
    - Title VII prohibits **intentional** discrimination based on race, color, religion, sex, or national origin. For example, Title VII forbids a covered employer from testing the reading ability of African American applicants or employees but not testing the reading ability of their white counterparts. This is called **"disparate treatment"** discrimination. Disparate treatment cases typically involve the following issues:
      - Were people of a different race, color, religion, sex, or national origin treated differently?
      - Is there any evidence of bias, such as discriminatory statements?
      - What is the employer's reason for the difference in treatment?
      - Does the evidence show that the employer's reason for the difference in treatment is untrue, and that the real reason for the different treatment is race, color, religion, sex, or national origin?
    - Title VII also prohibits employers from using neutral tests or selection procedures that have the **effect** of disproportionately excluding persons based on race, color, religion, sex, or national origin, where the tests or selection procedures are not "job-related and consistent with business necessity." This is called **"disparate impact"** discrimination.

    Disparate impact cases typically involve the following issues:

    - Does the employer use a particular employment practice that has a **disparate impact** on the basis of race, color, religion, sex, or national origin? For example, if an employer requires that all applicants pass a physical agility test, does the test disproportionately screen out women? Determining whether a test or other selection procedure has a disparate impact on a particular group ordinarily requires a statistical analysis.

- If the selection procedure has a disparate impact based on race, color, religion, sex, or national origin, can the employer show that the selection **procedure is job-related and consistent with business necessity**? An employer can meet this standard by showing that it is necessary to the safe and efficient performance of the job. The challenged policy or practice should therefore be associated with the skills needed to perform the job successfully. In contrast to a general measurement of applicants' or employees' skills, the challenged policy or practice must evaluate an individual's skills as related to the particular job in question.
- If the employer shows that the selection procedure is job-related and consistent with business necessity, can the person challenging the selection procedure demonstrate that there is a **less discriminatory alternative** available? For example, is another test available that would be equally effective in predicting job performance but would not disproportionately exclude the protected group?

  See 42 U.S.C. § 703 (k). This method of analysis is consistent with the seminal Supreme Court decision about disparate impact discrimination, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

- In 1978, the EEOC adopted the Uniform Guidelines on Employee Selection Procedures or "UGESP" under Title VII. *See* 29 C.F.R. Part 1607.[1] UGESP provided uniform guidance for employers about how to determine if their tests and selection procedures were lawful for purposes of Title VII disparate impact theory.
  - UGESP outlines three different ways employers can show that their employment tests and other selection criteria are job-related and consistent with business necessity. These methods of demonstrating job-relatedness are called "test validation." UGESP provides detailed guidance about each method of test validation.

- Title I of the Americans with Disabilities Act (ADA)
  - Title I of the ADA prohibits private employers and state and local governments from discriminating against qualified individuals with disabilities on the basis of their disabilities.
  - The ADA specifies when an employer may require an applicant or employee to undergo a medical examination, *i.e.*, a procedure or test that seeks information about an individual's physical or mental impairments or health. The ADA also specifies when an employer may make "disability-related inquiries," *i.e.*, inquiries that are likely to elicit information about a disability.
    - When hiring, an employer may not ask questions about disability or require medical examinations until **after** it makes a conditional job offer to the applicant. 42 U.S.C. §12112 (d)(2);
    - After making a job offer (but before the person starts working), an employer may ask disability-related questions and conduct medical examinations as long as it does so for **all individuals entering the same job category**. *Id.* at § 12112(d)(3); and
    - With respect to **employees**, an employer may ask questions about disability or require medical examinations only if doing so is **job-related and consistent with business necessity**. Thus, for example, an employer could request medical information when it has a **reasonable belief**, based on **objective evidence**, that a particular employee will be unable to perform essential job functions or will pose a direct threat because of a medical condition, or when an employer receives a request for a **reasonable accommodation** and the person's disability and/or need for accommodation is not obvious. *Id*. at § 12112(d)(4).
  - The ADA also makes it unlawful to:
    - Use employment tests that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the test, as used by the

employer, is shown to be job-related and consistent with business necessity. 42 U.S.C. § 12112(b)(6);

- Fail to select and administer employment tests in the most effective manner to ensure that test results accurately reflect the skills, aptitude or whatever other factor that such test purports to measure, rather than reflecting an applicant's or employee's impairment. *Id*. at § 12112(b)(7); and
- Fail to make reasonable accommodations, including in the administration of tests, to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such accommodation would impose an undue hardship. *Id*. at § 12112(b)(5).

- The Age Discrimination in Employment Act (ADEA)
  - The ADEA prohibits discrimination based on age (40 and over) with respect to any term, condition, or privilege of employment. Under the ADEA, covered employers may not select individuals for hiring, promotion, or reductions in force in a way that unlawfully discriminates on the basis of age.
  - The ADEA prohibits **disparate treatment** discrimination, i.e., intentional discrimination based on age. For example, the ADEA forbids an employer from giving a physical agility test only to applicants over age 50, based on a belief that they are less physically able to perform a particular job, but not testing younger applicants.
  - The ADEA also prohibits employers from using neutral tests or selection procedures that have a **discriminatory impact** on persons based on age (40 or older), unless the challenged employment action is based on a **reasonable factor other than age**. *Smith v. City of Jackson*, 544 U.S. 228 (2005). Thus, if a test or other selection procedure has a disparate impact based on age, the employer must show that the test or device chosen was a reasonable one.

Recent EEOC Litigation and Settlements

A number of recent EEOC enforcement actions illustrating basic EEO principles focus on testing.

- **Title VII and Cognitive Tests**: Less Discriminatory Alternative for Cognitive Test with Disparate Impact. *EEOC v. Ford Motor Co. and United Automobile Workers of America*, involved a court-approved settlement agreement on behalf of a nationwide class of African Americans who were rejected for an apprenticeship program after taking a cognitive test known as the Apprenticeship Training Selection System (ATSS). The ATSS was a written cognitive test that measured verbal, numerical, and spatial reasoning in order to evaluate mechanical aptitude. Although it had been validated in 1991, the ATSS continued to have a statistically significant disparate impact by excluding African American applicants. Less discriminatory selection procedures were subsequently developed that would have served Ford's needs, but Ford did not modify its procedures. In the settlement agreement, Ford agreed to replace the ATSS with a selection procedure, to be designed by a jointly-selected industrial psychologist, that would predict job success and reduce adverse impact. Additionally, Ford paid $8.55 million in monetary relief.
- **Title VII and Physical Strength Tests**: Strength Test Must Be Job-Related and Consistent with Business Necessity If It Disproportionately Excludes Women. In *EEOC v. Dial Corp.*, women were disproportionately rejected for entry-level production jobs because of a strength test. The test had a significant adverse impact on women – prior to the use of the test, 46% of hires were women; after use of the test, only 15% of hires were women. Dial defended the test by noting that it looked like the job and use of the test had resulted in fewer injuries to hired workers. The EEOC established through expert testimony, however, that the test was considerably more difficult than the job and that the reduction in injuries occurred two years before the test was implemented, most likely due to improved training and better job rotation procedures. On

appeal, the Eighth Circuit upheld the trial court's finding that Dial's use of the test violated Title VII under the disparate impact theory of discrimination. *See* http://www.eeoc.gov/press/11-20-06.html

- **ADA and Test Accommodation**: Employer Must Provide Reasonable Accommodation on Pre-employment Test for Hourly, Unskilled Manufacturing Jobs. The EEOC settled *EEOC v. Daimler Chrysler Corp.*, a case brought on behalf of applicants with learning disabilities who needed reading accommodations during a pre-employment test given for hourly unskilled manufacturing jobs. The resulting settlement agreement provided monetary relief for 12 identified individuals and the opportunity to take the hiring test with the assistance of a reader. The settlement agreement also required that the employer provide a reasonable accommodation on this particular test to each applicant who requested a reader and provided documentation establishing an ADA disability. The accommodation consisted of either a reader for all instructions and all written parts of the test, or an audiotape providing the same information.

Employer Best Practices for Testing and Selection

- Employers should administer tests and other selection procedures without regard to race, color, national origin, sex, religion, age (40 or older), or disability.
- Employers should ensure that employment tests and other selection procedures are properly validated for the positions and purposes for which they are used. The test or selection procedure must be job-related and its results appropriate for the employer's purpose. While a test vendor's documentation supporting the validity of a test may be helpful, the employer is still responsible for ensuring that its tests are valid under UGESP.
- If a selection procedure screens out a protected group, the employer should determine whether there is an equally effective alternative selection procedure that has less adverse impact and, if so, adopt the alternative procedure. For example, if the selection procedure is a test, the employer should determine whether another test would predict job performance but not disproportionately exclude the protected group.
- To ensure that a test or selection procedure remains predictive of success in a job, employers should keep abreast of changes in job requirements and should update the test specifications or selection procedures accordingly.
- Employers should ensure that tests and selection procedures are not adopted casually by managers who know little about these processes. A test or selection procedure can be an effective management tool, but no test or selection procedure should be implemented without an understanding of its effectiveness and limitations for the organization, its appropriateness for a specific job, and whether it can be appropriately administered and scored.
- For further background on experiences and challenges encountered by employers, employees, and job seekers in testing, see the testimony from the Commission's meeting on testing, located on the EEOC's public web site at: http://www.eeoc.gov/abouteeoc/meetings/5-16-07/index.html.
- For general information on discrimination Title VII, the ADA and the ADEA see EEOC's web site at:
  - http://www.eeoc.gov/abouteeo/overview_practices.html and
  - http://www.eeoc.gov/abouteeo/overview_laws.html

Footnote

[1]The Departments of Labor and Justice and the Office of Personnel Management (then called the Civil Service Commission) issued UGESP along with the EEOC.

This page was last modified on December 3, 2007.

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EEOC	NOTICE	Number 915.002
		Date 5/23/07

SUBJECT: Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities

PURPOSE: This document provides guidance regarding unlawful disparate treatment under the federal EEO laws of workers with caregiving responsibilities .

EFFECTIVE DATE: Upon receipt.

EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment, § a(5), this Notice will remain in effect until rescinded or superseded.

ORIGINATOR: Title VII/EPA/ADEA Division, Office of Legal Counsel

SUBJECT MATTER: File after Section 615 of Volume II of the Compliance Manual.

Naomi C. Earp
Chair

See Also: Questions and Answers about EEOC's Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities

ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES

Table of Contents

Although the federal EEO laws do not prohibit discrimination against caregivers per se, there are circumstances in which discrimination against caregivers might constitute unlawful disparate treatment. The purpose of this document is to assist investigators, employees, and employers in assessing whether a particular employment decision affecting a caregiver might unlawfully discriminate on the basis of prohibited characteristics under Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act of 1990. This document is not intended to create a new protected category but rather to illustrate circumstances in which stereotyping or other forms of disparate treatment may violate Title VII or the prohibition under the ADA against discrimination based on a worker's association with an individual with a disability. An employer may also have specific obligations towards caregivers under other federal statutes, such as the Family and Medical Leave Act, or under state or local laws.[1]

I. *BACKGROUND AND INTRODUCTION*

A. *Caregiving Responsibilities of Workers*

The prohibition against sex discrimination under Title VII has made it easier for women to enter the labor force. Since Congress enacted Title VII, the proportion of women who work outside the home has significantly increased,[2] and women now comprise nearly half of the U.S. labor force.[3] The rise has been most dramatic for mothers of young children, who are almost twice as likely to be employed today as were their counterparts 30 years ago.[4] The total amount of time that couples with children spend working also has increased.[5] Income from women's employment is important to the economic security of many families, particularly among lower-paid workers, and accounts for over one-third of the income in families where both parents work.[6] Despite these changes, women continue to be most families' primary caregivers.[7]

Of course, workers' caregiving responsibilities are not limited to childcare, and include many other forms of caregiving. An increasing proportion of caregiving goes to the elderly, and this trend will likely continue as the Baby Boomer population ages.[8] As with childcare, women are primarily responsible for caring for society's elderly, including care of parents, in-laws, and spouses.[9] Unlike childcare, however, eldercare responsibilities generally increase over time as the person cared for ages, and eldercare can be much less predictable than childcare because of health crises that typically arise.[10] As eldercare becomes more common, workers in the "sandwich generation," those between the ages of 30 and 60, are more likely to face work responsibilities alongside both childcare and eldercare responsibilities.[11]

Caring for individuals with disabilities – including care of adult children, spouses, or parents – is also a common responsibility of workers.[12] According to the most recent U.S. census, nearly a third of families have at least one family member with a disability, and about one in ten families with children under 18 years of age includes a child with a disability.[13] Most men and women who provide care to relatives or other individuals with a disability are employed.[14]

While caregiving responsibilities disproportionately affect working women generally, their effects may be even more pronounced among some women of color, particularly African American women,[15] who have a long history of working outside the home.[16] African American mothers with young children are more likely to be employed than other women raising young children,[17] and both African American and Hispanic women are more likely to be raising children in a single-parent household than are White or Asian American women.[18] Women of color also may devote more time to caring for extended family members, including both grandchildren[19] and elderly relatives,[20] than do their White counterparts.

Although women are still responsible for a disproportionate share of family caregiving, men's role has increased. Between 1965 and 2003, the amount of time that men spent on childcare nearly tripled, and men spent more than twice as long performing household chores in 2003 as they did in 1965.[21] Working mothers are also increasingly relying on fathers as primary childcare providers.[22]

B. ***Work-Family Conflicts***

As more mothers have entered the labor force, families have increasingly faced conflicts between work and family responsibilities, sometimes resulting in a "maternal wall" that limits the employment opportunities of workers with caregiving responsibilities.[23] These conflicts are perhaps felt most profoundly by lower-paid workers,[24] who are disproportionately people of color.[25] Unable to afford to hire a childcare provider, many couples "tag team" by working opposite shifts and taking turns caring for their children. In comparison to professionals, lower-paid workers tend to have much less control over their schedules and are more likely to face inflexible employer policies, such as mandatory overtime.[26] Family crises can sometimes lead to discipline or even discharge when a worker violates an employer policy in order to address caregiving responsibilities.[27]

The impact of work-family conflicts also extends to professional workers, contributing to the maternal wall or "glass ceiling" that prevents many women from advancing in their careers. As a recent EEOC report reflects, even though women constitute about half of the labor force, they are a much smaller proportion of managers and officials.[28] The disparity is greatest at the highest levels in the business world, with women accounting for only 1.4% of Fortune 500 CEOs.[29] Thus, one of the recommendations made by the federal Glass Ceiling Commission in 1995 was for organizations to adopt policies that allow workers to balance work and family responsibilities throughout their careers.[30]

Individuals with caregiving responsibilities also may encounter the maternal wall through employer stereotyping. Writing for the Supreme Court in 2003, Chief Justice Rehnquist noted that "the faultline between work and family [is] precisely where sex-based overgeneralization has been and remains strongest."[31] Sex-based stereotyping about caregiving responsibilities is not limited to childcare and includes other forms of caregiving, such as care of a sick parent or spouse.[32] Thus, women with caregiving responsibilities may be perceived as more committed to caregiving than to their jobs and as less

competent than other workers, regardless of how their caregiving responsibilities actually impact their work.[33] Male caregivers may face the mirror image stereotype: that men are poorly suited to caregiving. As a result, men may be denied parental leave or other benefits routinely afforded their female counterparts.[34] Racial and ethnic stereotypes may further limit employment opportunities for people of color.[35]

Employment decisions based on such stereotypes violate the federal antidiscrimination statutes,[36]even when an employer acts upon such stereotypes unconsciously or reflexively.[37] As the Supreme Court has explained, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group."[38] Thus, for example, employment decisions based on stereotypes about working mothers are unlawful because "the antidiscrimination laws entitle individuals to be evaluated as individuals rather than as members of groups having certain average characteristics."[39]

Although some employment decisions that adversely affect caregivers may not constitute unlawful discrimination based on sex or another protected characteristic, the Commission strongly encourages employers to adopt best practices to make it easier for all workers, whether male or female, to balance work and personal responsibilities. There is substantial evidence that workplace flexibility enhances employee satisfaction and job performance.[40] Thus, employers can benefit by adopting such flexible workplace polices[41] by, for example, saving millions of dollars in retention costs.[42]

II. *UNLAWFUL DISPARATE TREATMENT OF CAREGIVERS*

This section illustrates various circumstances under which discrimination against a worker with caregiving responsibilities constitutes unlawful disparate treatment under Title VII or the ADA. Part A discusses sex-based disparate treatment of female caregivers, focusing on sex-based stereotypes. Part B discusses stereotyping and other disparate treatment of pregnant workers. Part C discusses sex-based disparate treatment of male caregivers, such as the denial of childcare leave that is available to female workers. Part D discusses disparate treatment of women of color who have caregiving responsibilities. Part E discusses disparate treatment of a worker with caregiving responsibilities for an individual with a disability, such as a child or a parent. Finally, part F discusses harassment resulting in a hostile work environment for a worker with caregiving responsibilities.

A. *Sex-based Disparate Treatment of Female Caregivers*

1. *Analysis of Evidence*

Intentional sex discrimination against workers with caregiving responsibilities can be proven using any of the types of evidence used in other sex discrimination cases. As with any other charge, investigators faced with a charge alleging sex-based disparate treatment of female caregivers should examine the totality of the evidence to determine whether the particular challenged action was unlawfully discriminatory. All evidence should be examined in context. The presence or absence of any particular kind of evidence is not dispositive. For example, while comparative evidence is often useful, it is not necessary to establish a violation.[43] There may be evidence of comments by officials about the reliability of working mothers or evidence that, despite the absence of a decline in work performance, women were subjected to less favorable treatment after they had a baby. It is essential that there be evidence that the adverse action taken against the caregiver was based on sex.

Relevant evidence in charges alleging disparate treatment of female caregivers may

include, but is not limited to, any of the following:

- Whether the respondent asked female applicants, but not male applicants, whether they were married or had young children, or about their childcare and other caregiving responsibilities;
- Whether decisionmakers or other officials made stereotypical or derogatory comments about pregnant workers or about working mothers or other female caregivers;[44]
- Whether the respondent began subjecting the charging party or other women to less favorable treatment soon after it became aware that they were pregnant;[45]
- Whether, despite the absence of a decline in work performance, the respondent began subjecting the charging party or other women to less favorable treatment after they assumed caregiving responsibilities;
- Whether female workers without children or other caregiving responsibilities received more favorable treatment than female caregivers based upon stereotypes of mothers or other female caregivers;
- Whether the respondent steered or assigned women with caregiving responsibilities to less prestigious or lower-paid positions;
- Whether male workers with caregiving responsibilities received more favorable treatment than female workers;[46]
- Whether statistical evidence shows disparate treatment against pregnant workers or female caregivers;[47]
- Whether respondent deviated from workplace policy when it took the challenged action;
- Whether the respondent's asserted reason for the challenged action is credible.[48]

2. ***Unlawful Disparate Treatment of Female Caregivers as Compared with Male Caregivers***

Employment decisions that discriminate against workers with caregiving responsibilities are prohibited by Title VII if they are based on sex or another protected characteristic, regardless of whether the employer discriminates more broadly against all members of the protected class. For example, sex discrimination against working mothers is prohibited by Title VII even if the employer does not discriminate against childless women.[49]

EXAMPLE 1
UNLAWFUL DISCRIMINATION AGAINST WOMEN WITH YOUNG CHILDREN

Charmaine, a mother of two preschool-age children, files an EEOC charge alleging sex discrimination after she is rejected for an opening in her employer's executive training program. The employer asserts that it rejected Charmaine because candidates who were selected had better performance appraisals or more managerial experience and because she is not "executive material." The employer also contends that the fact that half of the selectees were women shows that her rejection could not

have been because of sex. However, the investigation reveals that Charmaine had more managerial experience or better performance appraisals than several selectees and was better qualified than some selectees, including both men and women, as weighted pursuant to the employer's written selection policy. In addition, while the employer selected both men and women for the program, the only selectees with preschool age children were men. Under the circumstances, the investigator determines that Charmaine was subjected to discrimination based on her sex.

Title VII does not prohibit discrimination based solely on parental or other caregiver status, so an employer does not generally violate Title VII's disparate treatment proscription if, for example, it treats working mothers and working fathers in a similar unfavorable (or favorable) manner as compared to childless workers.

3. ***Unlawful Gender Role Stereotyping of Working Women***

Although women actually do assume the bulk of caretaking responsibilities in most families and many women do curtail their work responsibilities when they become caregivers, Title VII does not permit employers to treat female workers less favorably merely on the gender-based assumption that a particular female worker will assume caretaking responsibilities or that a female worker's caretaking responsibilities will interfere with her work performance.[50] Because stereotypes that female caregivers should not, will not, or cannot be committed to their jobs are sex-based, employment decisions based on such stereotypes violate Title VII.[51]

Gender-based Assumptions About Future Caregiving Responsibilities

Relying on stereotypes of traditional gender roles and the division of domestic and workplace responsibilities, some employers may assume that childcare responsibilities will make female employees less dependable than male employees, even if a female worker is not pregnant and has not suggested that she will become pregnant.[52] Fear of such stereotyping may even prompt married female job applicants to remove their wedding rings before going into an interview.[53]

EXAMPLE 2
UNLAWFUL STEREOTYPING DURING HIRING PROCESS

Patricia, a recent business school graduate, was interviewed for a position as a marketing assistant for a public relations firm. At the interview, Bob, the manager of the department with the vacancy being filled, noticed Patricia's wedding ring and asked, "How many kids do you have?" Patricia told Bob that she had no children yet but that she planned to once she and her husband had gotten their careers underway. Bob explained that the duties of a marketing assistant are very demanding, and rather than discuss Patricia's qualifications, he asked how she would balance work and childcare responsibilities when the need arose. Patricia explained that she would share childcare responsibilities with her husband, but Bob responded that men are not reliable caregivers. Bob later told his secretary that he was concerned about hiring a young married woman – he thought she might have kids, and he didn't believe that being a mother was "compatible with a fast-paced business environment." A week after the interview, Patricia was

notified that she was not hired.

Believing that she was well qualified and that the interviewer's questions reflected gender bias, Patricia filed a sex discrimination charge with the EEOC. The investigator discovered that the employer reposted the position after rejecting Patricia. The employer said that it reposted the position because it was not satisfied with the experience level of the applicants in the first round. However, the investigation showed that Patricia easily met the requirements for the position and had as much experience as some other individuals recently hired as marketing assistants. Under the circumstances, the investigator determines that the respondent rejected Patricia from the first round of hiring because of sex-based stereotypes in violation of Title VII.

Mixed-motives Cases

An employer violates Title VII if the charging party's sex was a motivating factor in the challenged employment decision, regardless of whether the employer was also motivated by legitimate business reasons.[54] However, when an employer shows that it would have taken the same action even absent the discriminatory motive, the complaining employee will not be entitled to reinstatement, back pay, or damages.[55]

EXAMPLE 3
DECISION MOTIVATED BY BOTH UNLAWFUL STEREOTYPING AND LEGITIMATE BUSINESS REASON

Same facts as above except that the employer did not repost the position but rather hired Tom from the same round of candidates that Patricia was in. In addition, the record showed that other than Tom's greater experience, Tom and Patricia had similar qualifications but that the employer consistently used relevant experience as a tiebreaking factor in filling marketing positions. The investigator determines that the employer has violated Title VII because sex was a motivating factor in the employer's decision not to hire Patricia as evidenced by Bob's focus on caregiving responsibilities, rather than qualifications, when he interviewed Patricia and other female candidates. However, the employer would have selected Tom, even absent the discriminatory motive, based on his greater experience. Thus, Patricia may be entitled to attorney's fees and/or injunctive relief, but is not entitled to instatement, back pay, or compensatory or punitive damages.

Assumptions About the Work Performance of Female Caregivers

The effects of stereotypes may be compounded after female employees become pregnant or actually begin assuming caregiving responsibilities. For example, employers may make the stereotypical assumptions that women with young children will (or should) not work long hours and that new mothers are less committed to their jobs than they were before they had children.[56] Relying on such stereotypes, some employers may deny female caregivers opportunities based on assumptions about how they might balance work and family responsibilities. Employers may further stereotype female caregivers who adopt part-time or flexible work schedules as "homemakers" who are less committed to the

workplace than their full-time colleagues.[57] Adverse employment decisions based on such sex-based assumptions or speculation, rather than on the specific work performance of a particular employee, violate Title VII.

EXAMPLE 4
UNLAWFUL SEX-BASED ASSUMPTIONS ABOUT WORK PERFORMANCE

Anjuli, a police detective, had received glowing performance reviews during her first four years with the City's police department and was assumed to be on a fast track for promotion. However, after she returned from leave to adopt a child during her fifth year with the department, her supervisor frequently asked how Anjuli was going to manage to stay on top of her case load while caring for an infant. Although Anjuli continued to work the same hours and close as many cases as she had before the adoption, her supervisor pointed out that none of her superiors were mothers, and he removed her from her high-profile cases, assigning her smaller, more routine cases normally handled by inexperienced detectives. The City has violated Title VII by treating Anjuli less favorably because of gender-based stereotypes about working mothers.

EXAMPLE 5
UNLAWFUL STEREOTYPING BASED ON PARTICIPATION IN FLEXIBLE WORK ARRANGEMENT

Emily, an assistant professor of mathematics at the University for the past seven years, files a charge alleging that she was denied tenure based on her sex. Emily applied for tenure after she returned from six months of leave to care for her father. The University's flexible work program allowed employees to take leave for a year without penalty. Before taking leave, Emily had always received excellent performance reviews and had published three highly regarded books in her field. After returning from leave, however, Emily believed she was held to a higher standard of review than her colleagues who were not caregivers or had not taken advantage of the leave policies, as reflected in the lower performance evaluations that she received from the Dean of her department after returning from leave. Emily applied for tenure, but the promotion was denied by the Dean, who had a history of criticizing female faculty members who took time off from their careers and was heard commenting that "she's just like the other women who think they can come and go as they please to take care of their families."

While the University acknowledges that Emily was eligible for tenure, it asserts that it denied Emily tenure because of a decline in her performance. The investigation reveals, however, that Emily's post-leave work output and classroom evaluations were comparable to her work performance before taking leave. In addition, The University does not identify any specific deficiencies in Emily's performance that warranted the decline in its evaluation of her work. Under the circumstances, the investigator determines that Emily was denied tenure because of her sex.

Employment decisions that are based on an employee's actual work performance, rather than assumptions or stereotypes, do not generally violate Title VII, even if an employee's unsatisfactory work performance is attributable to caregiving responsibilities.

EXAMPLE 6
EMPLOYMENT DECISION LAWFULLY BASED ON ACTUAL WORK PERFORMANCE

After Carla, an associate in a law firm, returned from maternity leave, she began missing work frequently because of her difficulty in obtaining childcare and was unable to meet several important deadlines. As a result, the firm lost a big client, and Carla was given a written warning about her performance. Carla's continued childcare difficulties resulted in her missing further deadlines for several important projects. Two months after Carla was given the written warning, the firm transferred her to another department, where she would be excluded from most high-profile cases but would perform work that has fewer time constraints. Carla filed a charge alleging sex discrimination. The investigation revealed that Carla was treated comparably to other employees, both male and female, who had missed deadlines on high-profile projects or otherwise performed unsatisfactorily and had failed to improve within a reasonable period of time. Therefore, the employer did not violate Title VII by transferring Carla.

"Benevolent" Stereotyping

Adverse employment decisions based on gender stereotypes are sometimes well-intentioned and perceived by the employer as being in the employee's best interest.[58] For example, an employer might assume that a working mother would not want to relocate to another city, even if it would mean a promotion.[59] Of course, adverse actions that are based on sex stereotyping violate Title VII, even if the employer is not acting out of hostility.[60]

EXAMPLE 7
STEREOTYPING UNLAWFUL EVEN IF FOR BENEVOLENT REASONS

Rhonda, a CPA at a mid-size accounting firm, mentioned to her boss that she had become the guardian of her niece and nephew and they were coming to live with her, so she would need a few days off to help them settle in. Rhonda's boss expressed concern that Rhonda would be unable to balance her new family responsibilities with her demanding career, and was worried that Rhonda would suffer from stress and exhaustion. Two weeks later, he moved her from her lead position on three of the firm's biggest accounts and assigned her to supporting roles handling several smaller accounts. In doing so, the boss told Rhonda that he was transferring her so that she "would have more time to spend with her new family," despite the fact that Rhonda had asked for no additional leave and had been completing her work in a timely and satisfactory manner. At the end of the year, Rhonda, for the first time in her 7-year stint at the firm, is denied a pay raise, even though many other workers did receive raises. When she asks for an explanation, she is told that she needs to be available to work on bigger accounts if she

wants to receive raises. Here, the employer has engaged in unlawful sex discrimination by taking an adverse action against a female employee based on stereotypical assumptions about women with caregiving responsibilities, even if the employer believed that it was acting in the employee's best interest.

In some circumstances, an employer will take an action that unlawfully imposes on a female worker the employer's own stereotypical views of how the worker *should* act even though the employer is aware that the worker objects. Thus, if a supervisor believes that mothers should not work full time, he or she might refuse to consider a working mother for a promotion that would involve a substantial increase in hours, even if that worker has made it clear that she would accept the promotion if offered.

EXAMPLE 8
DENIAL OF PROMOTION BASED ON STEREOTYPE OF HOW MOTHERS SHOULD ACT

Sun, a mid-level manager in a data services company, applied for a promotion to a newly created upper-level management position. At the interview for the promotion, the selecting official, Charlie, who had never met Sun before, asked her about her childcare responsibilities. Sun explained that she had two teenage children and that she commuted every week between her home in New York and the employer's main office in Northern Virginia. Charlie asked Sun how her husband handled the fact that she was "away from home so much, not caring for the family except on weekends." Sun explained that her husband and their children "helped each other" to function as "a successful family," but Charlie responded that he had "a very difficult time understanding why any man would allow his wife to live away from home during the work week." After Sun is denied the promotion, she files an EEOC charge alleging sex discrimination. According to the employer, it considered Sun and one other candidate for the promotion, and, although they were both well qualified, it did not select Sun because it felt that it was unfair to Sun's children for their mother to work so far from home. Under the circumstances, the investigator determines that the employer denied Sun the promotion because of unlawful sex discrimination, basing its decision in particular on stereotypes that women with children should not live away from home during the week.[61]

4. ***Effects of Stereotyping on Subjective Assessments of Work Performance***

In addition to leading to assumptions about how female employees might balance work and caregiving responsibilities, gender stereotypes of caregivers may more broadly affect perceptions of a worker's general competence.[62] Once female workers have children, they may be perceived by employers as being less capable and skilled than their childless female counterparts or their male counterparts, regardless of whether the male employees have children.[63] These gender-based stereotypes may even place some working mothers in a "double bind," in which they are simultaneously viewed by their employers as "bad mothers" for investing time and resources into their careers and "bad workers" for devoting time and attention to their families.[64] The double bind may be particularly acute for mothers or other

female caregivers who work part time. Colleagues may view part-time working mothers as uncommitted to work while viewing full-time working mothers as inattentive mothers.[65] Men who work part time may encounter different, though equally harmful, stereotypes.[66]

Investigators should be aware that it may be more difficult to recognize sex stereotyping when it affects an employer's evaluation of a worker's general competence than when it leads to assumptions about how a worker will balance work and caregiving responsibilities. Such stereotyping can be based on unconscious bias, particularly where officials engage in subjective decisionmaking. As with other forms of gender stereotyping, comparative evidence showing more favorable treatment of male caregivers than female caregivers is helpful but not necessary to establish a violation.[67] Investigators should be particularly attentive, for example, to evidence of the following:

- Changes in an employer's assessment of a worker's performance that are not linked to changes in the worker's actual performance and that arise after the worker becomes pregnant or assumes caregiving responsibilities;
- Subjective assessments that are not supported by specific objective criteria; and
- Changes in assignments or duties that are not readily explained by nondiscriminatory reasons.

EXAMPLE 9
EFFECTS OF STEREOTYPING ON EMPLOYER'S PERCEPTION OF EMPLOYEE

Barbara, a highly successful marketing executive at a large public relations firm, recently became the primary caregiver for her two young grandchildren. Twice a month, Barbara and her marketing colleagues are expected to attend a 9 a.m. corporate sales meeting. Last month, Barbara arrived a few minutes late to the meeting. Barbara did not think her tardiness was noteworthy since one of her colleagues, Jim, regularly arrived late to the meetings. However, after her late arrival, Barbara's boss, Susan, severely criticized her for the incident and informed her that she needed to start keeping a daily log of her activities.

The next month, Susan announced that one of the firm's marketing executives would be promoted to the position of Vice President. After Susan selected Jim, Barbara filed a charge alleging that she was denied the promotion because of her sex. According to Susan, she selected Jim because she believed that he was more "dependable, reliable, and committed to his work" than other candidates. Susan explained to the investigator that she thought as highly of Barbara's work as she did of Jim's, but she decided not to promote a worker who arrived late to sales meetings, even if it was because of childcare responsibilities. Other employees stated that they could only remember Barbara's being late on one occasion, but that Jim had been late on numerous occasions. When asked about this, Susan admitted that she might have forgotten about the times when Jim was late, but still considered Jim to be much more dependable. The investigator asks Susan for more specifics, but Susan merely responds that her opinion was based on many years of experience working with both Barbara and Jim. Under the

circumstances, the investigator concludes that Susan denied Barbara the promotion because of her sex.

EXAMPLE 10
SUBJECTIVE DECISIONMAKING BASED ON NONDISCRIMINATORY FACTORS

Simone, the mother of two elementary-school-age children, files an EEOC charge alleging sex discrimination after she is terminated from her position as a reporter with a medium-size newspaper. The employer asserts that it laid Simone off as part of a reduction in force in response to decreased revenue. The employer states that Simone's supervisor, Alex, compared Simone with two other reporters in the same department to determine whom to lay off. According to Alex, he considered Jocelyn (an older woman with two grown children) to be a superior worker to Simone because Jocelyn's work needed less editing and supervision and she had the most experience of anyone in the department. Alex said he also favored Louis (a young male worker with no children) over Simone because Louis had shown exceptional initiative and creativity by writing several stories that had received national publicity and by creating a new feature to increase youth readership and advertising revenue. Alex said that he considered Simone's work satisfactory, but that she lacked the unique talents that Jocelyn and Louis brought to the department. Because the investigation does not reveal that the reasons provided by Alex are a pretext for sex discrimination, the investigator does not find that Simone was subjected to sex discrimination.

B. ***Pregnancy Discrimination***

Employers can also violate Title VII by making assumptions about pregnancy, such as assumptions about the commitment of pregnant workers or their ability to perform certain physical tasks.[68] As the Supreme Court has noted, "[W]omen as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."[69] Title VII's prohibition against sex discrimination includes a prohibition against employment decisions based on pregnancy, even where an employer does not discriminate against women generally.[70] As with other sex-based stereotypes, Title VII prohibits an employer from basing an adverse employment decision on stereotypical assumptions about the effect of pregnancy on an employee's job performance, regardless of whether the employer is acting out of hostility or a belief that it is acting in the employee's best interest.

Because Title VII prohibits discrimination based on pregnancy, employers should not make pregnancy-related inquiries. The EEOC will generally regard a pregnancy-related inquiry as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker.[71] Employers should be aware that pregnancy testing also implicates the ADA, which restricts employers' use of medical examinations. [72] Given the potential Title VII and ADA implications, the Commission strongly discourages employers from making pregnancy-related inquiries or conducting pregnancy tests.

An employer also may not treat a pregnant worker who is temporarily unable to perform some of her job duties because of pregnancy less favorably than workers whose job performance is similarly restricted because of conditions other than pregnancy. For

example, if an employer provides up to eight weeks of paid leave for temporary medical conditions, then the employer must provide up to eight weeks of paid leave for pregnancy or related medical conditions.[73]

For more information on pregnancy discrimination under Title VII, see "Questions and Answers on the Pregnancy Discrimination Act," 29 C.F.R. Part 1604 Appendix (1978).

EXAMPLE 11
UNLAWFUL STEREOTYPING BASED ON PREGNANCY

Anna, a records administrator for a health maintenance organization, was five months pregnant when she missed two days of work due to a pregnancy-related illness. Upon her return to work, Anna's supervisor, Tom, called her into his office and told her that "her body was trying to tell her something" and that "her attendance was becoming a serious problem." Anna reminded him that she had only missed two days and that her doctor had found no continuing complications related to her brief illness. However, Tom responded, "Well, now that you're pregnant, you will probably miss a lot of work, and we need someone who will be dependable." Tom placed Anna on an unpaid leave of absence, telling her that she would be able to return to work after she had delivered her baby and had time to recuperate and that "not working [was] the best thing for [her] right now." In response to Anna's EEOC charge alleging pregnancy discrimination, the employer states that it placed Anna on leave because of poor attendance. The investigation reveals, however, that Anna had an excellent attendance record before she was placed on leave. In the prior year, she had missed only three days of work because of illness, including two days for her pregnancy-related illness and one day when she was ill before she became pregnant. The investigator concludes that the employer subjected Anna to impermissible sex discrimination under Title VII by basing its action on a stereotypical assumption that pregnant women are poor attendees and that Anna would be unable to meet the requirements of the job.[74]

EXAMPLE 12
UNLAWFUL REFUSAL TO MODIFY DUTIES

Ingrid, a pregnant machine operator at a bottling company, is told by her doctor to temporarily refrain from lifting more than 20 pounds. As part of her job as a machine operator, Ingrid is required to carry certain materials weighing more than 20 pounds to and from her machine several times each day. She asks her supervisor if she can be temporarily relieved of this function. The supervisor refuses, stating that he can't reassign her job duties but can transfer her temporarily to another lower-paying position for the duration of the lifting restriction. Ingrid reluctantly accepts the transfer but also files an EEOC charge alleging sex discrimination. The investigation reveals that in the previous six months, the employer had reassigned the lifting duties of three other machine operators, including a man who injured his arm in an automobile accident and a woman who had undergone surgery to treat a hernia. Under the circumstances, the investigator determines that the employer subjected Ingrid to discrimination based on sex (i.e., pregnancy).

C. ***Discrimination Against Male Caregivers***[75]

The Supreme Court has observed that gender-based stereotypes also influence how male

workers are perceived: "Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination."[76] Stereotypes of men as "bread winners" can further lead to the perception that a man who works part time is not a good father, even if he does so to care for his children.[77] Thus, while working women have generally borne the brunt of gender-based stereotyping, unlawful assumptions about working fathers and other male caregivers have sometimes led employers to deny male employees opportunities that have been provided to working women or to subject men who are primary caregivers to harassment or other disparate treatment.[78] For example, some employers have denied male employees' requests for leave for childcare purposes even while granting female employees' requests. For more information on how to determine whether an employee has been subjected to unlawful disparate treatment, see the discussion at § II.A.1, above, "Sex-based Disparate Treatment of Female Caregivers – Analysis of Evidence."

Significantly, while employers are permitted by Title VII to provide women with leave specifically for the period that they are incapacitated because of pregnancy, childbirth, and related medical conditions, employers may not treat either sex more favorably with respect to other kinds of leave, such as leave for childcare purposes.[79] To avoid a potential Title VII violation, employers should carefully distinguish between pregnancy-related leave and other forms of leave, ensuring that any leave specifically provided to women alone is limited to the period that women are incapacitated by pregnancy and childbirth.[80]

EXAMPLE 13
EMPLOYER UNLAWFULLY DENIED BENEFIT TO MALE WORKER BECAUSE OF GENDER-BASED STEREOTYPE

Eric, an elementary school teacher, requests unpaid leave for the upcoming school year for the purpose of caring for his newborn son. Although the school has a collective bargaining agreement that allows for up to one year of unpaid leave for various personal reasons, including to care for a newborn, the Personnel Director denies the request. When Eric points out that women have been granted childcare leave, the Director says, "That's different. We have to give childcare leave to women." He suggests that Eric instead request unpaid emergency leave, though that is limited to 90 days. This is a violation of Title VII because the employer is denying male employees a type of leave, unrelated to pregnancy, that it is granting to female employees.

EXAMPLE 14
EMPLOYER UNLAWFULLY DENIED PART-TIME POSITION TO MALE WORKER BECAUSE OF SEX

Tyler, a service technician for a communications company, requests reassignment to a part-time position so that he can help care for his two-year-old daughter when his wife returns to work. Tyler's supervisor, however, rejects the request, saying that the department has only one open slot for a part-time technician, and he has reserved it in case it is needed by a female technician. Tyler's supervisor says that Tyler can have a part-time position should another one open up. After two months, no additional slots have opened up, and Tyler files an EEOC charge alleging sex discrimination. Under the circumstances the employer has discriminated against Tyler based on sex by denying him a part-time position.

D. ***Discrimination Against Women of Color***

In addition to sex discrimination, race or national origin discrimination may be a further employment barrier faced by women of color who are caregivers. For example, a Latina working mother might be subjected to discrimination by her supervisor based on his stereotypical notions about working mothers or pregnant workers, as well as his hostility toward Latinos generally. Women of color also may be subjected to intersectional discrimination that is specifically directed toward women of a particular race or ethnicity, rather than toward all women, resulting, for example, in less favorable treatment of an African American working mother than her White counterpart.[81]

EXAMPLE 15
UNLAWFUL DENIAL OF COMPENSATORY TIME BASED ON RACE

Margaret, an African American employee in the City's Parks and Recreation Department, files an EEOC charge alleging that she was denied the opportunity to use compensatory time because of her race. She asked her supervisor, Sarah, for the opportunity to use compensatory time so she could occasionally be absent during regular work hours to address personal responsibilities, such as caring for her children when she does not have a sitter. Sarah rejected the request, explaining that Margaret's position has set hours and that any absences must be under the official leave policy. The investigation reveals that while the City does not have an official compensatory time policy, several White employees in Margaret's position have been allowed to use compensatory time for childcare purposes. When asked about this discrepancy, Sarah merely responds that those employees' situations were "different." In addition, the investigation reveals that while White employees have been allowed to use compensatory time, no African Americans have been allowed to do so. Under the circumstances, the investigator determines that Margaret was unlawfully denied the opportunity to use compensatory time based on her race.

EXAMPLE 16
UNLAWFUL HARASSMENT AND REASSIGNMENT BASED ON SEX AND NATIONAL ORIGIN

Christina, a Mexican-American, filed an EEOC charge alleging that she was subjected to discrimination based on national origin and pregnancy. Christina had worked as a server waiting tables at a large chain restaurant until she was reassigned to a kitchen position when she was four months pregnant. One of Christina's supervisors has regularly made comments in the workplace about how Mexicans are entering the country illegally and taking jobs from other people. After Christina becomes pregnant, he began directing the comments at Christina, telling her that Mexican families are too large and that it is not fair for Mexicans to come to the United States and "take over" and use up tax dollars. When he reassigned Christina, he explained to her that he thought customers' appetites would be spoiled if they had their food brought to them by someone who was pregnant. Under these circumstances, the evidence shows that Christina was subjected to discrimination based on both sex (pregnancy) and national origin.

E. ***Unlawful Caregiver Stereotyping Under the Americans with Disabilities Act***

In addition to prohibiting discrimination against a qualified worker because of his or her own disability, the Americans with Disabilities Act (ADA) prohibits discrimination because of the disability of an individual with whom the worker has a relationship or association, such as a child, spouse, or parent.[82] Under this provision, an employer may not treat a worker less favorably based on stereotypical assumptions about the worker's ability to perform job duties satisfactorily while also providing care to a relative or other individual with a disability. For example, an employer may not refuse to hire a job applicant whose wife has a disability because the employer assumes that the applicant would have to use frequent leave and arrive late due to his responsibility to care for his wife.[83] For more information, see EEOC's *Questions and Answers About the Association Provision of the ADA* at http://www.eeoc.gov/facts/association_ada.html.

EXAMPLE 17
UNLAWFUL STEREOTYPING BASED ON ASSOCIATION WITH AN INDIVIDUAL WITH A DISABILITY

An employer is interviewing applicants for a computer programmer position. The employer determines that one of the applicants, Arnold, is the best qualified, but is reluctant to hire him because he disclosed during the interview that he is a divorced father and has sole custody of his son, who has a disability. Because the employer concludes that Arnold's caregiving responsibilities for a person with a disability may have a negative effect on his attendance and work performance, it decides to offer the position to the second best qualified candidate, Fred, and encourages Arnold to apply for any future openings if his caregiving responsibilities change. Under the circumstances, the employer has violated the ADA by refusing to hire Arnold because of his association with an individual with a disability.

F. ***Hostile Work Environment***

Employers may be liable if workers with caregiving responsibilities are subjected to offensive comments or other harassment because of race, sex (including pregnancy), association with an individual with a disability,[84] or another protected characteristic and the conduct is sufficiently severe or pervasive to create a hostile work environment. [85] The same legal standards that apply to other forms of harassment prohibited by the EEO statutes also apply to unlawful harassment directed at caregivers or pregnant workers.

Employers should take steps to prevent harassment directed at caregivers or pregnant workers from occurring in the workplace and to promptly correct any such conduct that does occur. In turn, employees who are subjected to such harassment should follow the employer's harassment complaint process or otherwise notify the employer about the conduct, so that the employer can investigate the matter and take appropriate action. For more information on harassment claims generally, see *EEOC Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19, 1990) at http://www.eeoc.gov/policy/docs/currentissues.html, and Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 19, 1999) at http://www.eeoc.gov/policy/docs/harassment.html.

EXAMPLE 18
HOSTILE WORK ENVIRONMENT BASED ON STEREOTYPES OF MOTHERS

After Yael, a supervisor at a construction site, returned to work from maternity

leave, she asked her supervisor, Rochelle, for permission to use her lunch break to breastfeed her child at the child's day care center. Rochelle agreed, but added, "Now that you're a mother, you won't have the same dedication to the job. That's why I never had any kids! Maybe you should rethink being a supervisor." She also began monitoring Yael's time, tracking when Yael left and returned from her lunch break and admonishing her if she was late, even only a few minutes. Other employees who left the site during lunch were not similarly monitored. Rochelle warned Yael that if she had another child, she could "kiss her career goodbye," and that it was impossible for any woman to be a good mother and a good supervisor at the same time. Yael is very upset by her supervisor's conduct and reports it to a higher-level manager. However, the employer refuses to take any action, stating that Yael is merely complaining about a "personality conflict" and that he does not get involved in such personal matters. After the conduct continues for several more months, Yael files an EEOC charge alleging that she was subjected to sex-based harassment. Under the circumstances, the investigator determines that Yael was subjected to a hostile work environment based on sex and that the employer is liable.

EXAMPLE 19
HOSTILE WORK ENVIRONMENT BASED ON PREGNANCY

Ramona, an account representative, had been working at a computer software company for five years when she became pregnant. Until then, she had been considered a "top performer," and had received multiple promotions and favorable evaluations. During Ramona's pregnancy, her supervisor, Henry, frequently made pregnancy-related comments, such as, "You look like a balloon; why don't you waddle on over here?" and, "Pregnant workers hurt the company's bottom line." Henry also began treating Ramona differently from other account representatives by, for example, asking for advance notification and documentation of medical appointments – a request that was not made of other employees who took leave for medical appointments nor of Ramona before her pregnancy.

After Ramona returned from maternity leave, Henry continued to treat her differently from other account representatives. For example, shortly after Ramona returned from maternity leave, Henry gave Ramona's coworkers an afternoon off so that they could attend a local fair as a "reward" for having covered Ramona's workload while she was on leave, but required Ramona to stay in the office and answer the phones. On another occasion, Ramona requested a schedule change so that she could leave earlier to pick up her son from daycare, but Henry denied the request without explanation, even though other employees' requests for schedule changes were granted freely, regardless of the reason for the request. Henry also continued to make pregnancy-related comments to Ramona on a regular basis. For example, after Ramona returned from maternity leave, she and Henry were discussing a coworker's pregnancy, and Henry sarcastically commented to Ramona, "I suppose you'll be pregnant again soon, and we'll be picking up the slack for you just like the last time."

Ramona complained about Henry's conduct to the Human Resources Manager, but he told her he did not want to take sides and that matters like schedule changes were within managerial discretion. After the conduct had continued for several months, Ramona filed an EEOC charge alleging that she had been subjected to a hostile work environment because of her pregnancy and use of maternity leave. Noting that Ramona experienced ongoing abusive conduct

after she became pregnant, the investigator determines that Ramona has been subjected to a hostile work environment based on pregnancy and that the employer is liable.[86]

EXAMPLE 20
HOSTILE WORK ENVIRONMENT BASED ON ASSOCIATION WITH AN INDIVIDUAL WITH A DISABILITY

Martin, a first-line supervisor in a department store, had an excellent working relationship with his supervisor, Adam, for many years. However, shortly after Adam learned that Martin's wife has a severe form of multiple sclerosis, his relationship with Martin deteriorated. Although Martin had always been a good performer, Adam repeatedly expressed his concern that Martin's responsibilities caring for his wife would prevent him from being able to meet the demands of his job. Adam removed Martin from team projects, stating that Martin's coworkers did not think that Martin could be expected to complete his share of the work "considering all of his wife's medical problems." Adam set unrealistic time frames for projects assigned to Martin and yelled at him in front of coworkers about the need to meet approaching deadlines. Adam also began requiring Martin to follow company policies that other employees were not required to follow, such as requesting leave at least a week in advance except in the case of an emergency. Though Martin complained several times to upper management about Adam's behavior, the employer did nothing. Martin files an EEOC charge, and the investigator determines that the employer is liable for harassment on the basis of Martin's association with an individual with a disability.

III. ***RETALIATION***

Employers are prohibited from retaliating against workers for opposing unlawful discrimination, such as by complaining to their employers about gender stereotyping of working mothers, or for participating in the EEOC charge process, such as by filing a charge or testifying on behalf of another worker who has filed a charge. Because discrimination against caregivers may violate the EEO statutes, retaliation against workers who complain about such discrimination also may violate the EEO statutes.[87]

The retaliation provisions under the EEO statutes protect individuals against any form of retaliation that would be reasonably likely to deter someone from engaging in protected activity.[88] Caregivers may be particularly vulnerable to unlawful retaliation because of the challenges they face in balancing work and family responsibilities. An action that would be likely to deter a working mother from filing a future EEOC complaint might be less likely to deter someone who does not have substantial caregiving responsibilities. As the Supreme Court noted in a 2006 decision, "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children."[89] Thus, the EEO statutes would prohibit such a retaliatory schedule change or any other act that would be reasonably likely to deter a working mother or other caregiver from engaging in protected activity.

Footnotes

[1] For more information on the FMLA, see Compliance Assistance – Family and Medical Leave Act,

http://www.dol.gov/esa/whd/fmla/ (U.S. Department of Labor web page); *see also* EEOC Fact Sheet, *The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of* (1995), http://www.eeoc.gov/policy/docs/fmlaada.html (discussing questions that arise under Title VII and the ADA when the FMLA also applies).

While federal law does not prohibit discrimination based on parental status, some state and local laws do prohibit discrimination based on parental or similar status. *E.g.*, ALASKA STAT. § 18.80.200 (prohibiting employment discrimination based on "parenthood"); D.C. Human Rights Act, D.C. CODE § 2-1402.11 (prohibiting employment discrimination based on "family responsibilities").

[2] In 1970, 43% of women were in the labor force while 59% of women were in the labor force in 2005. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 1 (2006) [hereinafter DATABOOK], http://www.bls.gov/cps/wlf-databook-2006.pdf.

[3] AFL-CIO, PROFESSIONAL WOMEN: VITAL STATISTICS (2006), http://www.pay-equity.org/PDFs/ProfWomen.pdf (in 2005, women accounted for 46.4% of the labor force).

[4] DATABOOK, *supra* note 2, Table 7 (59% of mothers with children under 3 were in the civilian labor force in 2005, compared with 34% in 1975).

[5] BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, WORKING IN THE 21ST CENTURY, http://www.bls.gov/opub/working/home.htm (combined work hours per week for married couples with children under 18 increased from 55 hours in 1969 to 66 hours in 2000).

[6] Testimony of Heather Boushey, Senior Economist, Center for Economic and Policy Research, to the EEOC, Apr. 17, 2007, http://www.eeoc.gov/abouteeoc/meetings/4-17-07/boushey.html ("For many families, having a working wife can make the difference between being middle class and not. . . . The shift in women's work participation is not simply about women wanting to work, but it is also about their families needing them to work.").

[7] *See generally* Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 378-80 (2001) (discussing women's continued role as primary caregivers in our society and citing studies).

BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, AMERICAN TIME-USE SURVEY (2006), Table 8, http://www.bls.gov/news.release/pdf/atus.pdf (in 2005, in households with children under 6, working women spent an average of 2.17 hours per day providing care for household members compared with 1.31 hours for working men; in households with children 6 to 17, working women spent an average of .99 hours per day providing care for household members compared with .50 for working men).

[8] *See generally* Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 355-60 (2004).

[9] *Id*. at 360 (noting that women provide about 70% of unpaid elder care); see *also Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003) (noting that working women provide two-thirds of the nonprofessional care for older, chronically ill, and disabled individuals); Cathy D. Martin, *More Than the Work: Race and Gender Differences in Caregiving Burden*, 21 JOURNAL OF FAMILY ISSUES 986, 989-90 (2000) (discussing greater role women play in providing eldercare).

[10] Smith, *supra* note 8, at 365-70.

[11] *See* BOSTON COLL. CTR. FOR WORK & FAMILY, EXECUTIVE BRIEFING SERIES, EXPLORING THE

COMPLEXITIES OF EXCEPTIONAL CAREGIVING (2006) (contact the Center to order copies of the Executive Briefing Series, 617-552-2865 or cwf@bc.edu).

[12] *See generally* DEP'T OF HEALTH & HUMAN SERVS., INFORMAL CAREGIVING: COMPASSION IN ACTION (1998) (hereinafter INFORMAL CAREGIVING), http://aspe.hhs.gov/daltcp/repo

[13] U.S. CENSUS BUREAU, DISABILITY AND AMERICAN FAMILIES: 2000, at 3, 16 (2005), http://www.census.gov/prod/2005pubs/censr- 23.pdf#search=%22disability%20american%20families%202000%22.

[14] INFORMAL CAREGIVING, *supra* note 12, at 11.

[15] *See, e.g.*, Lynette Clemetson, *Work vs. Family, Complicated by Race*, N.Y. TIMES, Feb. 9, 2006, at G1 (discussing unique work-family conflicts faced by African American women).

[16] For example, by 1900, 26% of married African American women were wage earners, compared with 3.2% of their White counterparts. JENNIFER TUCKER & LESLIE R. WOLFE, CTR. FOR WOMEN POLICY STUDIES, DEFINING WORK AND FAMILY ISSUES: LISTENING TO THE VOICES OF WOMEN OF COLOR 4 (1994) (citing other sources). More recently, in 1970, more than 70% of married African American middle-class women and nearly 45% of married African American working-class women were in the labor force compared with 48% and 32%, respectively, of their White counterparts. LONNAE O'NEAL PARKER, I'M EVERY WOMAN: REMIXED STORIES OF MARRIAGE, MOTHERHOOD AND WORK 29 (2005).

[17] DATABOOK, *supra* note 2, Table 5 (in 2005, 68% of African American women with children under the age of 3 were in the workforce compared with 58% of White women, 53% of Asian American women, and 45% of Hispanic women).

[18] POPULATION REFERENCE BUREAU, *Diversity, Poverty Characterize Female Headed Households*, http://www.prb.org/Articles/2003/DiversityPovertyCharacterizeFemaleHeadedHouseholds.aspx (about 5% of White or Asian American households are female-headed households with children compared with 22% of African American households and 14% of Hispanic households).

Native American women may have greater childcare responsibilities and are less likely to be employed than their White or African American counterparts. Native American women may have special family and community obligations based on tribal culture and often have more children than do White or African American women. Job opportunities may be further limited since Native American women often live in remote areas where the few available jobs tend to be in traditionally male-dominated industries. THE NATIVE NORTH AMERICAN ALMANAC 1088 (2d ed. 2001).

[19] U.S. CENSUS BUREAU, GRANDPARENTS LIVING WITH GRANDCHILDREN: 2000, Table 1 (2003),http://www.census.gov/prod/2003pubs/c2kbr-31.pdf (showing a higher proportion of African American and Native American grandmothers responsible for raising grandchildren than White, Asian, or Hispanic grandmothers).

[20] *See* NAT'L ASS'N OF STATE UNITS ON AGING, IN THE MIDDLE: A REPORT ON MULTICULTURAL BOOMERS COPING WITH FAMILY AND AGING ISSUES (2001), http://www.nasua.o (in survey of Baby Boomers in the "sandwich generation," one in five White respondents reported providing eldercare or financial assistance to their parents, compared with two in five Asian Americans or one in three Hispanics or African Americans); see also Karen Bullock et al., *Employment and Caregiving*: *Exploration of African American Caregivers*, SOCIAL WORK 150 (Apr. 2003) (discussing impact of eldercare responsibilities on employment status of African Americans).

[21] Donna St. George, *Fathers Are No Longer Glued to Their Recliners*, WASH. POST, Mar. 20, 2007, at

A11 (men's childcare work increased from 2.5 hours to 7 hours per week between 1965 and 2003). The total workload of married mothers and fathers combining paid work, childcare, and housework is about equal at 65 hours per week for mothers and 64 hours per week for fathers. *Id.*; see also SUZANNE BIANCHI ET AL., CHANGING RHYTHMS OF AMERICAN FAMILY LIFE (2006).

[22] *See, e.g.*, KAREN L. BREWSTER & BRYAN GIBLIN, EXPLAINING TRENDS IN COUPLES' USE OF FATHERS AS CHILDCARE PROVIDERS, 1985.2002, at 2.3 (2005), http://www.fsu.edu/~popctr/p -151paper.pdf (percentage of employed married women who relied on their husbands as the primary childcare provider increased from 16.6% in 1985 to 23.2% in 2002).

[23] *See generally* Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003) (discussing "maternal wall" discrimination, which limits the employment opportunities of workers with caregiving responsibilities). See also MARY STILL, UNIV. OF CAL., HASTINGS COLL. OF LAW, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES (2005), http://www.uchastings.edu/site_files/WL (documenting rise in lawsuits alleging discrimination against caregivers).

[24] *See generally* JOAN WILLIAMS, UNIV. OF CAL., HASTINGS COLL. OF LAW, ONE SICK CHILD AWAY FROM BEING FIRED: WHEN "OPTING OUT" IS NOT AN OPTION (2006), http://www.uchast

[25] The median weekly earnings of full-time wage and salary workers in 2005 were $596 for White women compared with $499 for African American women and $429 for Hispanic women. DATABOOK, *supra* note 2, Table 16. While the weekly median earnings for Asian American women, $665, exceed the earnings of White women, id., the earnings of Asian American women vary widely depending on national origin. *See Socioeconomic Statistics and Demographics*, Asian Nation, http://www.asian-nation.org/demographics.shtml (discussing the wide disparity in socioeconomic attainment rates among Asian Americans).

[26] ONE SICK CHILD AWAY FROM BEING FIRED, *supra* note 24, at 8.

[27] *E.g.*, ONE SICK CHILD AWAY FROM BEING FIRED, *supra* note 24, at 23 (discussing case presented to arbitrator where employee with nine years of service was discharged for absenteeism when she left work after receiving a phone call that her four-year-old daughter had fallen and was being taken to the emergency room).

[28] EQUAL EMPLOYMENT OPPORTUNITY COMM'N, GLASS CEILING: THE STATUS OF WOMEN AS OFFICIALS AND MANAGERS IN THE PRIVATE SECTOR (2004), http://www.eeoc.gov/stats/re

[29] Diane Stafford, *Wanted: Women in the Workplace*, MONTEREY COUNTY HERALD, Apr. 5, 2006, available at 2006 WLNR 5689048.

[30] GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL, Washington, D.C.: U.S. Gov't Printing Office, at 3. The Glass Ceiling Commission was established under the Civil Rights Act of 1991 to complete a study of the barriers to advancement faced by women and minorities. A copy of the Commission's 1995 fact-finding report is available at http://digitalcommons.ilr.cornell.edu/key_workplace/116.

[31] *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003) (holding that the family-leave provision of the Family and Medical Leave Act is a valid exercise of congressional power to combat sex discrimination by the states); *see also Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring) (Title VII does not permit "ancient canards about the proper role of women to be a basis for discrimination").

[32] *Hibbs*, 538 U.S. at 731 (in an FMLA claim brought by a male worker who was denied leave to care for his ailing wife, the Court noted that states' administration of leave benefits has fostered the "pervasive sex-role stereotype that caring for family members is women's work").

[33] *See* SHELLEY CORRELL & STEPHEN BENARD, GETTING A JOB: IS THERE A MOTHERHOOD PENALTY? (2005) (women with children were recommended for hire and promotion at a much lower rate than women without children).

[34] *See Knussman v. Maryland*, 272 F.3d 625, 629-30 (4th Cir. 2001) (male employee was not eligible for "nurturing leave" as primary caregiver of newborn unless his wife were "in a coma or dead").

[35] See § II.D, *infra* (discussing disparate treatment of women of color who are caregivers).

[36] This document addresses only disparate treatment, or intentional discrimination, against caregivers. It does not address disparate impact discrimination.

[37] *See Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999) ("concept of 'stereotyping' includes not only simple beliefs such as 'women are not aggressive' but also a host of more subtle cognitive phenomena which can skew perceptions and judgments").

[38] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

[39] *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004).

[40] For example, results of internal employee surveys as reported by Eli Lilly revealed that employees with the most flexibility and control over their hours reported more job satisfaction, greater sense of control, and less intention to leave than those on other schedules. CORPORATE VOICES FOR WORKING FAMILIES, BUSINESS IMPACTS OF FLEXIBILITY: AN IMPERATIVE FOR EXPANSION (2005) 13, http://www.cvworkingfamilies.org/flex_report/flex_report.shtr

[41] In a 2005 study, almost half of the employers that offer flexible work schedules or other programs to help employees balance work and family responsibilities stated that the main reason they did so was to recruit and retain employees, and one-quarter said they did so mainly to enhance productivity and commitment. FAMILIES AND WORK INST., NATIONAL STUDY OF EMPLOYERS 26 (2005), http://familiesandwork.org/eproducts/2005nse.pdf; *see also* Work Life, Fortune Special Section, http://www.timeinc.net/fortune/services/sections/fortune/corp/2004 (2004) (noting that "smart companies are retaining talent by offering employees programs to help them manage their work and personal life priorities").

[42] For example, based on the proportion of workers who said they would have left in the absence of flexible workplace policies, the accounting firm Deloitte and Touche calculated that it saved $41.5 million in turnover-related costs in 2003 alone. CORPORATE VOICES, *supra note* 40, at 10.

[43] *See Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 121 (2d Cir. 2004) (female school psychologist with a young child could show that she was denied tenure because of her sex by relying on evidence of gender-based comments about working mothers and other evidence of sex stereotyping and was not required to show that similarly situated male workers were treated more favorably); *Plaetzer v. Borton Auto., Inc.*, No. Civ. 02-3089 JRT/JSM, 2004 WL 2066770, at *6 n.3 (D. Minn. Aug. 13, 2004) (evidence of more favorable treatment of working fathers is not needed to show sex discrimination against working mothers where an "employer's objection to an employee's parental duties is actually a veiled assertion that mothers, because they are women, are insufficiently devoted to work, or that work and motherhood are incompatible"); *cf. Lust*, 383 F.3d at 583 (reasonable jury

could have concluded that the plaintiff's supervisor did not recommend her for a promotion because he assumed that, as a working mother, the plaintiff would not accept a promotion that would require her to move because of its disruptive effect on her children). *But see Philipsen v. University of Mich. Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822 (E.D. Mich. Mar. 22, 2007) (holding that a plaintiff cannot establish a prima facie case of sex discrimination against women with young children in the absence of comparative evidence that men with young children are treated more favorably). While the Commission agrees that the plaintiff raised no inference of sex discrimination, it believes that cases should be resolved on the totality of the evidence and concurs with *Back* and *Plaetzer* that comments evincing sex-based stereotypical views of women with children may support an inference of discrimination even absent comparative evidence about the treatment of men with children.

[44] *E.g., Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000) (comments by decisionmakers reflecting concern that the plaintiff might not be able to balance work and family responsibilities after she had a second child could lead a jury to conclude that the plaintiff was fired because of sex).

[45] *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667, 678 (S.D.N.Y. 1995) (the plaintiff's only "deeply critical" performance evaluation was received shortly after she announced her pregnancy and therefore could be discounted).

[46] *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (evidence showed that the employer had a policy of not hiring women with preschool age children, but did not have a policy of not hiring men with preschool age children).

[47] *Sigmon*, 901 F. Supp. at 678 (reasonable factfinder could conclude that the decreasing number of women in the corporate department was caused by sex discrimination where tension between female associates and the employer regarding the maternity leave policy contributed to the high separation rate of pregnant women and mothers).

[48] For more information on the kinds of evidence that may be relevant in a disparate treatment case, see EEOC Compliance Manual: *Race Discrimination*, Volume II, § 15-V, A.2, "Conducting a Thorough Investigation" (2006), http://www.eeoc.gov/policy/docs/race-color.html#VA2.

[49] *Martin Marietta Corp.*, 400 U.S. at 545 (Title VII prohibits employer from hiring men with preschool age children while refusing to hire women with preschool age children). Some courts and commentators have used the term "sex plus" to describe cases in which the employer discriminates against a subclass of women or men, i.e., sex plus another characteristic, such as caregiving or marriage. *See, e.g., Philipsen v. University of Mich. Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822, at *4 (E.D. Mich. Mar. 22, 2007) ("sex plus" discrimination is discrimination based on sex in conjunction with another characteristic); *Gee-Thomas v. Cingular Wireless*, 324 F. Supp. 2d 875 (M.D. Tenn. 2004) ("Title VII also prohibits so-called 'gender plus' or 'sex plus' discrimination, by which an employer discriminates, not against the class of men or women as a whole, but against a subclass of men or women so designated by their sex plus another characteristic."); Regina E. Gray, Comment, *The Rise and Fall of the "Sex Plus" Discrimination Theory: An Analysis of* Fisher v. Vassar College, 42 How. L. J. 71 (1998). In Back, the Second Circuit explained that the term "sex plus" is merely a concept used to illustrate that a Title VII plaintiff can sometimes survive summary judgment even when not all members of the protected class are subjected to discrimination. The Commission agrees with the *Back* court that, in practice, the term "sex plus" is "often more than a little muddy" and that the "[t]he relevant issue is not whether a claim is characterized as 'sex plus' or 'gender plus,' but rather, whether the plaintiff provides evidence of purposefully sex-discriminatory acts." 365 F.3d at 118-19 & n.8.

[50] *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004) ("Realism requires acknowledgment that the average mother is more sensitive than the average father to the possibly disruptive effect on children of moving to another city, but the antidiscrimination laws entitle individuals to be evaluated as

individuals rather than as members of groups having certain average characteristics."); *see also Manhart v . City of Los Angeles, Dep't of Water & Power*, 435 U.S. 702, 708 (1978) ("[Title VII's] focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.").

[51] *Back*, 365 F.3d at 121 (in a sex discrimination claim under 42 U.S.C. § 1983, the court stated that "where stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based").

[52] Marion Crain, "*Where Have All the Cowboys Gone?" Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1893 (1999) ("[T]he cultural assignment to women of the primary responsibility for nurturing children and making a home undermines their performance in the market . . . . Women who are not caregivers may be adversely affected as well, because employers will assume that their attachment to the waged labor market is secondary.").

[53] Felice N. Schwartz, BREAKING WITH TRADITION: WOMEN AND WORK, THE NEW FACTS OF LIFE 9-26 (1992) (commenting that "even today, women sometimes are advised to remove their wedding rings when they interview for employment, presumably to avoid the inference that they will have children and not be serious about their careers"), *cited in* Williams & Segal, *supra* note 23, at 97; Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 631 n.124 (1993) (stating that "getting married itself is an act that sends out the wrong signal on this score [of commitment to the labor market] – that is, it does for women – and thus the evidence that married women hide their wedding rings prior to job interviews is not surprising").

[54] 42 U.S.C. § 2000e-3(m).

[55] *Id*. § 2000e-5(g)(2).

[56] *Back*, 365 F.3d at 120 ("it takes no special training to discern stereotyping in the view that a woman cannot 'be a good mother' and have a job that requires long hours, or in the statement that a mother who received tenure 'would not show the same level of commitment [she] had shown because [she] had little ones at home'").

[57] *See* Alice H. Eagly & Valerie J. Steffen, *Gender Stereotypes, Occupational Roles, and Beliefs About Part-Time Employees*, 10 PSYCH. WOMEN. Q. 252, 260-61 (1986) (finding that "[f]or women, part-time employment is generally associated with substantial domestic obligations, and female part-time employees are consequently perceived as similar to homemakers"). In contrast, part-time employment in men is associated with difficulty in finding full-time paid employment.

Courts are divided as to whether the practice of paying part-time workers at a lower hourly rate than full-time workers implicates the Equal Pay Act. *Compare Lovell v. BBNT Solutions, LLC*, 295 F. Supp. 2d 611, 620-21 (E.D. Va. 2003) (part-time female worker could compare herself with full-time male worker for purposes of establishing a prima facie case under the EPA), with *EEOC v. Altmeyer's Home Stores, Inc.*, 672 F. Supp. 201, 214 (W.D. Pa. 1987) (EEOC could not establish sex-based pay discrimination by comparing part-time worker with full-time worker). See also Section 10: *Compensation Discrimination*, § 10-IV F.2.h, EEOC Compliance Manual, Volume II (BNA) (2000).

[58] Employers may think that they are behaving considerately when they act on stereotypes that they believe correspond to characteristics that women should have, such as the belief that working mothers with young children should avoid extensive travel. *See KATHLEEN FUEGEN ET AL., Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*,

60 J. SOC. ISSUES 737, 751 (2004); Williams & Segal, supra note 23, at 95.

[59] *Lust*, 383 F.3d 580 (upholding jury's finding that employee was denied promotion based on sex where supervisor did not consider plaintiff for a promotion that would have required relocation to Chicago because she had children and he assumed that she would not want to move, even though she had never told him that and, in fact, had told him repeatedly that she was interested in a promotion despite the fact that there was no indication that a position would be available soon at her own office in Madison).

[60] *Cf. International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 199-200 (1991) (in rejecting employer policy that excluded fertile women from positions that would expose them to fetal hazards, the Court stated that the "beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination").

[61] *See Lettieri v. Equant Inc.*, 478 F.3d 640 (4th Cir. 2007) (evidence was sufficient for finder of fact to conclude that the plaintiff was denied a promotion because of discriminatory belief that women with children should not live away from home during the work week).

[62] *See Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 42, 59-61 (1st Cir. 1999) ("concept of 'stereotyping' includes not only simple beliefs such as 'women are not aggressive' but also a host of more subtle cognitive phenomena which can skew perceptions and judgments").

[63] See Amy J.C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 711 (2004) ("Not only are [working mothers] viewed as less competent and less worthy of training than their childless female counterparts, they are also viewed as less competent than they were before they had children. Merely adding a child caused people to view the woman as lower on traits such as capable and skillful, and decreased people's interest in training, hiring, and promoting her.").

[64] *See Back*, 365 F.3d at 115 (employer told employee that it was "not possible for [her] to be a good mother and have this job"); *Trezza v. Hartford, Inc.*, No. 98 CIV. 2205 (MBM), 1998 WL 912101, at *2 (S.D.N.Y. Dec. 30, 1998) (employer remarked to employee that, in attempting to balance career and motherhood, "I don't see how you can do either job well"); see also Cecilia L. Ridgeway & Shelley J. Correll, *Motherhood as a Status Characteristic*, 60 J. SOC. ISSUES 683, 690 (2004) (noting that while mothers are expected always to be "on call for their children," a worker is expected to be "unencumbered by competing demands and be always there for his or her employer").

[65] *See, e.g.*, Nicole Buonocore Porter, *Re-defining Superwoman: An Essay on Overcoming the "Maternal Wall" in the Legal Workplace*, 13 DUKE J. GENDER L. & POL'Y 55, 61-62 (Spring 2006).

[66] *See infra* § II.C.

[67] *See supra* § II.A.1.

[68] For information on protections under the Family and Medical Leave Act, see Compliance Assistance – Family and Medical Leave Act, http://www.dol.gov/esa/whd/fmla/.

[69] *International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 204 (1991).

[70] Title VII defines the terms "because of sex" or "on the basis of sex" as including "because of or on

the basis of pregnancy, childbirth, or related medical conditions" and provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

[71] Some employers' improper pregnancy-related "inquiries" have even included pregnancy testing. *See, e.g., Justice Department Settles Pregnancy Discrimination Charges Against D.C. Fire Department*, U.S. FED. NEWS, Sept. 8, 2005, 2005 WLNR 14256220 (reporting on settlement between DOJ and District of Columbia regarding complaint that employment offers as emergency medical technicians were contingent on negative pregnancy test result and that technicians who became pregnant during first year of employment were threatened with termination).

[72] *See* EEOC Enforcement Guidance: *Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act*, Question 2 (2000), http://www.eeoc.gov/policy/docs/guidance-inquiries.html ("A 'medical examination' is a procedure or test that seeks information about an individual's physical or mental impairments or health.") (emphasis added). For information on the ADA's specific restrictions on the use of medical examinations, see 29 C.F.R. §§ 1630.13, .14 & Appendix to Part 1630.

[73] 29 C.F.R. Part 1604 Appendix, Question 5 (1978).

[74] *Cf. Troy v. Bay State Computer Group, Inc.*, 141 F.3d 378 (1st Cir. 1998).

[75] This document supersedes EEOC's *Policy Guidance on Parental Leave* (Aug. 27, 1990).

[76] *Hibbs*, 538 U.S. at 736.

[77] See Williams & Segal, *supra* note 23, at 101-02 (discussing stereotypes of men who take active role in childcare).

[78] For information on protections under the Family and Medical Leave Act, see Compliance Assistance – Family and Medical Leave Act, http://www.dol.gov/esa/whd/fmla/.

[79] *See California Fed. Sav. & Loan Ass'n v. Guerra*, 472 U.S. 272, 290 (1987) (upholding state pregnancy disability-leave statute requiring employers to provide leave for the period of time that a woman is physically disabled by pregnancy, childbirth, and related medical conditions).

[80] This period includes the postpartum period that a woman remains incapacitated as a result of having given birth. *See generally* Pat McGovern et al., *Postpartum Health of Employed Mothers 5 Weeks After Childbirth*, ANNALS OF FAMILY MEDICINE, Mar. 2006, at 159, *available at* http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1467019.

[81] *See* EEOC Compliance Manual: Race Discrimination, Volume II, § 15-IV, C, "Intersectional Discrimination" (2006), http://www.eeoc.gov/policy/docs/race-color.html#IVC.

[82] 42 U.S.C. § 12112(b)(4). Section 501 of the Rehabilitation Act provides the same protection to federal workers. 29 U.S.C. § 791(g) (incorporating ADA standards).

[83] *Abdel-Khalke v. Ernst & Young*, LLP, No. 97 CIV 4514 JGK, 1999 WL 190790 (S.D.N.Y. Apr. 7, 1999) (issues of fact regarding whether employer refused to hire applicant because of concern that she would take time off to care for her child with a disability).

[84] 29 U.S.C. § 1630.8 (ADA makes it unlawful for employer to "deny equal jobs or benefits to, or *otherwise discriminate against*," a worker based on his or her association with an individual with a disability) (emphasis added).

[85] 29 C.F.R. § 1604.11 (Sexual Harassment Guidelines); *EEOC Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19, 1990) (sex-based harassment – harassment not involving sexual activity or language – may give rise to Title VII liability if it is "sufficiently patterned or pervasive"), http://www.eeoc.gov/policy/docs/currentissues.html.

[86] This example is based on *Walsh v. National Computer Systems, Inc.*, 332 F.3d 1150 (8th Cir. 2003) (upholding jury verdict that the plaintiff was subjected to a hostile work environment in violation of Title VII when she was harassed because she had been pregnant, taken pregnancy-related leave, and might become pregnant again).

[87] *E.g., Gallina v. Mintz, Levin, Cohn, Ferris, Glosky & Popeo, P.C.*, Nos. 03-1883, 03-1947, 2005 WL 240390 (4th Cir. Feb. 2, 2005) (unpublished) (plaintiff presented sufficient evidence for reasonable jury to conclude that she was denied a pay raise and terminated for complaining about harassment and other adverse conduct that began after the acting manager learned that the plaintiff had a small child).

[88] *See Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006) ("plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have "dissuaded a reasonable worker from making or supporting a charge of discrimination"'") (citations omitted).

[89] *Id*.

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Bernard J. ("Bud") Bobber is a partner in Foley's national Labor & Employment Practice. Although he maintains his office in Milwaukee, Mr. Bobber represents employers before federal and state courts and administrative agencies throughout the country in all areas of employment law, with particular focus on wage and hour, trade secrets/noncompete, employment discrimination and employee benefits matters. Mr. Bobber has extensive experience in the defense of class action cases. He also routinely represents clients in labor arbitrations and in unfair labor practice proceedings before the National Labor Relations Board.

Mr. Bobber also provides both organized and union-free employers with employment and labor law advice, and provides assistance with problem prevention. For example, Mr. Bobber drafts employment agreements and company policies with confidentiality, non-competition and other restrictive covenants for employers to use with key employees. He also counsels employers on reductions and reorganizations, harassment issues, disability accommodation, problematic terminations, collective bargaining strategy, and a host of other work place issues that require thoughtful analysis and practical application of the legal rights and obligations of employers.

Mr. Bobber is an experienced trial lawyer, having tried cases before juries and judges in federal courts in Illinois, Wisconsin, New York and Missouri, as well as in state courts in Wisconsin and Illinois. Additionally, he has tried many dozens of arbitration cases. He also has argued appeals before the United States Courts of Appeals for the Seventh, Sixth, Tenth, Third and Second Circuits. For over five years running, at the request of the chair of Foley's Litigation Department, Mr. Bobber has served as a co-coordinator of the firm's Litigation Department Training Program. In that role, Mr. Bobber has responsibility for the training of all of the firm's litigation associates, numbering approximately 150, in the areas of trial advocacy and related litigation skills.

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Mr. Bobber's abilities and professionalism have been observed and acknowledged by others. Mr. Bobber received the very highest rating available from a peer review process conducted by Martindale-Hubbell. The publisher that conducts the review process explains that the rating awarded to Mr. Bobber confirms "very high to preeminent legal ability," and reflects his "expertise, experience, integrity and overall professional excellence." Similarly, Chambers, a company based in London that reviews and rates American lawyers and publishes its ratings for European and American businesses, rated Mr. Bobber to be one of the top labor and employment attorneys in the state of Wisconsin. Chambers confirmed that top rating in its 2003, 2004, 2005, 2006 and 2007 publications. Mr. Bobber is also listed in *The Best Lawyers In America,* and *Who's Who Legal USA* – Management Labour & Employment 2006. He was also named to the list of Wisconsin Super Lawyers by *Law & Politics Media, Inc.* for his employment & labor work (2005-2007).

Mr. Bobber is a native of Oak Lawn, Illinois, a near suburb of Chicago. He received his J.D. from Northwestern University School of Law in 1987, where he was elected to the Order of the Coif distinction for graduating in the top ten percent of his class. He earned his bachelor's degree in economics from the University of Illinois in 1984. He also is a proud alumnus of Quigley Preparatory Seminary High School on Chicago's south side.

Mr. Bobber is licensed to practice in the states of Wisconsin and Illinois, and is admitted to the bar of the United States Supreme Court, and numerous federal appellate and trial courts. Mr. Bobber is a member of the American Bar Association (both its litigation section and labor and employment law section), the State Bar of Wisconsin, and the Milwaukee Bar Association.

Mr. Bobber currently serves on Foley & Lardner's National Pro Bono Committee, and is the co-chair of the Pro Bono

Committee in the firm's Milwaukee Office. He served on Foley & Lardner's Recruiting Committee from 1997 to 2004, and has been especially active in minority hiring efforts. He served on the board of directors for the Girl Scouts of Milwaukee Area for six years, in addition to other community involvement such as his work on United Way Campaigns. He lives in Mequon, Wisconsin with his wife, Joyce, and their three children.