

**THE YEAR IN REVIEW: AN UPDATE OF THE MOST SIGNIFICANT CASES
UNDER EMPLOYMENT DISCRIMINATION (AND RELATED) STATUTES**

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INTRODUCTION

This year's summary by a plaintiff's side employment lawyer, who specializes in class actions in his practice, focuses primarily on decisions of the federal appellate courts in employment discrimination cases and related procedural issues or other statutes. However, several other recent decisions at the district court level are also noted where they touch on important issues before, or likely to confront the federal appellate courts. State court decisions and state law developments, including some of significance, as well as cases involving traditional labor law, are beyond the scope of this paper.

In order to provide coverage of at least twelve months of developments prior to the writing of this "annual summary," some case decisions from the latter part of 2005 are included in this paper.

THE YEAR IN REVIEW

I. Title VII of the Civil Rights Act of 1964

A. When Are Title VII Requirements Jurisdictional?

1. Arbaugh v. Y & H Corp., 126 S.Ct. 1235 (2006).

In reversing the Fifth Circuit's dismissal of plaintiff's Title VII sexual harassment claim, the Supreme Court held that the 15-employee threshold defining employers subject to the Act (42 U.S.C. § 2000e(b)) is merely an element of the claim and not jurisdictional. The court noted that the 15-employee threshold does not appear in Title VII's jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3), but in a separate definitional section. The court applied a rule that, "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, the courts and litigants will be duly instructed and will not be left to wrestle with the issue... But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." Because the defendant failed to assert its defense based on the 15-employee threshold until after trial, the court held the defense, now understood to be not jurisdictional but only for failure to state a claim upon which relief could be granted, to have been waived.

2. Bacon v. Honda of America Mfg., Inc., 2006 WL 1973242 (6th Cir.) (unpublished opinion).

The Sixth Circuit noted, without deciding, the tension between its previous holding that administrative exhaustion is jurisdictional under Title VII with the Supreme Court's decision in Arbaugh as well as with the D.C. Circuit's decision In re James (see below in this section).

Also of interest is the court's discussion of what constitutes actionable adverse action for retaliation and other Title VII claims. The

court noted that while promotion and termination constitute adverse actions in a case not involving alleged retaliation, a critical counseling or being placed on a performance improvement plan would not; however, those latter actions could constitute adverse actions in the context of a retaliation claim. The court held they were not actionable in this case, however, because a four-year gap between the employee's protected activity and the criticisms of his performance was too long for plaintiff to show a temporal connection establishing the necessary causal nexus.

3. Pacheco v. Mineta, 448 F.3d 783 (5th Cir. 2006).

The Fifth Circuit dismissed plaintiff's disparate impact claim, holding that plaintiff, a federal employee suing under § 717 of Title VII, failed to exhaust his administrative remedies for the claim because it could not reasonably be expected to grow out of his administrative charge. In considering whether plaintiff's disparate impact claim could "reasonably be expected to grow out of the charge of discrimination," the court noted that this liberal standard did not require plaintiffs to allege a prima facie case for each of their claims. However, the court, in applying this test, appeared to disregard its own analysis and focused on the absence of an identified neutral employment policy, an element of the disparate impact prima facie case, in concluding that a disparate impact claim could not be reasonably expected to grow out of plaintiff's EEOC charge. In addition, the court cited the fact that plaintiff's charge facially alleged disparate treatment and only complained of incidents of disparate treatment as further support for its rejection of plaintiff's disparate impact claim.

In a footnote, the court mused about the unsettled state of the law with respect to an issue it declined to answer, finding it unnecessary to resolve in deciding the case – whether the administrative exhaustion requirement is jurisdictional or merely a statutory prerequisite to bringing a lawsuit under Title VII. In another footnote, the court observed that "the relevant scope of the exhaustion requirement is the same for both federal and private employees." This, however, appears contrary to, or at least inconsistent with, a prior Fifth Circuit decision, Brown v. Dept. of Army, 854 F.2d 77 (5th Cir. 1988), finding "a critical difference between private discrimination cases and those premised on a waiver of sovereign immunity by the federal government."

4. In re James, 444 F.3d 643 (D.C. Cir. 2006).

See discussion in section VI.C of this Outline.

5. Doe v. Oberweis Dairy, 456 F.3d 704 (7th Cir. 2006).

The Seventh Circuit reversed the district court's grant of summary judgment in favor of the defendant-employer in this Title VII sexual

harassment case. The district court had concluded, as the Tenth Circuit did with its “good faith” cooperation exhaustion requirement in Shikles v. Sprint/United Mgmt. Co., 426 F.3d 1304 (10th Cir. 2005), that the plaintiff’s failure to cooperate with the EEOC investigation of her claims constituted a failure to exhaust her administrative remedies. The Seventh Circuit rejected this argument on the grounds that this alleged exhaustion requirement had no textual basis in the language of Title VII. Because the plaintiff filed her charge with the EEOC within 180 days of the complained of employment action and did not sue until after she received a “right to sue” letter, the court concluded that plaintiff satisfied all of Title VII’s procedural requirements. Moreover, the court found the vagueness of the Tenth Circuit’s “good faith” cooperation standard too unwieldy and vulnerable to abuse to be useful. In particular, the court was concerned that permitting the issue of whether a plaintiff had sufficiently cooperated with the EEOC’s investigation of her charge to become a potentially jurisdictional defense would result in extensive litigation of issues ancillary to the lawsuit.

On the merits, the court reversed a summary that had been granted to the employer on plaintiff’s sexual harassment claim. The court ruled that although the sexual harassment consisted of a low-level shift supervisor’s having had consensual sex with the plaintiff, that act constituted statutory rape because plaintiff was under-age and could not therefore be considered legally consented to; and that the question whether the employer had exercised sufficient care with regard to the shift supervisor – on a standard imposing less than strict liability as would apply for the acts of a direct supervisor, but a higher standard than for the acts of a co-worker – is normally for the jury.

6. Laber v. Harvey, 438 F.3d 404 (4th Cir. 2006) (en banc).

The Fourth Circuit overruled its previous circuit precedent by holding that a “federal employee plaintiff who prevails before the OFO [EEOC’s Office of Federal Operations] on the issue of liability but who is unsatisfied with the OFO’s remedy must place his employing agency’s discrimination at issue in order to properly claim entitlement to a more favorable remedial award in the district court.” The court supported this position by citing Title VII statutory language that conditioned the ability of district courts to award certain remedies under Title VII upon first reaching a finding of discrimination. In addition, the court cited Chandler v. Roudebush, 425 U.S. 840 (1976), as implicitly recognizing that an employee’s right to *de novo* review of the EEOC’s findings of cause necessarily presumed that administrative findings as to liability were not binding or beyond review. With this holding, the Fourth Circuit joins the Third, Tenth, Eleventh and D.C. Circuits.

Next, the court considered whether the complaint's failure to raise the issue of liability resulted in a jurisdictional defect. It concluded, as a matter of first impression, that the complaint did not because plaintiff's claim for additional relief invoked Title VII, a federal law, thereby providing the district court with subject matter jurisdiction pursuant to 28 U.S.C. § 1331. Having found sufficient grounds to support jurisdiction, the court concluded that the defendant was entitled to judgment as a matter of law on plaintiff's Title VII claim.

B. Disparate Treatment Discrimination

1. Ash v. Tyson Foods, Inc., 126 S.Ct. 1195 (2006).

The Supreme Court summarily reversed the Eleventh Circuit's affirmance of a grant of judgment as a matter of law to the employer, after a trial which resulted in a verdict and damages awards for plaintiffs, under FRCP 50(b), based in part on the Court of Appeals' holding that use of "boy" alone in the context of a racial discrimination in promotions case could not evidence discrimination. As to the epithet, the court explained that the "speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage," and rejected a per se rule that the term "boy" could never be probative of racial bias. In addition, the court rejected the Eleventh Circuit's standard for determining whether defendant's non-discriminatory reasons for refusing to promote plaintiffs were pretextual. It found the Court of Appeals' requirement that the disparity in qualifications "jump off the page and slap you (presumably a court) in the face" wholly unhelpful, and encouraged the use of other Circuit's standards, such as the Ninth Circuit's, which considers whether the plaintiff's qualifications are "clearly superior" to those of the selected, non-protected group applicant.²

2. Petruska v. Gannon Univ., 462 F.3d 294 (3d Cir. 2006).

The Third Circuit, in a matter of first impression, joined the First, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh circuits in recognizing and adopting the First Amendment freedom of religion-based ministerial exception as barring any claim that would limit a religious institution's right to choose who will perform particular spiritual functions. Applying this exemption, the court dismissed the plaintiff's Title VII sex discrimination and retaliation claims as well as her state common law claims against the defendant, a private Catholic diocesan college, as barred for failure to state a claim upon which relief can be granted, under FRCP 12(b)(6) (but not for lack of jurisdiction.) because they directly infringed upon the defendant's right to structure its religious institution. In contrast,

² In the author's opinion, this summary decision may be viewed as (another) example of the Supreme Court telling a Court of Appeals that it has gone too far in a jurisprudence that sometimes smacks of hastiness.

the court held that plaintiff's claims for fraudulent misrepresentation and breach of contract were not barred by the exception because neither claim imposed upon the college's free exercise of religion rights as their adjudication did not require "wading into doctrinal waters."

3. **Maldonado v. City of Altus, 433 F.3d 1294 (10th Cir. 2006).**

(See discussion in Section I.C. of this Outline.)

C. **Disparate Impact Discrimination**

1. **Int'l Brotherhood of Electrical Workers v. Mississippi Power & Light Co., 442 F.3d 313 (5th Cir. 2006).**

The Fifth Circuit granted summary judgment in favor of defendant on plaintiffs' disparate impact claim, involving a concededly job-related test, because plaintiffs failed to meet their burden of demonstrating the existence of an acceptable alternative employment practice after defendant successfully established a business necessity defense. In keeping with long-accepted understanding, the court held that after a defendant establishes a business necessity defense to a claim based on disparate impact, the burden of demonstrating a less discriminatory alternative employment practice falls upon the plaintiff rather than the defendant. The court reasoned that the plain language of the statute places the burden of proving these alternative practices upon the complaining party and that the Supreme Court has repeatedly allocated this burden of proof upon plaintiffs in the context of disparate impact cases. In doing so, the Fifth Circuit joined the Third and Eleventh Circuits and parted with an apparently aberrant decision of the Eighth Circuit on this issue. Applying this standard to the case at hand, the court found that plaintiffs failed to carry their burden because they made "no meaningful showing of acceptable alternative employment practice," finding unacceptably "tenuous" the imprecise and brief reference of plaintiffs' expert in his testimony to the possible use of structured interviews or sample-task interviewing.

2. **Adams v. City of Chicago, 469 F.3d 609 (7th Cir. 2006)**

In the latest appellate opinion from the Chicago police department promotion discrimination cases, the Seventh Circuit considered whether the plaintiffs had successfully demonstrated the existence of an acceptable, less discriminatory alternative to the defendant's use of an examination and ranking process that had adverse impact on minority police officers seeking promotion. The panel, in a 2-1 opinion, affirmed the district court's grant of summary judgment on that issue. During the period covered by the litigation, the police department changed its promotional selection process from a traditional promotional test, which the parties

conceded and the court found to be valid and job-related despite its disparate impact on minorities, to a different selection process that, while also valid, has lesser disparate impact due to its use of “merit” as shown by in-position performance ratings as an important selection factor, along with test results. Plaintiffs argued that the newer selection system constituted a less discriminatory alternative that the police department could and should have used instead of the earlier testing process, and that the failure to do so constituted a Title VII violation.

The district court excluded evidence of the later procedure entirely, but the Seventh Circuit reversed that ruling, finding the later procedure probative and relevant to proving the availability of an alternative procedure at an earlier time. However, the Court of Appeals affirmed the district court’s ultimate holding on the grounds that plaintiffs had not shown that the later procedure had in fact been developed at the time the police department was using the earlier, more discriminatory procedure; that the police department had refused to use the later or any other alternative procedure of which it was aware; or indeed that at the earlier time period there was in existence any alternative procedure that was as valid and job related as the testing procedure then in use. A dissenting opinion argued that there were questions of fact as to whether the less discriminatory alternative procedure was available and known to the defendant at the relevant time.

3. Carpenter v. Boeing Co., 456 F.3d 1183 (10th Cir. 2006).

The Tenth Circuit affirmed the district court’s grant of summary judgment in favor of the defendant, citing plaintiffs’ failure to restrict its statistical analysis to qualified employees. Plaintiffs alleged gender discrimination in the defendant’s compensation practices based upon a disparate impact theory, alleging that supervisor discretion in assigning overtime among hourly-paid workers resulted in men working more overtime than women. Although the report of the plaintiffs’ eminent statistical expert found highly statistically significant gender disparities in the amount of assigned overtime, the court concluded that plaintiffs’ regression analysis was inadequate because it failed to account for all the relevant qualifications for the assignment of overtime hours, and in particular failed to limit the analyses to employees who met all of the eligibility requirements, including some specified in the applicable CBA. Because plaintiffs could not isolate whether the disparate impact was caused by supervisor discretion or the eligibility criteria that were not included in their regressions, the court held that the plaintiffs did not establish their prima facie case for disparate impact discrimination.

The court’s discussion is detailed and reflects a demanding approach to the use of statistical analyses to show discrimination on an adverse impact theory. Among other observations, the court noted:

(1) “the data [must] concern those persons subject to the challenged employment practices”; (2) “when the selection process is only partially subjective, a disparate-impact plaintiff should control for the constraints placed upon the decision-maker’s discretion”; (3) however, “when reliable data regarding that pool [of qualified person] are unavailable, a different population may be used if it adequately reflects the population of qualified persons”; and (4) it is part of plaintiff’s burden to show either that reliable data restricted to qualified employees are unavailable or that the pool used in plaintiff’s analyses constitutes a reliable proxy for qualification. The court also delineates the phenomenon by which relatively small degrees of absolute or practical differences, i.e. 10% - 20% in number of overtime hours worked in the sample, may be associated with extremely high levels of statistical significance where the sample size or number of observations is very large.

In another holding in the case, the court ruled that plaintiffs’ failure to file their petition for a FRCP 23(f) interlocutory appeal of the district court’s orders certifying a class of salaried employees rendered that petition untimely, despite the fact that plaintiffs timely sought reconsideration of the decertification order and filed a timely 23(f) petition after the district court’s denial of that motion.

4. Maldonado v. City of Altus, 433 F.3d 1294 (10th Cir. 2006).

The Tenth Circuit reversed the district court’s grant of summary judgment in favor of defendant City, holding that a reasonable juror could find that the employer’s English-only rule would create a disparate impact on Latino employees in that the rule and its implementation created a hostile work environment affecting Latino workers but not other employees. The court was particularly troubled by the fact that the employer’s language restrictions covered lunch hours, breaks, and even private telephone conversations, and concluded that this evidence constituted adequate evidence to support the inference of animus.

The court also reversed the district court’s grant of summary judgment to the City on the plaintiffs’ disparate treatment claim, finding that the City’s imposition of the English-only rule and statements and actions in connection with the rule constituted prima-facie evidence of animus against Latinos. On the same grounds, the court also held defendant’s conduct violated equal protection rights secured by 42 U.S.C. § 1983.

D. Retaliation

1. Burlington Northern & Santa Fe Rwy Co. v. White, 126 S.Ct. 2405 (2006).

In what was perhaps the year's most significant decision, the Supreme Court held that Title VII's anti-retaliation provision was not limited to actions affecting employment terms and conditions and instead protected workers against any action that a reasonable worker would regard as a materially adverse action. Plaintiff, a female forklift operator, alleged employer retaliation when she was transferred to a standard track laborer position after complaining about sexual harassment from her immediate male supervisor as well as when she was suspended for 37 days without pay following her filing of an EEOC complaint. The court, citing the differences in limiting words and purposes between the anti-retaliation and substantive (anti-discrimination) provisions of Title VII, concluded that the anti-retaliation provision provided broader protection by covering employer actions that would appear materially adverse to a reasonable employee or applicant and not just employment actions that would meet the more stringent adverse action standard for substantive discrimination claims. In other words, the proper standard for retaliation claims was whether the challenged action would have "dissuaded a reasonable worker from making or supporting a charge of discrimination." The court also specifically rejected the prior holdings of Circuits that had required an adverse "ultimate employment decision" such as hiring, promotion, compensation or discharge as the basis for a retaliation claim.

Applying this standard, the court found sufficient evidentiary basis to support the jury's conclusion that the plaintiff was retaliated against by being assigned to a more arduous, less desired, and dirtier position. In addition, the court concluded that plaintiff's 37 day suspension without pay could constitute a materially adverse action even though the defendant later reinstated her and provided back pay for that period. The court reasoned that a reasonable employee could find that a month without pay was a serious hardship not only because such an action could deter the filing of a discrimination complaint, but it could also result in emotional distress that would not be fully compensated by the provision of back-pay for lost wages. Justice Alito concurred, finding the actions against plaintiff to be materially adverse under the same standard applicable to substantive Title VII claims, but disagreed with the majority's conclusion that a broader standard applies to discrimination claims.

2. Rochon v. Gonzales, 438 F.3d 1211 (D.C. Cir. 2006).

The D.C. Circuit held that Congress waived the Executive branch's sovereign immunity from Title VII retaliation claims when it enacted Section 717, 42 U.S.C. § 2000e-16, even though Section 717 does not

contain an explicit prohibition against retaliation similar to that of Section 704(a), which applies to non-federal employers. The court also went on, pre-Burlington Northern, to conclude that claims of retaliation under Title VII were not limited to adverse employment actions and instead could encompass any materially adverse actions that would likely discourage a party from opposing discrimination, including allegedly retaliatory actions against the employee outside the work context.

3. Jensen v. Potter, 435 F.3d 444, (3d. Cir. 2006).

Judge Alito, while still on the Court of Appeals (but after his nomination to the Supreme Court), wrote for the Third Circuit as it reversed summary judgment for the defendant in a Title VII co-worker retaliation case, holding that co-worker harassment could constitute a cognizable claim for retaliation if it created a hostile work environment under Title VII and employer liability could be established. Plaintiff was reassigned to a unit formerly headed by a supervisor who had been fired because he sexually harassed the plaintiff. Upset over the termination of their supervisor, plaintiff's new co-workers subjected her to a pattern of harassment, which included threats, vandalism to her car, and physically intimidating behavior. The court concluded that this harassment satisfied both the subjective and objective components of a hostile work environment claim, and thus constituted retaliation. In addition, the fact that the employer-defendant took over a year to stop the co-workers' harassing behavior, despite plaintiff's numerous complaints, created an issue of material fact regarding employer liability so as to preclude summary judgment.

In holding that a retaliation claim may be founded on a hostile work environment, rather than some other adverse action, the Third Circuit stated that it was joining the view of a Circuit majority including the Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits, and rejecting the contrary view of the Fifth and Eighth Circuits. The Third Circuit also held in this decision that an allegation that retaliatory harassment followed a plaintiff employee's complaint about sexual harassment "will almost always present a question that must be presented to the trier of fact" as a claim of sex discrimination.

Although the Supreme Court's opinion in Burlington Northern does not mention Jensen v. Potter, the Third Circuit's later opinion in Moore v. City of Philadelphia (discussed in this section of the outline below) states that the Supreme Court in Burlington Northern "disagreed with a formulation like the one we adopted in ... Jensen."

4. Moore v. City of Philadelphia, 461 F.3d 331 (3d Cir. 2006).

The Third Circuit, applying Burlington Northern, in a fact-intensive opinion, reversed the district court's grant of summary judgment in favor of defendant in a Title VII retaliation case, concluding that there was a material issue of fact regarding whether plaintiff suffered materially adverse consequences. Plaintiffs, white police officers of the Philadelphia Police Department, alleged retaliation for opposing racial discrimination against African American officers. The court began its analysis by noting that the plaintiffs sufficiently opposed unlawful discrimination by expressing their criticism of their supervisor's racist behavior up the chain of command. It clarified that opposition, in the retaliation context, did not require the filing of a formal complaint with the EEOC and instead could be satisfied by informal complaints. In addition, definitive proof of discrimination was not a prerequisite to bringing a retaliation claim so long as a reasonable person in their position could believe discrimination was occurring. With these elements present, the court concluded that each of the plaintiffs had adduced sufficient evidence to create genuine issues of material fact that they suffered materially adverse consequences for opposing their supervisor's racist behavior, which included inappropriately severe discipline, co-worker assault not properly addressed, assignment transfer, and intervention into child custody proceedings.

5. **Randolph v. Ohio Dept. of Youth Servs., 453 F.3d 724 (6th Cir. 2006).**

(See discussion in section I.E of this Outline.)

6. **Bacon v. Honda of America Mfg., Inc., 2006 WL 1973242 (6th Cir. 2006) (unpublished opinion).**

7. **Jordan v. Alternative Resources Corp., 467 F.3d 378 (4th Cir. 2006)**

Over an impassioned dissent, a panel of the Fourth Circuit affirmed dismissal of an African American plaintiff's claim of retaliatory and racially discriminatory discharge. On the retaliation claim, the court applied Burlington Northern v. White's requirement that in order to state a claim for retaliation the plaintiff must show that a reasonable person could have believed s/he was being adversely affected by the employer's action in a particularly disturbing factual situation. The plaintiff overheard a fellow employee making grossly and blatantly racist remarks (about "black monkeys," and even worse) not directed at the plaintiff, and reported them to management which allegedly took no corrective action. The plaintiff pressed his complaint, and alleged that thereafter he was retaliated against and ultimately fired for pursuing it. The panel majority held that the offensive remarks, made on a single occasion, did not amount to a racially hostile environment, and could not be reasonably regarded by

an objective person as having created such a hostile environment, because they were not pervasive or continuing, and therefore plaintiff's complaint was not about conduct that constituted a violation of plaintiff's Title VII rights. The majority rejected plaintiff's argument that the individual offender's remarks were so profoundly racist as to reflect attitudes certain to result in additional incidents that would constitute severe and pervasive racial hostility sufficient to create a hostile environment, and therefore plaintiff was complaining about an "incipient" hostile environment. The majority also minimized the plaintiff's assertion that its holding placed him in a dilemma because, under the Ellerth/Faragher doctrine, if he did not complain about the discriminatory conduct he would lose the ability to base a hostile environment claim on that conduct, but if he did complain, without delay, he would be deprived of a remedy for retaliation against him for complaining.

Judge King wrote a very strongly worded and reasoned dissent, arguing that the majority's holding eviscerates the Supreme Court's holding in Burlington Northern v. White and places workers exposed to discriminatory conduct that may not in itself constitute a hostile environment in a "classic 'Catch-22' situation." The law as read by Judge King does not require "that the activity he [the retaliation case plaintiff] opposed has, in fact, contravened some aspect of Title VII. Rather, he must simply have a reasonable belief that Title VII has been – or is in the process of being – violated by the activity being opposed." Judge King further argued that it was eminently reasonable for the plaintiff to have believed that the viciously racist remarks he overheard constituted, or would inevitably lead to, a hostile environment in violation of his Title VII rights.

(See section I.A of this Outline.)

E. Sex Discrimination and Sexual Harassment.

1. Randolph v. Ohio Dept. of Youth Servs., 453 F.3d 724 (6th Cir. 2006).

In this case, the Sixth Circuit held that the plaintiff, a female employee at an all-male youth intake facility who alleged a hostile work environment arising from verbal and physical sexual harassment, sufficiently established the prima facie case for a hostile work environment claim, thus surviving summary judgment. In reaching this conclusion, the court emphasized that such claims for hostile work environment claims necessarily required the consideration of the "totality of the circumstances" to determine if the harassment was "sufficiently severe and pervasive" to be actionable, especially since "by their very nature [such claims] require ongoing conduct." Because of the "ongoing conduct" requirement, the district court erred in refusing to consider

evidence of conditions and events outside the period specified in the plaintiff's EEOC charge. The court further found that, at least at the summary judgment stage, the plaintiff had presented sufficient evidence that the employer had actual or constructive notice of the hostile environment created by the inmates and failed to take appropriate corrective action.

On plaintiff's claim for retaliation, the court found the plaintiff's complaints to the facility's administration about some of the inmates' acts and the plaintiffs' working conditions to constitute protected activity as the predicate for the claim. It further held that while not every action affecting a plaintiff's employment constitutes actionable adverse action under Burlington Northern v. Ellerth, adverse action occurred here since the plaintiff was placed on administrative leave, terminated, and then later reinstated with only 70% back pay, citing Burlington Northern v. White.

2. Vickers v. Fairfield Medical Center, 453 F.3d 757 (6th Cir. 2006).

The Sixth Circuit affirmed the district court's dismissal of plaintiff's Title VII sex discrimination, sexual harassment, and retaliation claims, holding that plaintiff was discriminated against on the basis of his perceived sexual orientation and not because of sexual stereotyping. Analogizing to Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), plaintiff argued that the verbal and physical harassment he suffered arose from his harassers' objection to plaintiff's supposed adoption of the less masculine role in homosexual behavior. The court rejected this argument and refused to interpret the theory of sexual stereotyping to include discrimination on the basis of sexual orientation. In support of this position, the court distinguished Price Waterhouse on the grounds that there the Supreme Court focused on characteristics readily demonstrable in the workplace, whereas here the gender non-conforming behavior cited by plaintiff could not be observed in the workplace. In light of this fact, the court concluded that the harassment complained of by plaintiff was more properly viewed as based on perceived homosexuality rather than gender non-conformity. Finally, the court recognized that any discrimination on the basis of sexual orientation would be actionable if it adopted plaintiff's more expansive view of sexual stereotyping – an expansion of Title VII it was not prepared to permit. One Judge on the panel dissenting, arguing that plaintiff presented a straightforward case of sex discrimination based on sex stereotyping, made actionable by Price Waterhouse.

3. Doe v. Oberweis Dairy, 456 F.3d 704 (7th Cir. 2006).

(See section I.A of this Outline.)

4. Jespersen v. Harrah’s Operating Company, Inc., 444 F.3d 1004 (9th Cir. 2006) (en banc)

In this case involving grooming standards applied to female bartenders employed by the defendant casino, the Ninth Circuit held the disputed “appearance policy,” which required female bartenders but not male bartenders to wear facial makeup, to be non-discriminatory, with a minority of the en banc panel dissenting. The majority and dissenters agreed that the makeup requirement had to be evaluated not in isolation, but as part of the employer’s overall dress and grooming standards for bartenders, which also contained restrictions on dress and other aspects of personal appearance. The majority found that the entirety of the appearance policy was not unreasonably burdensome to women than to men, although particular aspects of the policy, including the makeup requirement, were applicable only to women, holding the issue to be “not whether the policies [as applied to male and female employees] are different, but whether the policy imposed on the plaintiff creates ‘an unequal burden’ for the plaintiff’s gender.” Answering this question, the court held that the plaintiff had failed to present evidence creating a triable issue that defendant’s appearance policy was more burdensome for women than for men, and therefore the employer’s motion for summary judgment was properly granted. The court further held that the makeup requirement did not amount to impermissible sex stereotyping because the overall appearance policy of which makeup was a part applied to male and female bartenders alike, and did not reflect a stereotyped view of women as sex objects. The dissenters argued that the requirement to wear makeup was inherently reflective of a stereotyping view of women employees and was obviously more burdensome (for women) than its absence (for men).

F. Religious Discrimination

1. Baker v. Home Depot, 445 F.3d 541 (2d Cir. 2006).

The Second Circuit held that, in a Title VII religious discrimination case, an employer’s affirmative defense of offering a reasonable accommodation may not be met if it does not eliminate the conflict between the employment requirement and the religious practice. Plaintiff alleged religious discrimination under Title VII arising from his employer’s refusal to provide him with Sundays off, which conflicted with his religious belief that he was not permitted to work on Sunday. The district court granted summary judgment in favor of the defendant arguing that defendant’s offered accommodation of later shifts on Sundays, in an effort to enable plaintiff to attend morning church services, constituted a reasonable accommodation. The Second Circuit disagreed, noting that the accommodation failed to eliminate the conflict between plaintiff’s religious beliefs, which prohibited working at all on Sunday, and defendant’s employment practices of requiring plaintiff to work later shifts

on Sunday, and thus there were material issues of fact as to whether the employer's proposed schedule change or allowance of shift exchanges with other employees be considered a reasonable accommodation. While noting that the offered accommodation did not fully eliminate the conflict between the employer's requirements and the employee's professed beliefs, the court also noted that "employees are not entitled to hold out for the 'most beneficial accommodation,' and that '[o]rdinarily, questions of reasonableness are best left to the fact finder."

II. 42 U.S.C. § 1981

A. Hague v. Thompson Distribution Co., 436 F.3d 816 (7th Cir. 2006).

The Seventh Circuit affirmed the district court's grant of summary judgment in favor of the defendant on the grounds that the white employee-plaintiffs, who alleged racial discrimination under § 1981, failed to establish that the African American employer-defendant's reasons for terminating them were pretextual. Because this case involved a claim of reverse discrimination, the court adopted a "modified" (and, seemingly, somewhat heightened) McDonnell Douglas standard that required the majority-group plaintiff to establish "background circumstances sufficient to demonstrate that the particular employer has reason or inclination to discriminate invidiously against whites or evidence that there is something fishy about the facts at hand" (internal quotes omitted). The court joined the Sixth, Eighth, Tenth, and D.C. Circuits in applying this standard, but split with the Third Circuit, which rejects this modified test and only requires a plaintiff, whether a member of a majority or minority group, to present adequate evidence that could persuade a factfinder that the employer treated the employee less favorably based upon protected traits such as race (including white). Despite applying this modified and heightened standard, the court found that the fact that the African American employer fired all white employees and replaced them with African Americans was sufficient to meet the prima facie test. Nevertheless, the court upheld the district court's grant of summary judgment because the defendant provided legitimate non-discriminatory reasons for firing plaintiffs, including "fit," which plaintiffs could not prove were pretextual.

B. Ofori-Tenkorang v. American Int'l Group, Inc., 460 F.3d 296 (2d Cir. 2006).

The Second Circuit held, as a matter of first impression for itself as well as all circuit courts, that § 1981 did not apply to extraterritorial violations occurring outside the United States, but rather only to domestic ones. Looking first to the statutory language, the court viewed the phrases "persons within the jurisdiction of the United States" who are entitled to the same "right[s] in every State and Territory" which appears in § 1981 as clearly indicating a domestic scope of intended protection. The court also noted that its holding was consistent with the general principle that extraterritorial application of civil rights statutes is limited to situations where Congress explicitly and unequivocally manifests its intent for

such application, which the court found absent in the § 1981 context. Finally, the court rejected plaintiff's "center of gravity" or "substantial contacts" theories – even though the plaintiff's employment by defendant began within the United States – on the grounds that they failed to meet the basic requirements of § 1981 that the injured party be physically present within the United States when the allegedly actionable conduct occurred, and as such those theories would greatly expand the scope of § 1981 in contravention of the statute's language and Congress' intent.

C. Azimi v. Jordan's Meats, Inc., 456 F.3d 228 (1st Cir. 2006).

The First Circuit affirmed that a jury could find the presence of a hostile work environment arising under § 1981 and Title VII, but nevertheless refuse to award compensatory damages in the absence of sufficient causation. Noting that neither case precedent nor statutes provide for presumptive or automatic damages, the court rejected plaintiff's demand for compensatory damages following a finding of a hostile work environment as improperly attempting to eliminate the requirement of causation from the determination of damages. The court held that in the event a jury determines that a plaintiff did not suffer any distress caused by § 1981 and Title VII violations, as occurred in this case, that jury was not compelled to award compensatory damages.

The court did not reach plaintiff's arguments that he should have been awarded at least nominal damages and therefore permitted to challenge the Circuit's rule of law requiring some compensatory damages award as a prerequisite for punitive damages, because plaintiff had not objected to the relevant jury instructions, or sought nominal damages, in a timely fashion.

III. Americans With Disabilities Act (ADA)

A. Hostile Work Environment

1. Arrieta-Colon v. Walmart Puerto Rico, Inc., 434 F.3d 75 (1st Cir. 2006).

The First Circuit affirmed a jury verdict of \$76,000 in compensatory damages and \$160,000 in punitive damages in favor of the plaintiff in an ADA hostile work environment case. Plaintiff alleged severe and pervasive harassment by co-workers and supervisors arising by co-workers and supervisors arising from his physical appearance after undergoing surgery for a penile implant which he contended "left [him] with the appearance of a constant semi-erection." Despite plaintiff's having complained to several supervisors about the harassment, defendant did not take any corrective actions. In affirming the verdict, the court agreed that the district court's refusal provide a jury instruction on the Ellerth-Faragher affirmative defense was without error because no reasonable jury could conclude that the defendant's open door policy was

actually implemented given defendant's non-responsiveness after plaintiff's repeated complaints and because plaintiff's repeated complaints provided sufficient notice of the harassment to defendant's management, which it did promptly address it. On damages, the court rejected the defendant's argument that the mere existence of an open door policy precluded the award of punitive damages, and found sufficient evidence to uphold the jury's verdict, concluding that the alleged open-door policy was a sham, establishing reckless disregard for the plaintiff's rights and entitling plaintiff to punitive damages. The court upheld the jury's denial of back pay on the grounds that plaintiff failed to request that the issue of back pay be reserved for the court and that he failed to provide evidence that he attempted to mitigate his losses. Interestingly, the court overlooked the fact that defendants typically carry the burden of proof on the issue of mitigation as well as 42 U.S.C. § 1981a(b)(2)'s apparent automatic reservation of the back pay determination for the district court, not the jury. The court also affirmed the jury's denial of front pay because plaintiff did not demonstrate that reinstatement was impossible or impracticable.

B. Reasonable Accommodation

1. **D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220 (11th Cir. 2006).**

The Eleventh Circuit held that employers are required to provide reasonable accommodations for both disabled and regarded-as-disabled employees under the ADA. There is a current circuit split on this issue with the Third Circuit and First (indirectly) Circuits agreeing with the Eleventh Circuit, while the Fifth, Sixth, Eighth, and Ninth Circuits disagree. In reaching its conclusion, the court found that the plain language of the ADA treats disabled and regarded-as-disabled persons the same – citing the lack of differentiation among the different types of disabilities in the ADA's definition of disability. The court also noted the parallels between the ADA and the Rehabilitation Act, which has already been interpreted as requiring the same degree of protection from discrimination for regarded as disabled person as for disabled persons.

C. Sovereign Immunity from Damages Claims

1. **United States v. Georgia, 546 U.S. 151, 126 S.Ct. 877, Nos. 04-1203 and 14-1236 (January 10, 2006).**

The Supreme Court ruled, in this non-employment case involving a state prison inmate's inartfully pleaded claims sounding in both the Equal Protection Clause of the Fourteenth Amendment, made actionable under 42 U.S.C. § 1983, and Title II of the ADA (public accommodations), that Eleventh Amendment sovereign immunity did not bar plaintiff's claims

for damages to the extent those claims were based on “actual,” injuries due to actions violative of the Fourteenth Amendment, and not just claims for forward-looking or “prophylactic” enforcement of ADA rights. The court ruled that Congress’ power to enforce the “substantive” provisions of the Fourteenth Amendment pursuant to Section 5 of that Amendment are undoubted, and that Congress permissibly exercised that power in enacting the ADA. Thus, Section 2 of the ADA constitutes a valid abrogation by Congress of the states’ immunity from claims for damages from conduct that “actually” violates the Fourteenth Amendment and at the same time violates the ADA. The court reserved for further proceedings in the lower courts, and ultimately for its own review, the question whether, to the extent the defendant’s conduct may have violated Section 2 of the ADA but not the Fourteenth Amendment, Congress’s purported abrogation of sovereign immunity in enacting Section 2 of the ADA is constitutionally valid.

Although the case does not discuss the employment provisions of the ADA, its reasoning would seem to apply to ADA/Fourteenth Amendment cases against public entities.

IV. Age Discrimination in Employment Act (ADEA)

A. Business Justification and Necessity

1. Pippin v. Burlington Resources Oil and Gas Co., 440 F.3d 1186 (10th Cir. 2006).

The Tenth Circuit affirmed the district court’s award of summary judgment in favor of defendant who terminated plaintiff as part of a reduction in force (RIF), because plaintiff failed to prove, on his disparate treatment claim, that defendant’s offered business justifications for terminating him were pretextual; and on his disparate impact claim, under the specific standards governing such a claim under the ADEA pursuant to Smith v. City of Jackson, 544 U.S. 228 (2005), because plaintiff could not show the policies underlying the RIF were not based on “reasonable factors other than age” such as prior performance ratings and needed skills. The court concluded that the RIF was implemented consistently and in light of legitimate business concerns, rejecting plaintiff’s arguments that the reduction in force or his performance evaluations were pretextual.

2. Meacham v. Knolls Atomic Power Lab. Inc., 461 F.3d 134 (2d Cir. 2006).

The Second Circuit, on remand after the Supreme Court’s decision in Smith v. City of Jackson, which held that the “business necessity” test was not applicable to the ADEA context, concluded that an employer did not have to provide a business necessity justification for its actions once a

plaintiff made a prima facie showing of ADEA disparate impact discrimination, but instead only needed to satisfy a reasonableness test. Under the reasonableness test of Smith, employers are only required to show that the challenged employment action, which must rely upon non-age factors, was a reasonable means to achieve the employer's legitimate goals and thereby eliminated the need to meet heightened standards of business necessity and absence of a less discriminatory alternative.

Addressing the burden of proof issue, the court looked to Wards Cove which placed on plaintiff the burden of proving that the employer's offered justification was unreasonable, and concluded that the burden of proving that the employer's legitimate justification is unreasonable similarly falls on the plaintiff – not the defendant. Despite noting that the RFOA provision has many characteristics of an affirmative defense, which if it was an affirmative defense would require the defendant-employer to prove reasonableness, the court viewed City of Jackson and Wards Cove as specifically addressing the character of the RFOA provision and holding otherwise. In applying the test to the present case, the court determined that the plaintiffs did not discharge their burden because the defendant's implementation of its involuntary reduction in force, though subjective in some parts, had adequate standards and matrices to evidence a substantial attempt to limit the amount of arbitrary decision making and therefore, were sufficient and reasonable.

B. Procedural Issues

1. EEOC v. Sidley Austin, LLP, 437 F.3d 695 (7th Cir. 2006).

The Seventh Circuit held that the EEOC could obtain monetary relief on behalf of the partner-plaintiffs alleging violations of the ADEA relating to their demotion from equity partnership status even though they were barred from bringing their own individual suits because they failed to file timely EEOC charges. Citing EEOC v. Waffle House, Inc., 534 U.S. 279 (2002), the court concluded that the EEOC's ability to seek monetary relief for these individual plaintiffs was not barred because its enforcement authority was not derivative of the individual plaintiffs' legal rights and the EEOC has no obligation to exhaust administrative remedies prior to filing suit under the ADEA. The court noted, however, that defenses to recovery like failure to mitigate or the entry of partners into a prior settlement would apply.

2. Warch v. Ohio Cas. Ins. Co., 435 F.3d 510 (4th Cir. 2006).

The Fourth Circuit created a circuit split with the Sixth Circuit by holding, in a pretext and mixed motive ADEA case challenging the plaintiff's termination for poor job performance, that courts could consider evidence of job performance to determine whether a plaintiff proved a

prima facie case of discrimination. Plaintiff appealed the district court's grant of summary judgment in favor of the defendant arguing that its analysis improperly conflated the first and second stages of the McDonnell Douglas analysis by using defendant's proffered nondiscriminatory reason for its action, reserved for the second stage of the analysis, as a predicate for assessing the plaintiff's prima facie case at the first stage of analysis. The Fourth Circuit rejected plaintiff's argument, noting that in termination cases the emphasis is less focused upon qualifications for the job, since the fact that the plaintiff had the job presumes that he was qualified to hold it, and instead focuses upon job performance. Thus, in termination cases, demonstrating that a plaintiff was qualified as part of the prima facie case of discrimination requires inquiring into whether the employee adequately performed her job and met the employer's legitimate job expectations. The court concluded that "we find no impermeable barrier that prevents the employer's use of such evidence at different stages of the McDonnell Douglas framework," and cited the flexibility of its approach as contributing to "the inquiry into the elusive factual question of intentional discrimination." The fact that the plaintiff had a long history sub-par job performance prior to his termination justified affirmance of the summary judgment against plaintiff on both his pretext and mixed-motive claims.

C. Waiver of ADEA Rights

1. Syverson v. Int'l Business Machines Corporation, 461 F.3d 1147 (9th Cir. No. 04-16449 (August 31, 2006).

The Ninth Circuit invalidated what appears to be IBM's standard waiver form for layoffs with severance benefits in this Older Workers Benefit Protection Act (OWBPA) and ADEA case. The OWBPA invalidates waivers of rights or claims under the ADEA unless the written waiver is "knowing and voluntary," 29 U.S.C. §626(f)(1). To meet this test, under DOL regulations and some caselaw, the waiver instrument entered into by the employer and employee must be "written in a manner calculated to be understood by the average individual eligible to participate" in the workforce reduction program. The Ninth Circuit, agreeing with a previous decision of the Eight Circuit involving the same waiver form, Thomforde v. Int'l Bus. Mach. Corp., 406 F.3d 500 (8th Cir. 2005), but with more extensive reasoning than the Eighth Circuit, noted that the waiver proponent (generally the employer) has the burden of showing the validity of the waiver, and found that IBM's waiver did not carry its burden under the applicable test.

The court reasoned that to meet the "manner calculated" standard, the waiver must, as the DOL regulations require, be written in "plain language geared to the level of understanding" of the eligible or affected individuals, and not contain "technical jargon and long complex sentences." The defect it found in IBM's waiver was this: The waiver

language includes both a release of the right to sue under the ADEA (and other statutes) and a covenant not to sue, which covenant states, however, in the context of consequences of violating the covenant, that it “does not apply to actions based solely under the ADEA. This means if you were to sue IBM only under the ADEA you would not be liable for their attorneys’ fees and costs.” The Ninth Circuit found the language of these two provisions – the release and the covenant –fatally confusing to the “average” affected individual as they required parsing seemingly similar legal terms to understand how they differ. It therefore found the waiver not “written in a manner calculated to be understood” by such persons, and therefore its acceptance was not “knowing and voluntary” on their part.

2. **Kruchowski v. Weyerhaeuser Company, 446 F.3d 1090 (10th Cir. 2006)**

In this rehearing panel decision, which was substituted for a 2005 panel decision, the Tenth Circuit invalidated a waiver signed by numerous over-40 years old employees in connection with a group lay-off at a single industrial plant. The OWPBA requires that a waiver of ADEA rights in connection with a group termination program, to be valid and enforceable, must provide information including age and job titles of those employees “eligible for the program” (i.e. to be laid off and offered severance in exchange for their waivers) and of those not so eligible. The question was whether the information Weyerhaeuser provided – job title and age for all salaried employees at the plant, including 15 employees in staff function positions who were not under the supervision of the Plant Manager – was accurate, since the only employees considered for layoff and the severance program were employees at the Plant who were within the Plant Manager’s line of reporting. The court held the information provided insufficient, and the release invalid.

The Tenth Circuit identified the specific issue as whether the “decisional unit” to which the information related was the same as the decisional unit for the employer’s decision-making process, and found that it was not. The court based its ruling on what it viewed as the “strict and unqualified requirement” of the OWPBA that information be provided for the actual decisional unit and not an approximation of that unit. It found the term “decisional unit” and its definition not in the statute, but in implementing regulations of the EEOC, the agency responsible for implementation and enforcement of the ADEA.

3. **Burlison v. McDonald’s Corporation, 453 F.3d 1242 (11th Cir. 2006)**

The Eleventh Circuit upheld as valid a release signed by a group of laid-off McDonald’s employees, granting the employer’s motion for

summary judgment on the employees' ADEA action, challenging their termination. The issue centered on the same OWPBA provision involved in Kruchowski, requiring that the employer provide information about those laid off and not laid off in the relevant "decisional unit" to employees offered severance payments in exchange for a release. The layoffs in question resulted from a corporate reorganization which merged three McDonald's regions into one, the new Atlanta region; additional employees were laid off in similar reorganizations that took place simultaneously in other parts of the country. McDonald's provided the requisite information for the Atlanta region only, not for layoffs in other parts of the country.

The Eleventh Circuit rejected the plaintiffs' contention that McDonald's provided inadequate information since it provided information only about the Atlanta region, which it found was the "decisional unit" in which the decisions as to which employees to lay off (and offer severance to) were made. It arrived at that result by finding the statutory language, which does not include the term "decisional unit" but only refers to the "program" including the layoffs and severance offers, to be ambiguous. It then adopted the principle of Chevron deferral to the interpreting rules or the agency charged with administering the statute, which in the case of ADEA is the EEOC. The court also found that following the "decisional unit" regulation of the EEOC is consistent with the remedial purposes of the OWPBA because making the information provided congruent in scope to the decision-making process will enable affected employees to discern any patterns that may appear in the layoff decisions and act accordingly to protect their ADEA rights.

The Eleventh Circuit sidestepped an additional question that plaintiffs sought to raise, relating to whether the OWPBA requires employers to state the "eligibility factors," i.e. grounds for the selection of individuals for layoff and offers of severance in exchange for a release, used in the decision-making process. The court did so because the plaintiffs had not raised the issue in the district court, and therefore could not raise it for the first time on appeal. The court noted that the Tenth Circuit, in Kruchowski, had initially addressed that question in its first panel opinion, but had withdrawn any reference to the "eligibility factors" issue in the revised panel opinion summarized above.

V. Other Statutes and Constitutional Provisions Affecting Employment Claims

A. Religions Freedom Restoration Act

1. Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006).

The Second Circuit held that the Religious Freedom Restoration Act of 1993 (RFRA), which only permits burdening a person's exercise of

religion if it would further a compelling governmental interest and is the least restrictive means of doing so, is constitutional and whether RFRA amends the ADEA as it applies to the plaintiff's age discrimination charge against his employer, a religious institution. While the district court dismissed for lack of jurisdiction by citing the non-statutory ministerial exemption, the court concluded that the RFRA superseded the exemption because it was statutorily based. Furthermore, the court held that the RFRA's application to federal law, such as ADEA, was a constitutional exercise of Congress' Necessary and Proper powers and did not violate the Establishment clause of the Constitution. The court remanded the issue to the district court to determine the effect the RFRA would have on the plaintiff's ADEA claim.

B. Congressional Accountability Act

1. Fields v. Office of Eddie Bernice Johnson, Employment office, U.S. Congress, 459 F.3d 1 (D.C. 2006) (en banc).

In this case, the D.C. Circuit Court held that the personnel decisions of Congressional representatives were not necessarily protected by Speech and Debate Clause immunity. In doing so, the court overturned its previous decision in Browning v. Clerk, U.S. House of Representatives, 789 F.2d 923 (D.C. Cir. 1986), which held that the personnel decisions of Congressional representatives were immune from judicial scrutiny where the affected "employee's duties were directly related to the due functioning of the legislative process." The court concluded that this previous holding was over-inclusive and instead held that personnel decisions of Congressional representative enjoy immunity for judicial scrutiny only if the decisions themselves are directly related to the "legislative process," stating a lawsuit may proceed if it "does not inquire into legislative motives or questions conduct part of or integral to the legislative process." Applying this standard to the plaintiffs' claims for race and sex discrimination and perceived disability discrimination by two Congressional staffers, which involved only routine employment decisions not closely related to the legislative processes, the court on interlocutory appeal, affirmed the District Court's denial of the defendants' motions to dismiss. However, the court noted that the Speech and Debate Clause could preclude relevant evidence even in cases where the personnel decisions were not legislative acts where such an inquiry could require exploration of the motivation behind those decisions, which could implicate legislative actions.

C. First Amendment Speech Rights of Public Employees

1. Garcetti v. Ceballos, 126 S.Ct. 1951, No. 040473 (May 30, 2006).

The Supreme Court held in this case that a public employee's free speech rights did not protect him from discipline including, in this case, discharge, for speech, in this case a memorandum criticizing his employer's (the District Attorney's) handling of a public matter (in this case, a criminal prosecution), when that speech was in the course of his official duties. In a 5-4 decision by Justice Kennedy, the court held that the statements of a public employee in the regular course of his professional duties – unlike a public employee's private statements as a citizen – are not protected speech under Pickering v. Board of Education, 391 U.S. 563 (1968), and therefore the First Amendment places no constraints on the public employer's disciplinary action based on such statements. In its reasoning, the court balanced the need for public entities to control their employees in their official acts against the constitutional values of free expression, and found ample justification for an employer requiring its public employee to refrain from critical statements within the scope of his official duties.

VI. Certification of Employment Discrimination Class Actions

A. Reeb v. Ohio Dept. of Rehab. & Corr., 435 F.3d 639 (6th Cir. 2006).

The Sixth Circuit again reversed a Rule 23(b)(2) class certification for equitable relief and money damages in this sex discrimination employment case, holding that Title VII class actions involving claims for individual compensatory damages may never be brought under Rule 23(b)(2). Because these individual compensatory damages would necessarily predominate over requests for declaratory or injunctive relief, the court reasoned that no Title VII class action seeking individual compensatory damages could be certified as (b)(2) class, based on its decision in Coleman v. General Motors Acceptance Corp., 296 F.3d 443 (6th Cir. 2002), which adopted and applied the rationale of Allison v. Citgo Petroleum Co., 151 F.3d 402 (5th Cir. 1998), in an Equal Credit Opportunity Act (ECOA) class action. The court found that the same factors which preclude the certification of a Rule 23(b)(2) action for individual compensatory damages under ECOA also apply to Title VII class actions. In its opinion, the Sixth Circuit specifically rejected the standards adopted by the Second Circuit in Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147 (2nd Cir. 2001); and the Ninth Circuit in Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003). Both of those Circuits require a case-by-case predominance analysis, and refuse to say “never” to Rule 23(b)(2) actions for damages. Judge Damon Keith vigorously dissented from all of the majority’s holdings, disagreeing with Allison and following Robinson. Thus, Reeb deepens the existing Circuit split around Allison.

Despite rejecting Rule 23(b)(2) as a vehicle for class actions seeking individual compensatory damages, the Sixth Circuit specifically noted that such actions may be brought under Rule 23(b)(3), and that plaintiffs may seek class-wide (not individual) compensatory and punitive damages in a Rule 23(b)(2) class action. These questions, as well as the standard governing certification of a Title VII class action for injunctive relief and back pay, remain to be explored in the Sixth Circuit.

This case appears to be an example of a mishandled case making what the author considers bad law. There is no indication in the opinion that the plaintiffs sought any type of monetary relief other than individual compensatory damages, such as back pay (which the court’s opinion therefore does not consider in its Rule 23(b)(2) analysis). The plaintiffs requested an injunction, but did not specify what conduct they wanted enjoined or the nature of the injunctive relief sought. In these circumstances, it is perhaps understandable that the Sixth Circuit’s was led to its holding that damages will always predominate for lack of any alternatives presented on this record.

The district court too, contributed to the wreckage. Despite having had a prior certification of the same class action reversed for failure to conduct the “rigorous analysis” required by Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147 (1982), on remand the district court received no evidence supporting its

23(a) and 23(b)(2) findings, but simply re-entered its certification order with only the broadest and most conclusory possible statements that those Rule 23 sections' requirements were met.

B. Love v. Johanns, 439 F.3rd 723 (D.C. Cir. 2006)

In this case brought under the Equal Credit Opportunity Act (ECOA) – not involving employment issues but credit discrimination claims – the D.C. Circuit upheld the district court's denial of class certification based on an insufficient showing of any common practices involved in the USDA Farm Service Agency's decisions to deny loans and subsidies to thousands of women farmers across the country. Plaintiffs' claim in the case was based on a theory somewhat analogous to that underlying many contemporary employment discrimination class actions – that defendants engaged in a “pattern or practice” of discrimination “by employing subjective loan-making criteria, which enabled decentralized decision-makers to discriminate amongst loan applicants on the basis of gender.” The D.C. Circuit found that plaintiffs had failed to demonstrate commonality as required by Rule 23(a)(2), despite submitting many hundreds of declarations with anecdotal testimony about loan applications not offered or submitted applications denied by the FSA. The court concluded that plaintiffs' evidence failed to “bridge the gap: between their individual claims and the requirement that a “common policy” be shown, largely because the anecdotal declarations “differ[ed] widely” and contained a wide range of discrimination complaints “interspersed with nondiscriminatory evidence and innocuous explanations,” and because over 40% of the declarants stated they “had no idea why their loan applications were denied” and therefore could not affirmatively allege discrimination. The court further observed that plaintiffs' “rudimentary” statistical evidence, showing that fewer women received loans and those who did received smaller loans than men, was inadequate to demonstrate any pattern of inequality due to its failure to control for any factors relevant to loan-worthiness among applicants.

In its decision, the D.C. Circuit steered away from overly broad pronouncements about certifiability of class actions. On one hand, it observed that the existence of subjective decision-making practices alone do not warrant a commonality finding for purposes of class certification. On the other hand, it specifically rejected the notion that “anecdotal evidence alone is inherently insufficient to justify class certification,” and framed its decision as an affirmation of the district court's exercise of discretion in denying class certification. Although the district court also ruled that the claim for \$3 billion in damages would necessarily predominate over any claim for injunctive relief or any common claims, thereby making the action non-certifiable under Rule 23(b)(2) or Rule 23(b)(3), and the parties and/or amici curiae apparently briefed those questions on appeal, the Court of Appeals did not reach those issues. While this decision could be considered fact-bound, or relating solely to ECOA jurisprudence, it is worth noting that it could also foreshadow, for the D.C. Circuit (which has not yet weighed in on Allison v. Citgo issues) the same type of decisional sequence followed by the Sixth Circuit in first ruling that class actions

for damages were improper under ECOA, then later, in Reeb, analogizing to and extending that holding to employment discrimination class actions while following the logic of Allison.

C. Garcia v. Johanns, 444 F.3d 625 (D.C. Cir. 2006)

This ECOA action was a companion case to Love v. Johanns, section VI.B above, and was similarly decided by the same panel of the D.C. Circuit. The action was brought by Hispanic farmers challenging national origin discrimination in the same loan programs involved in Love, also on a nationwide basis. The Court of Appeals affirmed the denial of class certification, based on facts and evidentiary analysis differing somewhat, but not greatly, from those in Love. This note focuses on the different aspects of the opinion.

The District of Columbia Circuit emphasized the district court's discretion in ruling on class certification, noting "we will affirm the district court even if we would have ruled differently in the first instance" unless the court finds "abuse of discretion or erroneous application of legal criteria." On the class disparate treatment claim, the court noted that – as in a Title VII action – plaintiffs had to show that discrimination was "standard operating procedure" manifested in a "common policy of discrimination that pervaded all of the defendant's challenged decisions." It also noted that commonality is usually more difficult to show in a disparate treatment case than under a disparate impact analysis. It faulted the plaintiffs for failing "to identify any centralized, uniform policy or practice of discrimination" and described plaintiffs' claims as "aris[ing] from multiple individual decisions made by multiple individual [loan] committees." On the disparate impact claim, the court faulted the plaintiffs for failing to identify a specific, facially neutral practice that resulted in discrimination common to the class. Further, the court found the statistical analyses on which plaintiffs relied to show disparate impact "flawed because they did not incorporate key relevant variables connecting disparate impact to loan decisionmaking criteria" such as credit-worthiness, experience, and other factors. Although the court found other evidence, consisting of loan-denial files, suggestive of commonality, it concluded that the district court did not deny its discretion because the files reflected a diversity of reasons for the defendant's actions, supporting the finding of a lack of commonality.

VII. Interlocutory Appeals

A. Carpenter v. Boeing Co.

(See section I.C of this Outline.)

B. In re James, 444 F.3d 643 (D.C. Cir. 2006).

The D.C. Circuit declined to hear plaintiffs' interlocutory appeal under Rule 23(f) from the district court's order, which denied class certification based on failure to comply with the charge-filing and administrative exhaustion

requirements of Title VII, citing Rule 23(f)'s restriction that courts may only consider issues relating to Rule 23 certification requirements on interlocutory appeals under that Rule. Because the district court's denial of class certification was based upon Title VII's filing and exhaustion requirements, and not Rule 23 certification requirements, the court, citing In re Lorazepam & Clorazepate Antitrust Litigation, 289 F.3d 98 (D.C. Cir. 2002), held it could not consider plaintiffs' appeal under Rule 23(f).

Also of interest is the court's observation that neither timeliness of charge filing nor exhaustion of administrative requirements is jurisdictional under Title VII, citing Arbaugh (see section I.A of this Outline.)

VIII. Arbitration

A. Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005), cert. denied, 126 S.Ct. 2020 (2006).

The Eleventh Circuit affirmed the district court's order compelling arbitration and dismissing plaintiffs' class action claims under the ADEA, ERISA, FLSA and individual claims under Title VII and FLSA on the grounds that the defendant's Dispute Resolution Policy (DRP), which contained an arbitration clause for all employment related claims as well as a ban on class actions, was valid and enforceable. In very troubling factual circumstances, the court applied Georgia contract law to determine whether the employees' waivers of their statutory rights to sue were "knowing and voluntary" acceptances of the employer's offer of continued employment, which included acceptance of its arbitration plan and waiver of all rights to proceed in court. The facts appear egregious. Defendant mailed to all of its employees a copy of the DRP, an explanatory cover letter, and question-and-answer form. Described as a condition of continued employment in the cover letter, the DRP had a clause buried close to the end of the document that stated that the document was in fact a contract, despite not being titled as such, and that continued employment constituted acceptance of the contract terms and that a signature was not required for the policy to be effective. Several month later, defendant modified the terms of the DRP – an action the employer had reserved the right to take – to include a ban against class or collective actions based on "covered" employment related claims. The very next day, defendant fired hundreds of employees including members of the plaintiff classes. In analyzing the DRP under Georgia contract law, the court found that plaintiffs' continued employment constituted sufficient acceptance, noting that Georgia contract law did not require that acceptance be knowing so long as it is done in the proper manner. Moreover, the court viewed the ban on class actions as being consistent with the principle of limiting certain litigation devices in an effort to simplify and expedite arbitration proceedings and thus, not unconscionable, creating a split with the Ninth Circuit on that issue.

The court rejected plaintiffs' argument that the heightened "knowing and voluntary" standard for waiving one's Seventh Amendment right to a jury trial

was violated by the DRP. Instead, the court argued that plaintiffs did not waive any substantive rights by submitting to an arbitral forum; that the right to a jury trial only applied where it is determined that litigation should proceed before a court, which was inapplicable in the presence of an arbitration agreement; and that general contract principles govern the enforceability of arbitration agreement – not a heightened “knowing and voluntary” standard. With this holding, the Eleventh Circuit joins the Third, Fourth, Fifth, and Seventh Circuit in applying common law contract principles to determine the enforceability of arbitration agreements, contrary to the Sixth and Ninth Circuits which require a heightened “knowing and voluntary” or “knowing” standard and the First Circuit which adopts an “appropriate” test based upon general federal arbitration law.

B. Berkley v. Dillard’s, Inc., 450 F.3d 775 (8th Cir. 2006)

The Eighth Circuit upheld a district court’s order compelling arbitration in this harassment and retaliation case. After having become an employee of defendant and after having filed an administrative complaint alleging the harassment that was later the subject of her lawsuit, the plaintiff was presented with several documents by the employer-defendant requiring arbitration of legal claims, including those for harassment. One of the documents stated that acceptance of continued employment with Dillard’s constituted acceptance of the arbitration program; another was a form acknowledging that continued employment constituted acceptance. The plaintiff refused to sign the acknowledgment form. Holding these written statements to have become contractual agreements as a result of the plaintiff’s having continued her employment, the Eighth Circuit held that the arbitration agreement was properly enforced, and the court action properly dismissed. The court rejected the argument that the agreement, even if contractually binding, could not be applied to events and plaintiff’s complaint concerning those events, both of which occurred before the implementation of the arbitration program. The court refused to consider plaintiff’s argument that the arbitration agreement, in the circumstances of the case, was unconscionable, because the plaintiff had not raised that argument in the district court.

C. Buckeye Check Cashing v. Cardenga, 126 S.Ct. 1204 (2006).

In this non-employment case, the Supreme Court held that a challenge to the enforceability, under state law and public policy, of a state law contract, which also included an arbitration clause, was a matter to be determined in the first instance by the arbitrator. Because arbitration clauses are, as a matter of substantive federal law, severable from the remainder of the contract, the court reasoned that general challenges to the validity of a contract did not impugn the applicability of the arbitration clause and thus, the validity issue was one for the arbitrator and not the court to decide. This decision does not address the more common situation, in which the enforceability challenge is to the arbitration clause alone, and not (as in Buckeye) the contract of which it is a part.

D. Nagrampa v. MailCoups, Inc., 469 F.3d 1257 (9th Cir. No. 03-15955, December 4, 2006) (en banc)

A sharply divided en banc (11 Judge) panel of the Ninth Circuit held in this non-employment contract case that it is for the district court, not the arbitrator, to determine whether an arbitration clause is unconscionable and therefore unenforceable under state law where the crux of the complaint in the action is a challenge to the arbitration clause rather than to the contract as a whole. The plaintiff, a franchisee, filed her court action challenging both the enforceability of the contract's arbitration provision, contending it was unconscionable under California law, and seeking relief under certain other provisions of the contract. Nowhere, in the majority's view, did she claim that the entire contract was invalid or unenforceable. In these circumstances, the majority held that, under Buckeye, the question of whether the arbitration provision was unconscionable and therefore unenforceable was for the court, not the arbitrator, to determine. The court noted that in Buckeye, the Supreme Court ruled that the arbitrator, not the court, must decide the issue because it involved a challenge to the entire contract of which the arbitration provision was a part, not to the arbitration clause alone. The court found that this case presented the opposite situation: plaintiff did not challenge, and in fact relied on, the contract as a whole, and only sought relief from its arbitration provisions. On the unconscionability claim, the majority, applying California law, found the arbitration provision unenforceable, largely because of substantively unconscionable provisions relating to forum selection and lack of mutuality, while remanding to the district court to determine whether the fee-splitting provisions were also unenforceable.

It is noteworthy that plaintiff Nagrampa was a sophisticated business person who presumably knew what she was doing when she entered into the contract, including the arbitration provision, in a purely commercial setting. The dissenters emphasized this fact heavily in arguing that there was no procedural unconscionability, and in their view little if any substantive unconscionability, in the arbitration provision. The applicability of this decision to the typical employment case may be limited. However, Judge Kozinski's dissent concludes with a prediction, or invitation, that the Supreme Court "soon take a close look at whether the unconscionability doctrine, as developed by some state courts, undermines the important policies of the [Federal] Arbitration Act" favoring the resolution of disputes of consenting parties through arbitration. Should the Supreme Court choose to intervene in this unsettled and hotly contested area of law, anything could happen.

IX. Attorneys' Fees

A. Young v. New Process Steel, L.P., 419 F.3d 1201 (11th Cir. 2005).

As a matter of first impression, the Eleventh Circuit held that "a district court may not require an unsuccessful plaintiff in a civil rights case to post an

appellate bond that includes not only ordinary costs but also defendant's anticipated attorneys' fees on appeal, unless the court determines that the appeal is likely to be frivolous, unreasonable, or without foundation." In reversing the district court's order imposition of a \$61,000 bond under Rule 7 of the Federal Rules of Appellate Procedure, the court explained that requiring a finding of frivolousness would correctly balance plaintiff's interest in avoiding a rule that would unduly discourage good basis appeals with defendant's interest in not having to defend lawsuit with no legal or factual basis.

X. Affirmative Action

A. Kohlbeck v. City of Omaha, Nebraska, 447 F.3d 552 (8th Cir. 2006).

The Eighth Circuit reversed the district court's grant of summary judgment in favor of the defendant in this reverse-discrimination case, holding that the defendant's 2002 Affirmative Action Plan violated the 14th Amendment Equal Protection clause because it was not narrowly tailored to remedy past discrimination as racial classifications were utilized in situations where no identified past discrimination was present. Under the 2002 Plan, the City was required to consider a minority candidate for any promotion within the Fire Department where minority representation was underutilized, which was defined as when actual minority representation was not within a half person of the representation goal. The court found that the City's determination of underutilization, based solely on the half person rule, was not a sufficient basis for using the racial classification. It reasoned that the half-person shortfall was not a statistically significant disparity and therefore failed to establish a prima facie case of discrimination; thus, the plan did not seek to remedy identifiable past discrimination or at least a prima facie showing of such discrimination. On appeal the City also argued in the alternative that it implemented the plan to develop and retain a diverse workforce, invoking Grutter v. Bollinger, 539 U.S. 306 (2003), but the court did not address this argument, which had not been ruled on by the trial court, and left the district court to analyze it on remand.

B. Dean v. City of Shreveport, 438 F.3d 448 (5th Cir. 2006).

The Fifth Circuit reversed in part and remanded in part the district court's grant of summary judgment in favor of the defendant in this reverse discrimination case, holding that the defendant failed to establish that its consent decree was necessary to remedy past discrimination at the time plaintiffs applied for employment and that defendant's use of separate lists of test scores on the basis of race and gender violated 42 U.S.C. § 2000e-2(1).

This case involved several white male plaintiffs who challenged, under the Fourteenth Amendment's Equal Protection clause as well as Title VII, both the continuing application of the defendant's fire department's 1980 consent decree, which was entered to remedy past discrimination against African American and female applicants, and the hiring process adopted by the City to comply with the

goals of the consent decree. As part of the hiring process, all applicants who scored a 75 or higher on the entrance exam were separated into three lists, consisting respectively of white males, African American males, and women. In order to determine which candidates would be considered in the second phase of the hiring process, defendant selected the highest scores from each list until the pool of applicants was 50% white male and 50% African American male, with all female applicants automatically moved on to the next phase.

In considering whether a compelling interest existed to continue using a numerical utilization analysis-based goal in hiring, the court began by clarifying that a governmental unit did not need to have a formal finding of past discrimination in order to utilize a race-conscious remedy. However, once the racial classification continuing use was challenged, the defendant had to justify it by strong evidence of past discrimination. Here, the court concluded that the defendant City made a sufficient showing of past discrimination to justify the 1980 consent decree, given its admissions of past systematic exclusion of African American and female applicants and the obvious racial and gender personnel disparities in the past. While the implementation of the 1980 consent decree was therefore warranted, the court found that the defendant failed to demonstrate that its race-conscious remedy remained necessary to address past discrimination at the time the plaintiffs applied (2000 and 2002) without adequate statistical evidence comparing the percentage of the “qualified” applicant pool that was African American to the department’s workforce during those years.

In particular, the court held that the City’s expert did not adequately determine what qualifications were required for the jobs at issue, and therefore, the “qualified” labor pool could not be measured or compared to the workforce. In the absence of a proper comparison demonstrating a continuing disparity, the City failed to provide sufficient basis for implementing the consent decree’s hiring processes. Moreover, the court found it impossible to determine, in the absence of proper qualifications determinations, whether the City’s continuing use of the consent decree was narrowly tailored in substance and duration. Consequently, the court remanded this issue to the district court for further development of those issues.

Separate from its analysis of the Equal Protection clause challenge to the defendant’s hiring goal, the court reversed the district court’s dismissal of plaintiff’s Title VII claims, finding that the use of separate lists of test scores based on race and gender violated 42 U.S.C. § 2000e-2(1)’s prohibition against using different cut off scores on employment related tests on the basis of race or sex. The court reasoned that selecting a fixed number or percentage of applicants from each of the separate lists necessarily amounted to setting separate cut off scores for selections, which that section expressly prohibits. The court differentiated defendant’s use of segregated lists from the more common practice of “banding” of test scores, which remains a widely accepted remedial technique.

XI. Cases to Watch in the Coming Year

- A. Dukes v. Walmart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004), appeal pending, Ninth Circuit Nos. 04-16688 & 04-16720.**

The country's largest and most closely-followed employment discrimination class action remains pending decision, 15 months (at this writing) after oral argument to a panel that appeared likely to divide 2-1 for affirmance of the district court's certification order.