THE YEAR IN REVIEW:

AN UPDATE OF THE MOST SIGNIFICANT CASES AND DEVELOPMENTS UNDER EMPLOYMENT DISCRIMINATION (AND RELATED) STATUTES

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January 5, 2009

[1] The presenter gratefully acknowledges the assistance of Lin Chan, Associate at Goldstein, Demchak, Baller, Borgen & Dardarian, in the preparation of this outline.

INTRODUCTION

This year's summary by a plaintiff's side employment lawyer, whose practice specializes in class actions – my fourth annual Outline – focuses primarily on decisions of the federal appellate courts in employment discrimination cases and related procedural issues or statutes. 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 decisions from the latter part of 2007, or earlier decisions in which appellate review was sought or granted in 2008, are included in this paper.

THE YEAR 2008 IN REVIEW

I. Jurisdiction: Administrative Prerequisites to Filing Suit and Timeliness Under Title VII, § 1981, and the ADEA.

A. Definition and sufficiency of a "charge."

1. Federal Express Corp. v. Holowecki, 128 S.Ct. 1147 (2008).

In this case, the Supreme Court, in a 7-2 opinion, written by Justice Kennedy, resolved a circuit split as to the meaning of the term "charge," with respect to the ADEA's EEOC charge filing requirement, 29 U.S.C. § 626(d). A group of Federal Express employees over the age of 40 alleged that two FedEx performance programs that tied compensation and continued employment to specified performance benchmarks violated the ADEA. FedEx argued that one of the plaintiffs filed her lawsuit too soon, i.e., that she did not file a "charge" with the EEOC at least 60 days before filing the suit, as required by 29 U.S.C. § 626(d). Plaintiff argued that her filing of an EEOC intake questionnaire, more than 60 days prior to filing the complaint, fulfilled the statutory requirement. In making this argument, plaintiff based her contention that the intake questionnaire should be treated as a charge on EEOC internal directives and policy statements.

Applying Skidmore deference – which gives less deference to agency opinions that are not embodied in regulations than would be required for regulations under Chevron – the Court adopted a permissive standard for fulfilling the "charge" requirement, stating, "[I]n addition to the information required by the regulations, *i.e.*, an allegation and the name of the charged party, if a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the

employer and the employee." 128 S.Ct. at 1157-58. On this basis, the Court held the lawsuit timely filed.

The Court distinguished between a plaintiff's filing of a charge and the filing of an actual complaint by an attorney, reasoning that since employees themselves may and commonly do file a "charge" with the EEOC, it is essential that such a process be accessible and easy to complete. Here, the Court found that the plaintiff in question had filed a "charge" despite the fact that the initial filing contained no request for the agency to act, as the EEOC materials provided. Applying this standard, the Court reasoned that it was sufficient that a supplemental affidavit contained the request "[p]lease force Federal Express to end their age discrimination plan so we can finish out our careers absent the unfairness and hostile work environment created within their application" of the performance programs. *Id.* at 1159-60. In its holding, the Court emphasized that such informal documents filed by the employee should be construed broadly "to protect the employee's rights and statutory remedies."

The majority, however, cautioned that its permissive interpretation of what constitutes a "charge" under the ADEA should not be applied to the Title VII context, or other statutes enforced by the EEOC "without careful and critical examination." *Id.* at 1153.

2. Holender v. Mutual Industries North Inc., 527 F.3d 352 (3d Cir. 2008).

A plaintiff, claiming hiring discrimination on the basis of age, filed a complaint with the EEOC and an ADEA suit against his employer after waiting the requisite 60 days after filing his charge. However, plaintiff never responded to an EEOC letter, sent nearly two months after his initial charge, requesting additional information in order to "docket this matter as a charge." Based on plaintiff's failure to respond to the EEOC request, the district court granted summary judgment in favor of the defendant.

On appeal, the Third Circuit, relying on Federal Express Corp. v. Holowecki, abandoned its former "manifest intent" rule for a more permissive standard for determining what constitutes a "charge." The Court looked to portions of plaintiff's initial EEOC filing, which specifically stated that he was filing a charge of discrimination and detailed the factual circumstances underlying his claim, and determined that the EEOC should have realized that plaintiff intended to file a charge and its failure to treat the filing as a charge did not prevent it from being considered as a charge for purposes of fulfilling the ADEA's charge-filing requirement.

This decision seems consistent with a likely trend towards relaxing the standards for what kind of submission constitutes the filing of an EEOC charge, in the wake of Holowiecki's broad language.

3. McClain v. Lufkin Indus. Inc., 519 F.3d 264 (5th Cir. 2008), cert. denied, -- S.Ct. --, 2008 WL 2715699 (Oct. 6, 2008).

In this Title VII class action by African-American plaintiffs against their employer, Lufkin Industries, Inc., the Fifth Circuit affirmed in part, reversed in part, and vacated and remanded in part the district court's judgment in favor of the employees and award of damages, injunctive relief, and attorneys' fees. First, the court examined whether the two class representatives had adequately raised the class disparate impact claims in their EEOC charges. Explaining that "[f]ailure to exhaust is not a procedural 'gotcha' issue," 519 F.3d at 272, the court determined that of the two plaintiffs who had complained of discrimination to the EEOC, only one had exhausted his EEOC remedies.

McClain, the plaintiff who the court found had failed to exhaust his EEOC remedies, complained in his charge of "discriminatory treatment" and "discriminatory acts" against himself. The Court found his charge's language did not sufficiently identify a neutral employment policy that would lead to a disparate-impact investigation by the EEOC. McClain's statement that Lufkin had a "cultural problem" was also found too vague to satisfy the required identification of a neutral employment policy. The Court additionally looked to the EEOC's response letter, which summarized his claims and framed them on an individualized, rather than a class-wide, level. The Fifth Circuit disagreed with the district court's finding that an OFCCP investigation into similar disparate impact claims fulfilled plaintiffs' administrative exhaustion requirement, holding that "no such Title VII shortcut" exists. 519 F.3d at 274.

However, the Fifth Circuit held that another plaintiff, Thomas, carried the requisite burden by alleging in his EEOC complaint, in addition to his individual promotion discrimination claims, that "[r]espondent has similarly discriminated against other black African Americans." This statement was held sufficient to satisfy plaintiffs' obligation with respect to the classwide promotion claims. The Court concluded, however, that with respect to initial assignment discrimination claims on behalf of employees of the separate Foundry division, where none of the named plaintiffs had worked, the EEOC administrative exhaustion requirement was not met because Thomas' charge only addressed promotions and McClain's charge did not adequately raise class issues. Finding nothing in the original charges that would have reasonably led the EEOC to investigate discrimination at the Foundry division, the Court vacated the judgment for the class on the initial assignment claims.

See also Sections II.E.1, VIII.A.2, and IX.A.1, *infra*, for discussion of other issues addressed by the Court.

B. Timeliness Issues Following Ledbetter.

The following three cases illustrate the lower courts' attempts to apply the Supreme Court's holding in Ledbetter v. Goodyear Tire & Rubber Co., 127 S.Ct. 2162 (2007), to determine the timeliness of EEOC charges stating discrimination claims. The cases come to different conclusions, depending in part on how the discriminatory act was framed.

1. Lewis v. City of Chicago, 528 F.3d 488 (7th Cir. 2008).

In this decision, the Seventh Circuit, in an opinion by Judge Posner, reversed a district court ruling in favor of plaintiffs in their Title VII disparate impact claim against the City of Chicago ("City"). The City, in 1995, administered a written test to applicants for jobs as firefighters in which their test scores were grouped into three categories: "well-qualified," "qualified," and "not qualified." The City then determined that they would only hire from the "well-qualified" group. Shortly after the results were released, the mayor of Chicago announced that "after all our efforts to improve diversity [], these test results are disappointing." 528 F.3d at 490. The notices to "qualified" applicants stated that they were unlikely to be hired because the City would probably fill all of the positions with "well-qualified" applicants. The plaintiffs were unsuccessful black applicants who were grouped as "qualified."

The City argued, and the Seventh Circuit agreed, that plaintiffs failed to fulfill their administrative prerequisite of filing an EEOC charge within 300 days of their claim having accrued. Plaintiffs filed their EEOC charge 420 days after the notices of the test results were sent, but within 300 days of the City's beginning to hire applicants from the "well-qualified" group. The Seventh Circuit, relying on Ledbetter, noted that the charging period begins when the discriminatory decision is made, and found that in this case the discriminatory decision was made when the test scores were released, particularly in light of the mayor's public comment. Plaintiffs cited Beavers v. American Cast Iron Pipe Co., 975 F.2d 792 (11th Cir. 1992), a case in which, long after the contested policy was adopted, plaintiffs sued their employer whose policy coverage limited coverage to employees' children who lived with their employee parent. The Seventh Circuit, however, distinguished Beavers, stating that action was timely with respect to the date of denial of plaintiffs' claim for dependent coverage because the "allegedly discriminatory policy was the sole cause of the denial; there was no intervening neutral act, as in this case." 528 F.3d at 491. The court also cited Palmer v. Board of Education of Community Unit School District 201-U, 46 F.3d 682 (7th Cir. 1995), for the principle that "when there is only one wrongful act the

claim accrues with the first injury." 528 F.3d at 492. Curiously (and in the author's view questionably), the Court did not find hiring decisions based on tests that disparately impact minorities to be separate wrongful acts.

The Seventh Circuit additionally emphasized that the doctrine of continuing violation did not change the result because that doctrine only applies until the discriminatory acts are sufficient to allow a plaintiff to state a claim for discrimination. In this case, plaintiffs could have stated a Title VII claim immediately after receiving their test scores.

2. Chaudhry v. Nucor Steel-Indiana, -- F.3d --, 2008 WL 4569962 (7th Cir. Oct. 15, 2008).

In this case, an Asian-Indian employee, who filed a Title VII race, national origin, and religious discrimination claim against his employer for denying him a pay raise and opportunities to qualify for a pay raise, appealed the district court's dismissal of his claim as untimely under Ledbetter. The Seventh Circuit affirmed in part and reversed and remanded in part, finding that with respect to his first allegation – the denial of a pay raise – the district court correctly determined that the plaintiff failed to file a timely EEOC charge. Although the employer refused to give him a raise in June 2003, the plaintiff waited until July 28, 2006, to file a charge with the EEOC. Under Ledbetter, the court reasoned, each paycheck received after the initial failure to promote does not create a new violation. Therefore, plaintiff's claim for failure to grant the pay increase was time-barred.

The Seventh Circuit reversed the district court with respect to plaintiff's claim that his employer continually denied him opportunities that would have made him eligible for a pay raise. The court reasoned that each time the employer denied opportunities to qualify for a pay raise, the employer committed a "fresh violation." The court distinguished the facts from Ledbetter, noting that in Ledbetter all of the pay decisions had been made outside of the limitations period whereas here, the decision not to provide plaintiff with opportunities to qualify for a higher salary occurred at least once a year.

This decision highlights that the way in which the charge and complaint frames of an employer's adverse action may determine whether a claim is found timely under Ledbetter.

3. Lukovsky v. City & County of San Francisco, 535 F.3d 1044 (9th Cir. 2008).

In this case, the Ninth Circuit addressed the question: when does a claim for employment discrimination in violation of §§ 1981 and 1983

accrue for limitations purposes? Here, plaintiffs sued city and county employers alleging race and national origin discrimination based on allegedly preferential hiring of Asian and Filipino workers. Although the plaintiffs applied for and were denied jobs in 2000, they filed their complaints in 2005 and 2006. Their asserted reason for the delay was that plaintiffs only learned of the preferential treatment given to Asian and Filipino workers much later.

The Ninth Circuit affirmed the district court's dismissal of the claims. Plaintiffs tried to frame their argument in terms of the "discovery rule," in which the limitations period only begins to run from the date when a plaintiff discovers that s/he has been injured. Rejecting this argument, the Ninth Circuit cited a general consensus among the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits that the limitations period begins to run upon awareness of the actual injury, which the Ninth Circuit defined as when plaintiffs knew that they would not be hired. The Ninth Circuit reasoned that its holding is consistent with Delaware State College v. Ricks, 449 U.S. 250 (1980) (holding that the statute of limitations begins to run when the adverse decision was communicated to plaintiff, even though the consequences of the action were not fully felt at the time). The Ninth Circuit also cited Ledbetter, seeming to draw a distinction between a discrete action and the consequences of that discriminatory action. In addition, the court analogized to its Federal Tort Claims Act cases which "held that a[] . . . claim accrues when the plaintiff knew or in the exercise of reasonable diligence should have known of the injury and the cause of that injury, but is not deferred until the plaintiff has evidence of fault." 535 F.3d at 1050. The court also found that plaintiffs were not eligible for equitable estoppel because their allegations of defendant's wrongdoing –that defendants concealed the discriminatory basis for not hiring them – was coextensive with the legal claim itself.

Although the logic of the Ninth Circuit's decision is in accord with other circuits', this decision would seem to require would-be plaintiffs to sue even when they do not necessarily know that an action is unlawful and to encourage individuals who believe they might have been subject to any adverse employment action to claim race, sex, or national origin discrimination just to preserve their potential claims, a result contrary to sound policy but flowing from Ledbetter's holding, as the dissent in that case predicted.

C. Worksharing Agreements

1. Schuler v. PricewaterhouseCoopers, LLP, 514 F.3d 1365 (D.C. Cir. 2008), rehearing *en banc* denied Apr. 3, 2008.

This case involved the question whether worksharing agreements between the EEOC and state agencies can satisfy dual filing requirements under the ADEA. Here, an employee filed a class action against his employer based on a partnership promotion policy that allegedly discriminated against older workers in violation of the ADEA and the District of Columbia Human Rights Act. The plaintiff only filed a charge with the EEOC's New York district office, and never directly filed with the D.C. Office of Human Rights (DCOHR). The district court dismissed the plaintiff's complaint for failure to file a charge with both the EEOC and with the appropriate state agency as required by the ADEA, 29 U.S.C. §§ 626(d), 633(b) (requiring plaintiffs to file with the appropriate state agency where the alleged unlawful practice occurs in a state that has a law prohibiting discrimination in employment because of age).

On appeal, the D.C. Circuit reversed based on the EEOC's worksharing agreement with the DCOHR, which provides that "the State agency will act on certain charges and the Commission will promptly process charges which the State agency does not pursue. *Charges received by one agency under the agreement shall be deemed received by the other agency* . . ." 29 C.F.R. § 1626.10(c) (emphasis added).

The Court reasoned that because of the worksharing agreement, filing a charge with one agency is equivalent to filing a charge with both agencies. Moreover, the court concluded that the DCOHR actually waived its right to process age discrimination claims initially filed with the EEOC because the worksharing agreement explicitly provided that "[t]he EEOC and the [DCOHR] will process all Title VII, ADA, and ADEA charges that they originally receive." 29 C.F.R. § 1626.10. The D.C. Circuit noted that its holding is in line with the Fifth and Seventh Circuits, which have held that worksharing agreements allowed plaintiffs to satisfy dual filing requirements under Title VII and the ADEA, and distinguished an arguably contrary Fourth Circuit holding. The D.C. Circuit added that the plaintiff employee explicitly told the EEOC in his original filing that his "complaint should be CROSS FILED WITH THE HUMAN RIGHTS AGENCIES OF NEW YORK CITY, THE STATE OF NEW YORK, *AND WASHINGTON, D.C.*" 514 F.3d at 1374 (emphasis added), and reasoned that the plaintiff should not be held responsible for the EEOC's misfeasance in not referring the charge to the relevant state agency.

Finally, the court addressed whether, given that his employer failed to promote him again a half year after he filed his charge with the New York EEOC, plaintiff was required to file another EEOC charge for the

second failure to promote. The Court held that because the single federal claim arose out of the employer's mandatory retirement and promotion policy, not two discrete nonpromotion charges, the first discriminatory nonpromotion charge was sufficient to raise both nonpromotion events.

2. Surrell v. California Water Service Co., 518 F.3d 1097 (9th Cir. 2008).

The Ninth Circuit found that an employee, who sued her employer for discrimination, retaliation, and subjecting her to a hostile-work environment, was not barred from asserting her Title VII claim despite her failure to obtain a right-to-sue letter from the EEOC. Plaintiff had filed a discrimination charge with the California Department of Fair Employment and Housing ("State Employment Department"), which provided her a right-to-sue letter and advised her to obtain a federal right-to-sue letter from the EEOC, but she did not obtain such a letter from the EEOC. In its reasoning, the court noted that the State Employment Department had a worksharing agreement with the EEOC, and found that the proper approach is that "where, as here, a plaintiff is entitled to receive a right-to-sue letter from the EEOC, a plaintiff may proceed absent such a letter, provided she has received a right-to-sue letter from the appropriate state agency." 518 F.3d at 1105. The court found that although plaintiff was not barred from asserting her claim, she could not satisfy the McDonnell Douglas analysis, and therefore affirmed the district court's grant of summary judgment for the employer.

II. Title VII of the Civil Rights Act of 1964

A. Disparate Treatment – Hostile Work Environment

1. Billings v. Town of Grafton, 515 F.2d 39 (1st Cir. 2008)

In this case, a female former employee brought a sexual harassment and retaliation claim against her former employer because her supervisor repeatedly stared at her breasts and she was transferred after she reported his behavior. The alleged harasser claimed that his staring was due to an eye condition. The district court granted summary judgment to the employer, finding that the alleged harassing conduct was insufficient to create an objectively hostile work environment and that plaintiff's subsequent transfer to another position failed to constitute materially adverse employment action.

In reversing the district court, the First Circuit acknowledged that the determination of whether sexual harassment was sufficiently severe and pervasive is a fact-specific inquiry, but stated that "[w]e cannot reasonably accept . . . that a man's repeated staring at a woman's breasts is to be ordinarily understood as anything other than sexual." 515 F.3d at 51.

Considering all the circumstances of this case, including the degree and severity of the staring, the fact that other women had complained of staring by the same male supervisor in the past, and the fact that the plaintiff repeatedly complained to her employer about the problem, the court determined that, in this case, there was at least a jury question as to whether the circumstances of plaintiff's employment constituted a hostile work environment.

On the issue of whether the employer's decision to transfer plaintiff to a different position was a sufficiently materially adverse employment action to constitute retaliation, the court noted that this case presented the first opportunity for the circuit to apply the Burlington Northern standard. Stating that under Burlington Northern, an "objectively reasonable loss of prestige" may suggest a materially adverse action, the court again found that there was at least a jury question as to whether plaintiff's transfer, resulting in her "reporting to a lower ranked supervisor, enjoying less contact with the Board, the Town, and members of the public, and requiring less experience and fewer qualifications" was objectively less prestigious. The court therefore vacated the district court's entry of summary judgment with respect to plaintiff's hostile environment claims and her retaliation claim based on her job transfer.

2. Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321 (6th Cir. 2008), rehearing *en banc* denied July 14, 2008.

This case expanded the circumstances in which employers may be liable for co-worker harassment. Four female employees filed this sex discrimination and retaliation action claiming employer liability both for harassment by a male coworker (Robinson), which created a hostile work environment, and for Robinson's retaliation against the female plaintiffs after they reported his harassment to management. The Sixth Circuit determined that the district court's granting of summary judgment for the employer was improper as to the hostile work environment claim and as to the coworker retaliation claim of the plaintiff whose car was set on fire.

In reversing the district court's dismissal based on plaintiffs' inability to establish sexual harassment that was sufficiently severe and pervasive to constitute a hostile work environment, the Sixth Circuit noted that plaintiffs' testimony clearly alleged that Robinson's harassment of them was ongoing and continual. The court also found that the district court erred by failing to consider evidence of other acts of harassment not directed at plaintiffs, but of which plaintiffs became aware. The court stated that such evidence may be considered, reasoning that the Sixth Circuit had previously held that such evidence should be considered in the Title VII context, Jackson v. Quanex Corp., 191 F.3d 647 (6th Cir. 1999), and that the Second, Third, Seventh, and Tenth Circuits also permit the consideration of similar acts of harassment of which a plaintiff becomes

aware, in a hostile environment case. The court observed that in considering the relevance of such evidence, factfinders should look to the "severity and prevalence of the similar acts of harassment, whether the similar acts have been clearly established or are mere conjecture, and the proximity in time of the similar acts to the harassment alleged by the plaintiff." 517 F.3d at 336. The court also noted, but declined to answer, the question whether off-premises harassment by a coworker may be considered part of the severe or pervasive test.

In determining that the "employer in this case was liable for the coworker harassment experienced by plaintiffs, the court noted that post-Ellerth and Faragher (setting a negligence standard for employer liability for supervisor harassment), the Sixth Circuit's "manifest indifference or unreasonableness" standard established by Blankenship v. Parke Care Ctrs., Inc., 123 F.3d 868 (6th Cir. 1997), remains good law with respect to coworker harassment. After reviewing the record which provided ample evidence that the employer knew of the harassment by "a known serial harasser" but failed to do anything about it apart from transferring women who complained to other units, the court found that the defendant employer was liable for coworker harassment suffered by plaintiffs. The court held defendant liable where it had "clear notice that the same employee has engaged in inappropriate behavior in the past," 517 F.3d at 341, even though the employer argued that it was unable to effectively address Robinson's harassment because his terms of employment were governed by a collective bargaining agreement. The remedies of Title VII would be rendered impotent if employers dealing with serial harassers were allowed to throw up their hands" due to difficulties in navigating the union grievance process. *Id.* at 344.

Finally, with respect to two of the plaintiffs' retaliation claims, the Sixth Circuit, relying on Burlington Northern, announced for the first time that "Title VII permits claims against an employer for coworker retaliation." In so holding, the court cited similar decisions by the First, Second, Third, Seventh, Ninth, and Tenth Circuits. The court held that "an employer will be liable for the coworker's actions if (1) the coworker's retaliatory conduct is sufficiently severe so as to dissuade a reasonable worker from making or supporting a charge of discrimination, (2) supervisors or members of management have actual or constructive knowledge of the coworker's retaliatory behavior, and (3) supervisors or members of management have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the plaintiff's complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances." *Id.* at 347. After evaluating the facts of each plaintiffs' claims, the court determined that the employer was liable for retaliation against the plaintiff whose car was likely set on fire by Robinson. However, as to the plaintiff whose house was allegedly burned down by Robinson, the employer was not liable because the employer

undertook proactive steps to protect that plaintiff from retaliation, including coordinating with law enforcement to monitor Robinson and offering to hire a security guard to protect the plaintiff at her home.

B. Disparate Treatment – Application of Summary Judgment Standards In Mixed-Motive Cases

1. White v. Baxter Healthcare Corp., 533 F.3d 381 (6th Cir. 2008).

The Sixth Circuit reversed and remanded the district court's grant of summary judgment in a Title VII mixed-motive case. The plaintiff, an African-American former employee of defendant, brought an employment discrimination claim for the employer's failure to promote. The plaintiff submitted direct evidence of racial animus, but his employer claimed that plaintiff was not promoted because the other candidate was more qualified, plaintiff had a disappointing performance record, and plaintiff did not interview well. The Sixth Circuit found that a trial was warranted because there were genuine issues of material fact as to whether the employer's justifications were pretextual and whether race was a motivating factor in the employer's failure to promote plaintiff.

On the main legal issue, the Sixth Circuit ruled that the McDonnell Douglas Corp. v. Green, "burden-shifting framework does *not* apply to the summary judgment analysis of Title VII mixed-motive claims." 533 F.3d at 399. The court reasoned that, in mixed-motive cases, there may be other factors in addition to discriminatory ones that motivated the employer. Therefore it is unreasonable to apply McDonnell Douglas to require plaintiffs to "eliminate or rebut all the possible legitimate motivations of the defendant as long as the plaintiff can demonstrate that an illegitimate discriminatory animus factored into the defendant's decision to take the adverse employment action." *Id.* at 401. Relying on Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), the court found that White met his burden at the summary judgment stage by presenting circumstantial evidence that the employer may have been motivated by racial animus in its failure to promote him.

In an unusually acerbic rejoinder to the dissenting opinion, the Court underscored that there is no business judgment rule in Title VII cases that requires courts to defer to the employer's "reasonable business judgment," 533 F.3d at 392 n.6.

This case creates a circuit split as to whether and how the McDonnell Douglas burden-shifting framework applies to Title VII mixed-motive cases, as the Eighth Circuit has squarely ruled contrary to the Sixth Circuit's holding (*see* Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Circ. 2004)), and, according to the Sixth Circuit's opinion,

the Eleventh, Fifth, Fourth and Ninth Circuits have also taken positions that differ from its own to varying degrees. *See* 533 F.3d at 398-400.

2. Makky v. Chertoff, 541 F.3d 205 (3d Cir. 2008).

Subsequent to White v. Baxter Healthcare, the Third Circuit also weighed in on the question of whether, in a summary judgment context, McDonnell Douglas applies to mixed-motive cases. The Third Circuit's conclusion is in accord with the Sixth Circuit, finding that McDonnell Douglas burden-shifting does not apply to mixed-motive cases "because the issue in a mixed-motive case is not whether discrimination played the dispositive role but merely whether it played 'a motivating part' in an employment decision." 541 F.3d at 214. The Third Circuit noted that Desert Palace "omitted any discussion of the McDonnell Douglas framework as a requirement in mixed-motive cases." *Id.* at 214-15.

The Court, however, affirmed the district court's dismissal on summary judgment by holding that "a mixed motive plaintiff has failed to establish a prima facie case of a Title VII employment discrimination claim if there is unchallenged objective evidence that s/he did not possess the minimal qualifications for the position plaintiff sought to obtain or retain." *Id.* at 215. In this case, the court noted that plaintiff did not possess the minimal qualifications required. While this decision could be read as providing defendants an easy out in mixed-motive cases, the court stressed that by "minimal qualifications," it meant only "the bare minimum requirement necessary to perform the job," or "an absolute minimum of qualification," and not a showing of subjective qualification, "i.e., [whether employees] performed their jobs well." *Id.* at 215-16.

C. BFOQ Defense to Overtly Gender Discriminatory Exclusions

1. Henry v. Milwaukee County, 539 F.3d 573, (7th Cir. 2008).

The Seventh Circuit reversed the district court's entry of judgment for the defendant County after a bench trial during which two female juvenile corrections officers claimed gender discrimination and retaliation. Central to plaintiffs' claims was a staffing policy that required there to always be at least one corrections officer of the same gender as the juvenile inmates. The policy effectively reduced the number of shifts available to women because there were more male juvenile inmates than female ones. Moreover, the bulk of the reduced shifts occurred at night, when fewer staff were needed to supervise the juvenile detainees. Corrections officers receive premium pay for night shifts, and night shift work is generally considered easier.

Although the district court found that the staffing policy was justified under the bona fide occupational qualification (BFOQ) defense

provided by Title VII, 42 U.S.C. § 2000e-2(e), the Seventh Circuit disagreed, citing the County's failure to show that the sex-based policy was *reasonably necessary*. The court emphasized the narrowness of the BFOQ exception. Although the county claimed that the decisions of prison officials are entitled to substantial weight under Torres v. Wisconsin Department of Health & Social Services, 859 F.2d 1523 (7th Cir. 1988), the court emphasized that such discretion is not unlimited and defendants must still prove that a particular sex classification is reasonably necessary. The court determined that the evidence did not show that such sex-based classifications were necessary to promote security, protect detainees' privacy interests, or promote same-sex mentoring. In particular, the court cited the fact that there had been zero incidents of staff-on-inmate sexual assault, thereby making this situation very different from other cases involving the presence of male guards in female prisons with a history of sexual abuse. Because the county failed to meet its burden of producing evidence to show that same-sex monitoring was necessary *at all times*, the court held that the same-sex staffing policy was not a BFOQ. The court, however, affirmed the district court's finding that plaintiffs did not suffer workplace harassment and retaliation, citing the clear error standard of review and the triviality of the alleged retaliation, which included being told not to wear sweaters or eat in front of the juveniles.

In a concurring opinion that unnecessarily reaches out beyond the BFOQ issue, Judge Easterbrook drew parallels to race-based policies, deriding the idea that guards of the same sex serve as mentors for prisoners as "a stereotype because it is based on folk wisdom." 539 F.3d at 588. Judge Easterbrook opined that "[e]mployers frequently assert that inmates (or students) respond more favorably to guards (or teachers) of their own sex or race. If this sort of justification had been advanced for matching the race of the inmates and the guards (or students and their teachers), courts would not go along." *Id.*

D. Pregnancy Discrimination

1. Hall v. Nalco Co., 534 F.3d 644 (7th Cir. 2008), rehearing *en banc* denied Aug. 15, 2008.

This case involved an issue of first impression: whether Title VII, as modified by the Pregnancy Discrimination Act ("PDA"), protects against adverse employment actions on the basis of undergoing in vitro fertilization ("IVF"). The Seventh Circuit determined that it does. In its reasoning, the court relied on International Union v Johnson Controls, Inc., 499 U.S. 187 (1991), which held that an employer policy that excluded all fertile women from jobs involving lead exposure was invalid under the PDA. According to the court, although infertility alone can be gender neutral, the application of fertility-based standards can be gender

discriminatory, as it was in Johnson Controls. The court distinguished on the facts this case from a Second and an Eighth Circuit case, Saks v. Franklin Covey Co. and Krauel v. Iowa Methodist Med. Ctr., both of which found that discrimination based on reproductive capacity is gender neutral. Reasoning that employees who take time off to undergo IVF "will always be women," the Seventh Circuit held that plaintiff may have been terminated "for the gender-specific quality of childbearing capacity." 534 F.3d at 648-49. Thus, the Seventh Circuit appeared to take a realist approach in evaluating whether fertility-related discrimination is gender-neutral. The court therefore reversed the district court's grant of summary judgment in favor of the employer.

2. Lulaj v. The Wackenhut Corp., 512 F.3d 760 (6th Cir. 2008).

The Sixth Circuit affirmed the district court's entry of judgment on the jury verdict in favor of an employee plaintiff who sued her employer for pregnancy discrimination under Michigan's Elliot-Larsen Civil Rights Act. Although plaintiff sued under state law, the language of the Michigan statute and Title VII are similar, and the court employed Title VII case law in its analysis. The court found that plaintiff presented sufficient evidence to show a nexus between the adverse employment action and pregnancy discrimination because company managers were aware of her pregnancy long before they decided not to promote her and because of the way her superior glanced at her stomach suggesting that pregnancy was a factor in denying her promotion. The Sixth Circuit also affirmed the district court's denial of front and back pay, reasoning that because the jury specifically found that plaintiff was not constructively discharged, defendant was liable for neither front nor back pay. The attorney's fees were affirmed under Michigan law.

This maternal profiling case appears to accord with Billings v. Town of Grafton (discussed at page 8, above) in that circuit courts seem open to interpreting allegedly subjective 'staring,' in this case staring at plaintiff's pregnant stomach, as discriminatory.

E. Adverse Impact

1. McClain v. Lufkin Indus. Inc., 519 F.3d 264 (5th Cir. 2008), cert. denied -- S.Ct. --, 2008 WL 2715699 (Oct. 6, 2008).

(*See also* Section I.A.3, page 3, above)

In this Title VII racial discrimination class action, the Fifth Circuit affirmed the district court's finding, after trial, of disparate impact discrimination (except for the portion vacated on jurisdictional grounds). First, the appellate court dismissed defendant's contention that the district court abused its discretion by finding a statistically significant disparate

impact in promotions based on plaintiff's statistical evidence while rejecting defendant's "actual" applicant flow analyses. The court noted that "[w]here actual data are unreliable, courts often permit parties to analyze potential applicant flow data," that "plaintiff's regression analysis need not include 'all measurable variables,'" and that "a disparity of two or three standard deviations" is not "categorically insufficient to support an inference of adverse impact." *Id.* at 281.

Second, the Fifth Circuit found that the district court did not err in finding that Lufkin employed subjective decisionmaking and in its finding that Lufkin's promotion practices were not capable of separation for review. With respect to the question of the subjectivity of Lufkin's employment practices, the court cited the ample evidence on record, including admissions from Lufkin managers, that its decisionmaking was often based on factors other than seniority and that managers were not provided with written guidelines on making employment decisions. With respect to whether the objective factors in Lufkin's promotion practices could be separated for review, the court referenced the analysis used in two cases: (1) Munoz v. Orr, 200 F.3d 291 (5th Cir. 2000), in which the court looked to whether the system used "tightly integrated and overlapping criteria"; and (2) Stender v. Lucky Stores, Inc., 803 F. Supp. 259 (N.D. Cal. 1992), in which looked to whether an employment practice "is pervaded by a lack of uniform criteria," for guidance Because it was impossible to separate objective factors, such as seniority, from the subjective factors that motivated Lufkin's promotion decisions, the Fifth Circuit affirmed the district court's determination that plaintiffs were entitled to analyze the decisionmaking process as one employment practice.

Third, the Fifth Circuit affirmed the trial court's finding that defendant's promotional system was subjective and that Lufkin's managers had exercised their subjective decision-making power to discriminate against African Americans in promotions to both hourly and salaried positions. The Court cited evidence that defendant often ignored seniority, subjectively determined when bidders had sufficient "ability" for the promoted job, used job assignments and training opportunities selectively to advance white employees, and arbitrarily applied or manipulated rules governing eligibility for promotion.

2. Dukes v. Wal-Mart, Inc., 509 F.3d 1168 (9th Cir. 2007), *pet. for rehearing en banc* pending.

See case description at pages 36-38 of this Outline.

F. Retaliation: What Constitutes "Adverse Action"?

In a series of post-Burlington Northern cases, the circuit courts have grappled with retaliation issues in light of the more relaxed standard for finding an "adverse action" as set forth by the Supreme Court in Burlington Northern.

1. Billings v. Town of Grafton, 515 F.3d 39 (1st Cir. 2008).

See Section II.A.1, page 8, above.

2. Crawford v. Carroll, 529 F.3d 961 (11th Cir. 2008).

In this case the Eleventh Circuit revisited its prior rule on the type of adverse employment action required as an element of a retaliation claim in light of Burlington Northern. An African-American employee sued her employer, a state university, for race discrimination and retaliation in violation of Title VII and § 1983. The district court granted summary judgment in favor of the defendants, and the Eleventh Circuit affirmed in part and reversed and remanded in part.

The Eleventh Circuit reversed the district court's determination that a poor performance evaluation that resulted in the denial of a merit raise was insufficient to constitute an adverse employment action for the purposes of plaintiff's retaliation claim. Although plaintiff eventually received a merit pay increase that was retroactively awarded, the Eleventh Circuit held that this retroactive correction did not deprive plaintiff of her right to pursue her claims. The court was persuaded by a similar case in the Seventh Circuit, Phelan v. Cook County, 463 F.3d 773 (7th Cir. 2006), and reasoned that "[t]o conclude otherwise would permit employers to escape Title VII liability by correcting their discriminatory and retaliatory acts after the fact." 529 F.3d at 972. Moreover, the court considered the Supreme Court's "decidedly more relaxed Burlington standard," *id.* at 973, for employer conduct that is considered actionable, and determined that the Burlington "materially adverse" standard displaces the former Eleventh Circuit "ultimate employment decision" rule. Because the court found that plaintiff suffered an adverse employment action based on the poor performance review, the court also concluded that the district court was incorrect in dismissing plaintiff's claim for retaliation and claim for disparate treatment in the terms and conditions of her employment.

The Eleventh Circuit also reversed the district court's grant of summary judgment as to plaintiff's failure-to-promote claim based on factual reasons. Finally, on the constitutional claims, the court affirmed the district court's grant of qualified immunity to Vice President Johnston, holding that she did not exhibit the level of involvement, racially discriminatory motive, or gross incompetence required to divest her of qualified immunity.

3. DeCaire v. Mukasey, 530 F.3d 1 (1st Cir. 2008).

Following a bench trial, the district court entered judgment for the employer in a federal employee's Title VII sex discrimination and retaliation action brought by a deputy United States Marshal against her employer United States Attorney General. The First Circuit reversed and remanded, citing errors of law and fact the district court's decision.

First, the appellate court determined that the district court applied the wrong legal standards in evaluating liability for plaintiff's discrimination claim because the district court seemed to suggest that employers will never be liable in mixed-motive cases and because the district court incorrectly found that evidence related to an adverse action against plaintiff could not be used with respect to her discrimination claim because it was time-barred. The court reiterated that the fact that other factors may have also motivated the practice may restrict the remedies but not absolve an employer of liability. Moreover, evidence that is time-barred with respect to damages can still act as background evidence to support a timely claim.

Next, the First Circuit found that the district court applied incorrect legal standards with respect to retaliation law by: (1) finding no retaliation where the complained-of retaliation would have "come out much the same had [plaintiff] been a male deputy"; (2) finding that the existence of prior discriminatory treatment "immunizes an employer from a retaliation claim following the complaint"; and (3) finding that the employer was justified in retaliating against plaintiff because he viewed filing an EEO complaint as an act of disloyalty. As to the first error, the First Circuit relied on Burlington Northern for the proposition that while actionable Title VII discrimination must be on the basis of an individual's status, the retaliation is an entirely separate matter. In short, "[t]he relevant question is whether [plaintiff's supervisor] was retaliating against [plaintiff] for filing a complaint, not whether he was motivated by gender bias at the time" of the retaliation. 530 F.3d at 19. As to the district court's second error, the court relied on clear First Circuit case law that holds that temporal proximity can suffice to establish a prima facie case of retaliation. The court suggested that the district "court may have overlooked the temporal closeness of the events by focusing on the fact that [plaintiff's supervisor] had mistreated [plaintiff] prior to her [EEO] complaint." *Id.*

With respect to the district court's *sua sponte* invocation of a "disloyalty defense" never raised by defendant, the First Circuit completely dismissed the idea, proclaiming that "[a]s a matter of law, the filing of an EEO complaint cannot be an act of disloyalty to either the U.S. Marshals Service or the Marshal which would justify taking adverse actions." *Id.* Finally, the court found that the district court erred by (1) requiring plaintiff to present evidence beyond simply proving that the

government's arguments were pretextual and (2) suggesting that only direct evidence of retaliation would suffice to show retaliation. The First Circuit also found that the district court clearly erred in its finding that the supervisor viewed plaintiff as disloyal because the district court's "disloyalty defense" was neither supported by the evidence nor even argued as a defense by the defendant employer.

4. Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321 (6th Cir. 2008), rehearing *en banc* denied July 14, 2008.

See Section II.A.2, page 9, above.

G. Retaliation: What Constitutes "Protected Activity"?

1. Kelley v. City of Albuquerque, 542 F.3d 802 (10th Cir. 2008).

The Tenth Circuit addressed an issue of first impression: whether a defense attorney representing an alleged violator of discrimination laws during an EEOC mediation qualifies as a protected participant under the "participation clause." In this case, the plaintiff was an assistant city attorney who represented the City against a client represented by Chavez, who was then in private practice but later was elected Mayor. As the newly-elected Major, Chavez immediately terminated the plaintiff, allegedly for her actions in defending the City in the earlier case. The plaintiff assistant city attorney sued the city, its city attorney, and Mayor Chavez, for race and sex discrimination and retaliation in violation of Title VII and New Mexico state law.

The Tenth Circuit took a strict textualist approach in finding the plaintiff covered by the participation clause even though she had defended against – not supported – the earlier discrimination claim. Noting that the plain language of 42 U.S.C. § 2000e-3(a) protects "*any* employee" who "participated in *any* manner in . . . [a] proceeding" included the act of representing an alleged discriminator in an EEOC proceeding, the court refused to engage the defendant in an analysis of Title VII's statutory purpose and rejected his absurd results argument. The court noted that "Congress could have rationally concluded that some over-inclusivity was a cost that it was willing to bear to ensure that no participant that it intended to protect was inadvertently omitted from the statute's coverage," 542 F.3d at 815, and added that it was necessary to shield both sides in an EEOC proceeding in order to safeguard the quality of representation and fairness of the proceedings.

Additionally, the Court concluded that plaintiff's position as an assistant city attorney did not fall within the personal staff exemption to Title VII's definition of "employee." In making its determination, the court noted that the exemption was to be construed narrowly, and stated

that "[f]actors relevant to the immediate adviser exemption include: (1) whether the elected official is charged with appointing or terminating individuals in the position; (2) whether the position reports to an intermediary appointee rather than directly to the elected official; and (3) whether the elected official exercises control over the independent judgment of one holding the position." *Id.* at 809. Focusing on the responsibilities and powers inherent in the assistant city attorney position, the court cited the City's ordinances relating to the position, observing that the ordinances neither vest the power of appointment to the mayor nor place the assistant city attorneys in a direct advisory relationship with the mayor.

In addition to the above issues, the Tenth Circuit, citing the Supreme Court's recent decision in Engquist v. Oregon Department of Agriculture (see case description at pages 34-35, i*nfra*), affirmed the district court's dismissal of plaintiff's class-of-one Equal Protection claim.

2. Goldsmith v. Bagby Elevator Co., 513 F.3d 1261 (11th Cir. 2008), rehearing *en banc* denied, 278 F. App'x 1001 (11th Cir. 2008).

This case centered on the question whether refusing to sign an arbitration agreement can constitute a protected activity under Title VII. Plaintiff, an African-American employee, was terminated after having filed an EEOC charge of racial discrimination against his employer and refusing to sign a dispute resolution agreement that would have applied to his pending discrimination charge. After a jury trial in which the jury found for the plaintiff on his claim of racial discrimination and retaliation and awarded plaintiff both compensatory and punitive damages, the defendant employer appealed on eleven separate issues, all of which were rejected by the Eleventh Circuit.

Most significantly, the Eleventh Circuit held that plaintiff's refusal to sign a dispute resolution agreement that would have applied to his pending discrimination charge was a protected activity under Title VII. The court distinguished its holding from that in Weeks v. Harden Mfg. Corp., 291 F.3d 1307 (11th Cir. 2002), because in this case, "it is undisputed that [plaintiff] had a pending EEOC charge when he was required to sign an agreement that applied to that charge." 513 F.3d at 1278.

The Court also held that the district court did not abuse its discretion when it admitted evidence of discrimination against plaintiff's coworkers. Although the court found that the district court's admission of "me too" evidence on the basis of habit under Rule 406 was incorrect, the evidence was admissible because: (1) it could prove intent to retaliate under Rule 404(b); (2) it could support a hostile work environment claim under Rule 402; and (3) the evidence was probative in rebutting the

defendant's good faith defenses and the accuracy of the statements made by the employer during trial. The court also found, based on its prior case law, that the district court did not abuse its discretion in refusing to instruct the jury to disregard the "me too" evidence, and in a variety of evidentiary rulings.

3. Crawford v. Metropolitan Government of Nashville and Davidson County, TN, 211 F. App'x 373 (6th Cir. 2006), *cert. granted*, 128 S.Ct. 1118 (2008).

The Sixth Circuit, in a per curiam decision, held that an employee who reports sexual harassment during the course of an employer's internal investigation is not protected from employer retaliation under Title VII's opposition clause. In this case, a former municipal and county employee reported, during the course of the employer's internal investigation of alleged sexual harassment, that she had been sexually harassed. Some time after her report, she was fired. The employee subsequently filed a charge of discrimination with the EEOC and filed the present Title VII claim. Three other employees who also reported sexual harassment were allegedly also terminated.

Adopting an exceedingly narrow definition of "opposed" under Title VII's protection of any employee who "has opposed any practice made an unlawful employment practice by this subchapter," 42 U.S.C. § 2000e-3(a), the Sixth Circuit found that plaintiff's report of sexual harassment does not constitute a "complaint" of sexual harassment. Rather, because plaintiff made the report during the course of a scheduled interview pursuant to the employer's own internal investigation, plaintiff was "cooperating" rather than "complaining." Next, the Sixth Circuit held that participation in an internal investigation of sexual discrimination is only protected if the investigation relates to a pending EEOC charge. The plaintiff argued that in light of Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (holding that an employer is not vicariously liable for sexual harassment by its employees when either the employer exercised reasonable care to prevent and promptly correct harassment and the plaintiff employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer), employees may be faced with a catch-22 in which they would not be protected if they did not report sexual harassment during an internal investigation and they also would not be protected if they participate in an internal investigation in the absence of an EEOC charge. The Sixth Circuit, however, dismissed plaintiff's concern, citing the need to protect employers who proactively launch internal investigations and the possibility that employers could still be held liable under Faragher if the employer administered its policies or investigations unreasonably or in bad faith. The Supreme Court heard oral argument on October 8, 2008.

4. Richardson v. Commission on Human Rights & Opportunities, 532 F.3d 114 (2d Cir. 2008).

The Second Circuit split with the Seventh Circuit, in EEOC v. Board of Governors, 957 F.2d 424 (7th Cir. 1992), as to whether an election-of-remedies provision in a collective bargaining agreement violates the anti-retaliation provision of Title VII. In this case, the plaintiff's union withdrew its appeal of her unlawful discrimination grievance on the basis of an election-of-remedies provision in which disputes over unlawful discrimination are not subject to the grievance procedure where a complaint is filed with the Commission on Human Rights and Opportunities. First, the Second Circuit held that the election-of-remedies provision does not violate the Gardner-Denver doctrine, which forbids prospective waivers of an employee's Title VII rights, because the collective bargaining agreement did not waive plaintiff's rights to pursue a Title VII charge in federal court. In its analysis of the anti-retaliation provision under Title VII, the court relied on its former holding in NYC Transit, 97 F.3d at 674, which found that an employer may refuse to continue with its informal, internal EEO proceedings where an employee filed a complaint with a governmental anti-discrimination agency. Rather than finding the election-of-remedies provision to be retaliatory, the court held that it was a "reasonable defensive measure." Although the court noted that the Seventh Circuit decided, in Board of Governors, that such provisions are in fact adverse employment actions violating the Title VII anti-retaliation provision, the Second Circuit criticized the sparse reasoning in Board of Governors and invoked the stare decisis effect of NYC Transit.

H. Religious Employers

1. Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008).

In this case, the Second Circuit formally adopted the ministerial exception, holding that the court was constitutionally barred from considering an African-American priest's Title VII race discrimination claim against a Bishop and the Roman Catholic Diocese. The court distinguished this case from Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006), in which the Second Circuit held that a clergy member could maintain an ADEA suit against his church and bishop. In Hankins, the court explained, the Religious Freedom Restoration Act (RFRA) governed the issues in the case, whereas in this case, the defendants explicitly waived RFRA in their brief. The court went on to reference the many sister circuits that have adopted the ministerial exception and to decide, based on the Free Exercise and Establishment Clauses, that the ministerial exception applies to employment discrimination cases and to this case in particular. The court, however, departed from other circuits that apply the ministerial exception only to employees that are functionally "ministers."

Instead, the court counseled that the exception may apply to both "lay" and high-level religious employees depending on whether a court's inquiry for the purposes of the claim would be necessarily "pervasively religious." In this case, the plaintiff claimed that defendants misapplied canon law. Therefore, on the particular facts of the case, the ministerial exception applied, and the court affirmed the district court's dismissal for lack of jurisdiction.

I. Admissibility, Relevance, and Inference From Spoliation of Evidence About Prior Discrimination.

1. Buckley v. Mukasey, 538 F.3d 306 (4th Cir. 2008).

In this Title VII race and sex discrimination and retaliation case, the Fourth Circuit – contrary to its usual recent track record of deference to lower-court rulings against plaintiffs in discrimination cases – overturned both the district court's grant of judgment as a matter of law in favor of the defendant Drug Enforcement Administration (DEA) on plaintiff's failure-to-promote retaliation claim and judgment on a jury verdict in favor of the employer on plaintiff's other claims. In doing so, the Fourth Circuit cited three areas in which the district court improperly dealt with evidentiary concerns during the course of the case.

First, the court held that the district court abused its discretion by excluding evidence about prior class action race discrimination litigation against the DEA ("*Segar* litigation"). In *Segar*, the court had entered an injunction against the DEA enjoining it from discriminating against African-American special agents in promotions, and later also granted a motion for a compliance order enjoining the use of specific promotion practices that were inconsistent with Title VII. Because plaintiff Buckley was active in the *Segar* litigation, she sought to introduce evidence about the *Segar* litigation in order to demonstrate retaliatory animus. The district court excluded evidence of the *Segar* litigation based on concerns about relevancy, propensity, the use of such evidence to show prior bad acts, and the potential for unfair prejudice. The Fourth Circuit, however, found that the district court's exclusion of such evidence was not harmless error because "[b]y prohibiting Buckley from introducing evidence of the *Segar* litigation in all but the most sanitized terms, . . . the court prevented Buckley from demonstrating why her participation in that litigation so rankled the relevant DEA decisionmakers that they were provoked to retaliate against her." 538 F.3d at 319 (internal quotations and brackets omitted). In its reasoning, the court emphasized that the district court misunderstood plaintiff's reason for introducing evidence of the *Segar* litigation, and as evidence of retaliatory animus, the *Segar* litigation was "unquestionably" relevant and admissible. *Id.*

Second, the court found that the district court erred by awarding judgment as a matter of law to the government on plaintiff's failure-to-promote retaliation claim. The district court, in its reasoning, found that emails between her supervisors concerning their displeasure about plaintiff's encouragement of outside inquiry into the racially discriminatory promotion practices of the DEA were "too slender a reed to permit the jury to speculate on whether Mr. Simpkins[, a key decisionmaker with respect to Buckley's subsequent nonpromotion,] knew that she was . . . more than" a passive plaintiff class member in the *Segar* litigation." *Id.* at 321 (brackets in original). The Fourth Circuit found the district court's analysis "dubious at best," and stated that any paucity of evidence on this claim was due to the district court's prior exclusion of evidence on the *Segar* litigation. *Id.*

Finally, and most interesting, the Fourth Circuit found that the district court abused its discretion by refusing to issue an adverse inference instruction against the government for spoliation of evidence. Plaintiff sought an adverse inference instruction because the DEA had destroyed electronic documents, including emails, as part of routine internal procedures, "from the time the government could reasonably anticipate this litigation until nearly two weeks after its discovery responses to Buckley were due." *Id.* at 322. The district court refused to issue an adverse inference instruction on the grounds that the DEA's destruction of evidence was mere negligence rather than willful or intentional conduct. The Fourth Circuit criticized the district court for misinterpreting its holding in Vodusek v. Bayliner Marine Corp., 71 F.3d 148 (4th Cir. 1995), clarifying its position that such sanctions may be imposed against a party who acts intentionally, but not necessarily in bad faith. The Fourth Circuit remanded the issue to the district court for reconsideration under that standard.

This holding is notable because it was reached in the context of what appear, from the opinion, to have been routine electronic document disposal procedures, and without any suggestion, in the opinion, that the destroyed documents contained information probative of or even particularly relevant to the plaintiff's claims. The Court's holding may have been motivated or provoked by the facts that (1) one saved copy of an email from the same period as others that were destroyed supported plaintiff's claims, and (2) the "routine" destruction of documents continued after the case was filed and even after document-seeking discovery was served.

III. 42 U.S.C. § 1981

A. Retaliation

1. CBOCS West, Inc. v. Humphries, 128 S.Ct. 1951 (2008).

This case resolved the long unanswered question whether § 1981 includes retaliation claims. The Supreme Court, in a 7-2 opinion by Justice Breyer, concluded that it does. In its reasoning, the court placed great emphasis on the principles of stare decisis, relying heavily on Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (2008), and Jackson v. Birmingham Bd. Of Ed., 544 U.S. 167 (2005), which interpreted Sullivan as including retaliation claims. The Court also noted that it has construed §§ 1981 and 1982 similarly, citing Runyon v. McCrary, 427 U.S. 160 (1976), which held that § 1981, like § 1982, reaches private conduct. The court then relied on Sullivan for the proposition that § 1981 prohibits retaliation as well. The court also noted the Congressional intent of the Civil Rights Act of 1991, which was designed to supersede Patterson v. McLean Credit Union, 491 U.S. 164 (1989), a case that seemed to foreclose § 1981 retaliation claims. Moreover, the court noted that since the 1991 Act, circuit courts "have uniformly interpreted § 1981 as encompassing retaliation actions." 128 S.Ct. at 1958.

Although CBOCS attempted to rely on a plain language interpretation of § 1981, emphasizing that the text's language does not expressly provide for retaliation claims, the court rebuffed CBOCS's approach, stating that the absence of such statutory language is not dispositive. The court again cited § 1982's retaliation protections under Sullivan and noted that Title IX, as interpreted by Jackson, allows for an antiretaliation remedy despite the absence of such explicit language in the text of the statute itself. Moreover, the court was unphased by potential overlap with Title VII in employment-related retaliation, stating that such overlap is necessary, particularly because "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Id.* at 1960 (quoting Gardner-Denver). CBOCS also argued that the status/conduct distinction made in Burlington should also apply here. However, the court stated that it used the distinction in Burlington in order to explain why Congress might have intended Title VII's antiretaliation provision to "sweep more broadly" than the substantive, status-based antidiscrimination provision.

This opinion serves as a companion case to Gomez-Perez v. Potter (discussed at page 29, below), in which the Court, relying on stare decisis, explicitly read anti-retaliation provisions into the ADEA.

B. Definition of "Race"

1. Abdullahi v. Prada USA Corp., 520 F.3d 710 (7th Cir. 2008).

Judge Posner, writing for the Seventh Circuit, grapples here with the meaning of "race" with respect to § 1981. In this case, an Iranian former employee sued his employer for discrimination and retaliation in violation of Title VII and § 1981. The district court dismissed the suit for failure to state a claim because plaintiff, in her amended complaint, failed to check the box marked "color," only checking the boxes marked "national origin" and "religion." In reversing the district court, Judge Posner discussed the difficulties of defining race and national origin, concluding that arguing that "Iranian" is a "race" "would be a loose sense of the word 'race,' but the loose sense is the right one to impute to a race statute passed in 1866." 520 F.3d at 712. The court noted that at the time § 1981 was passed, Congress routinely referred to nationalities or ethnic groups as races. Thus, a "distinctive physiognomy is not essential to qualify for § 1981 protection." *Id.* at 712. The court also noted the plaintiff's *pro se* status and the fact that the standard court form used by the *pro se* plaintiff to file his complaint did not explain the distinctions between "race," "color," and "national origin." The Seventh Circuit therefore reversed the district court's dismissal of plaintiff's § 1981 claim for failure to state a claim. It also reversed the district court's dismissal of plaintiff's Title VII claim of post-employment retaliation because it found that spreading derogatory rumors about an ex-employee can constitute retaliation under Robinson v. Shell Oil Co., 519 U.S. 337 (1997).

C. Statute of Limitations

1. Lukovsky v. City & County of San Francisco, 535 F.3d 1044 (9th Cir. 2008).

See case description at pages 5-6 of this Outline.

IV. Age Discrimination in Employment Act (ADEA)

A. Discrimination "Because of Age"

1. Kentucky Retirement Systems v. EEOC, 128 S.Ct. 2361 (2008).

The Supreme Court, in a 5-4 decision written by Justice Breyer, reversed the Sixth Circuit's *en banc* decision and instead held that Kentucky's state disability retirement plan did not violate the ADEA. Kentucky's retirement plan includes special provisions for "hazardous position" workers, such as policemen and firemen, permitting such workers to retire immediately if they become seriously disabled even if they have not reached the required age (55) or years of service normally required for retirement. Kentucky's method of calculating the amount of

retirement benefits due to seriously disabled hazardous position workers differs depending on whether the worker is older or younger than 55. The anomalous result of this complicated system is that in certain instances, a disabled worker over 55 would receive lower disability retirement payments than a disabled worker who is younger than 55.

The majority's reasoning relied heavily on Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), which emphasized the analytical distinction between pension status and age in the context of the ADEA. The court cited Hazen for the principle that in disparate treatment claims, the employee's age must have "actually played a role in that process and had a determinative influence on the outcome." 128 S.Ct. at 2366 (quoting Hazen). The court noted that the ADEA permits an employer to condition pension eligibility upon age, stating that "the ADEA treats [questions of pension eligibility] somewhat more flexibly and leniently in respect to age." *Id.* at 2367. Because Congress in the past has approved of programs that calculate permanent disability benefits based on age, the Court reasoned that age-based calculations are not necessarily prohibited by the ADEA.

The Court found that Kentucky's disability retirement plan does not discriminate *because of* age, noting the complexity of Kentucky's pension benefit rules, the fact that the retirement disability plan for hazardous position workers was given to all such workers at the time they are hired, and the "clear non-age-related rationale" of ensuring that hazardous position workers receive disability retirement benefits regardless of age-related eligibility for retirement. The Court also emphasized that there was no evidence that Kentucky was *actually motivated by age* in constructing its disability retirement plan as it did not appear to rely on the type of stereotypical assumptions that the ADEA sought to eradicate. Finally, the court factored in the difficulty of fashioning a remedy to correct age-related disparities while still maintaining the legitimate objectives of the Kentucky disability benefits system. The majority viewed Kentucky's system as different from other policies that facially discriminate based on age, appearing to carve out a 'pension status' exception to the ADEA's general proscription against facial discrimination on the basis of age.

The dissenting opinion by Justice Kennedy takes a somewhat literalist approach to the interpretation of the ADEA's prohibition of age discrimination, arguing that a benign motive cannot excuse a facially age-discriminatory employment action. The dissent further suggests that the Court's opinion heightens the requirements for discrimination under the ADEA such that even where an employer engages in facially discriminatory treatment on the basis of age, a plaintiff must additionally prove that the employer was actually motivated by age.

The division of the Court in this case cuts across the usual liberal/ conservative lines, with Justices Roberts and Thomas joining the majority and Justices Scalia and Alito, along with Justice Ginsburg, joining the dissent.

B. Admissibility of "Other Employee" Discrimination Evidence

1. Sprint/United Management Co. v. Mendelsohn, 128 S.Ct. 1140 (2008).

In vacating and remanding the Tenth Circuit's decision granting a new trial in plaintiff's ADEA claim, the Supreme Court unanimously held that "testimony by nonparties alleging discrimination at the hands of supervisors of the defendant company who played no role in the adverse employment decision challenged by plaintiff" is "neither *per se* admissible nor *per se* inadmissible." 128 S.Ct. at 1143. At trial, defendant successfully moved *in limine* to exclude the disputed testimony; on appeal, the Court of Appeals, treating the district court's order as being the application of a general rule barring testimony of this type, found that order to be an abuse of discretion. The Supreme Court, however, found that the Tenth Circuit erred in not according deference to the trial court's evidentiary rulings and in treating the district court's order excluding evidence of discrimination against non-plaintiffs who were "similarly situated" to plaintiff but who did not have the same supervisor as plaintiff as a *per se* rule against the admissibility of such evidence. Although the district court used the same words, "similarly situated," as the Tenth Circuit had used in a case cited by defendant in its motion to exclude the evidence (Aramburu v. Boeing Co., 112 F.3d 1398 (10th Cir. 1997)), the Supreme Court reasoned that the use of the phrase "similarly situated" by the district court did not necessarily mean that the district court relied on Aramburu because that case dealt with the "entirely different context of a plaintiff's allegation that nonminority employees were treated more favorably than minority employees." The Court declined to read the trial court's order as applying such a broad exclusionary rule to "a very different kind of evidence," and stressed the broad discretion afforded district courts in balancing relevancy under FRE 401 and the potential for prejudice under FRE 403, criticizing the Tenth Circuit for undertaking its own balancing under Rule 403.

Under this decision, "whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case." *Id.* at 1147. However, since the Court's reasoning did not hinge upon the ADEA context of the case, this decision would seem to apply to other types of employment discrimination claims in federal courts.

C. Reasonable Factor Others Than Age

1. Meacham v. Knolls Atomic Power Laboratory, 128 S.Ct. 2395 (2008).

This case answered the question left open by Smith v. City of Jackson, 544 U.S. 228 (2005), of which party bears the burden of persuasion of showing, in a disparate impact case under the ADEA, whether an allegedly discriminatory employment practice was based on "reasonable factors other than age" (RFOA). 29 U.S.C. § 623(f)(1). Twenty-eight employees who had been laid off by defendant Knolls Atomic Power Laboratory sued, claiming that the performance-related scoring system used to determine who would be laid off violated the ADEA. Although a jury found for the plaintiffs on a disparate impact theory, the Second Circuit reversed based on Smith, finding that the employees bore the burden of persuasion and therefore had to show that the employer's actions were not reasonable. The Supreme Court reversed, holding that under the ADEA the *employer* bears the burdens of production and persuasion, and must therefore show that its allegedly discriminatory employment practice was based on RFOA.

In its reasoning, the majority noted that the RFOA exemption appears in a section of the ADEA separate from, and stating exceptions or exemptions from, the prohibitions found in other sections, implying that the RFOA must be an affirmative defense. The court further compared the RFOA clause with the Bona Fide Occupational Qualification (BFOQ) clause, which is as an affirmative defense. Seeing no reason to treat the two clauses which appear in neighboring portions of the same section differently, the Court concluded that the most reasonable reading of the RFOA exemption, given the ADEA's structure, is that it is an affirmative defense "for which the burden of persuasion falls on the one who claims its benefits." 128 S.Ct. 2401. The Court buttressed its conclusion by reference to Congress's explicit addition of the phrase "otherwise prohibited" to several of the ADEA's exceptions in 1990, overruling Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989) (holding that the plaintiff bears the burden of proof of showing that other ADEA exemptions do not apply). The Court determined that Congress's additions in 1990 carried the avowed purpose of "restor[ing] the original congressional intent that the ADEA's benefits provision be read as an affirmative defense." 128 S.Ct. at 2402. Thus, given Congress's reaction to Betts, Congress must have intended the RFOA exemption to be an affirmative defense.

Although Knolls argued that the plaintiff must show that there was no RFOA in order to demonstrate that a questioned employment practice was "because of age," § 623(a)(2), the Court cited Smith, which held that the prohibition on practices that discriminate "because of age" applies to

disparate impact cases. Because, the Court reasoned, in disparate-impact cases, it is assumed that "a non-age factor was at work," the focus of the RFOA defense is a factual question of reasonableness, distinct from the question of whether a practice was "because of age." *Id.* at 2403.

The Court further addressed the business necessity test, holding that it has no place in ADEA disparate-impact cases. Instead, the Court ruled that a plaintiff must "isolat[e] and identif[y] the *specific* employment practices that are allegedly responsible for any observed statistical disparities" in order to set forth a proper ADEA disparate impact claim. *Id.* at 2405. The employer may then assert an RFOA defense, and "the more plainly reasonable the employer's 'factor other than age' is, the shorter the step for that employer from producing evidence raising the defense, to persuading the factfinder that the defense is meritorious." *Id.* at 2406. Although the Court recognized that its decision would make certain employment practices "harder and costlier to defend," *id.*, it also acknowledged that "certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." *Id.*

D. Retaliation

1. Gomez-Perez v. Potter, 128 S.Ct. 1931 (2008).

In this case the Supreme Court resolved a circuit split as to whether the ADEA's prohibition of "discrimination based on age" provides a cause of action for retaliation against federal employees who file an age discrimination complaint. Here, an employee of the United States Postal Service filed an ADEA claim alleging that her employer retaliated against her after she complained of age discrimination. The court, in a 6-3 decision by Justice Alito, reversed the First Circuit and held that the ADEA protects federal employees from retaliation for complaining of age discrimination.

Rejecting the defendant's argument that there is a clear difference between a cause of action for discrimination (which Congress expressly included in the relevant ADEA provision) and a cause of action for retaliation (which was not so spelled out), the Court relied on the presumed legislative intent behind Congress's explicit creation of a private right of action for age discrimination, finding that Congress intended to protect federal employees from both age discrimination itself and retaliation. The Court based its construction of the statute on the principles articulated in Jackson v. Birmingham Board of Ed., 544 U.S. 167 (2005), in which it held that Title IX's prohibition on sex discrimination must be interpreted as including a prohibition of retaliation for complaining about sex discrimination in violation of that Act. 128 S.Ct. at 1936-1937. The Court found the Court of Appeals' reliance on

Smith to be improper as the lower court had "conflated" the question of whether a statute confers a private right of action with the distinct question of whether the statute prohibits retaliation, and had reasoned that since the statute, and based on that misconception believed that the only basis for Smith's upholding of the retaliation claim was the express provision for a private right of action in Title IX. The Court also rejected the employer's argument that given the fact that the ADEA's private sector provision expressly prohibits retaliation, the absence of such a proscription in the public sector provision applicable to the plaintiff meant that Congress never intended to proscribe retaliation against federal employees who complain of age discrimination. The Court reasoned that this difference was not dispositive because Congress enacted the ADEA's federal-sector provision passed after, not in conjunction with, its private sector provision, and modeled it after Title VII's federal-sector discrimination ban, which explicitly proscribes retaliation.

Additionally, the Court rejected defendant's sovereign immunity argument, stating that although the Federal Government's waiver of sovereign immunity must be unequivocally expressed, Congress explicitly waived sovereign immunity in enacting the ADEA's federal employee provisions.

Chief Justice Roberts' dissent, joined in part by Justices Scalia and Thomas, views the statutory language and structure of the ADEA as implying that Congress, did not intend to provide a separate judicial remedy for retaliation under the ADEA but rather intended to protect federal employees from retaliation by providing remedies through prohibitions against retaliation contained in civil service system procedures.

This is one of several (along with Jackson, CBOS West, and Burlington Northern v. White), in which the Supreme Court has interpreted discrimination statutes that do not explicitly prohibit retaliation as including that prohibition in their ban of discrimination, and/or interpreted the proof requirements for retaliation claims broadly. The overall effect of these decisions is to establish that where Congress provides a right to be free of discrimination, it also prohibits retaliation for trying to enforce that right, and the prohibition against retaliation is to be read relatively expansively.

E. Mixed-Motive Cases

1. Gross v. FBL Financial Services, Inc., 526 F.3d 356 (8th Cir. 2008), petition for cert. filed Oct. 1, 2008.

In this case, defendant appealed from a jury verdict for plaintiff on his age discrimination claim under a mixed-motive theory, for allegedly

demoting him because of his age. At issue was whether the rule established by Justice O'Connor's plurality concurrence in Price Waterhouse, a Title VI case decided before the enactment of the Civil Rights Act of 1991, controls mixed-motive cases brought under the ADEA. Under the Price-Waterhouse rule for Title VII cases, a plaintiff could shift the burden of proof to defendant in a mixed motive case only by presenting "direct" evidence of discrimination; Section 107 of the 1991 Act, amending Title VII at 42 U.S.C. § 2000e-2(m), specifies that a violation is shown when a plaintiff presents any evidence (not limited to "direct evidence") that discrimination was "a motivating factor" in the employment action. The Eighth Circuit held that the Price-Waterhouse rule, not the amended Title VII standard, applies to ADEA actions.

Although the plaintiff argued that Desert Palace altered the direct evidence requirement by holding that in Title VII claims, circumstantial evidence is sufficient to prove employment discrimination in mixed-motive cases, the Eighth Circuit held that the application of Desert Palace was limited to Title VII claims. The court reasoned that the holding in Desert Palace was an effort to interpret § 2000e-2(m) and does not by its terms apply to age-related ADEA claims, Congress should be understood to have chosen to leave the evidentiary standards for ADEA mixed-motive cases unchanged. Thus, the court concluded that the district court's jury instruction improperly shifted the burden of persuasion to the employer without requiring the plaintiff to show age-based discrimination through direct evidence. Finding that the district court's jury instruction was not harmless error, the court reversed and remanded for a new trial.

F. Exhaustion of Administrative Remedies Requirement

1. Federal Express Corp. v. Holowecki, 128 S.Ct. 1147 (2008).

See case description at Section I.A.1, page 1, above.

V. Americans With Disabilities Act

A. Obvious Disabilities

1. Brady v. Wal-Mart Stores, Inc., 531 F.3d 127 (2d Cir. 2008).

In this case, the Second Circuit created an exception to the general rule that it is the individual's responsibility in accommodations cases to inform the employer that an accommodation is needed. Here, Wal-Mart failed to accommodate a former employee with cerebral palsy. Although plaintiff's disability was obvious, plaintiff testified that he did not think he needed an accommodation. The Second Circuit held that the employer may still be liable where an employee does not request an accommodation, but where the disability is obvious because "the statutory and regulatory language . . . speaks of accommodating 'known' disabilities." 531 F.3d at

135. The court reasoned that where an employer realizes, but the employee does not, that an accommodation is needed, the case is even stronger for dispensing with the requirement that the employee must request an accommodation. The court therefore held that "an employer has a duty reasonably to accommodate an employee's disability if the disability is obvious-which is to say, if the employer knew or reasonably should have known that the employee was disabled." *Id.* The Second Circuit accordingly affirmed entry of judgment on a jury verdict in favor of plaintiff.

B. Business Necessity

1. Bates v. United Parcel Service, Inc., 511 F.3d 974 (9th Cir. 2007) (*en banc*).

The Ninth Circuit, in an *en banc* decision, affirmed in part, reversed in part, and remanded a district court's judgment, following a bench trial, in favor of a class of hearing-impaired employees and job applicants who sought employment as package-car drivers with UPS. UPS had used a Department of Transportation (DOT) hearing standard to screen potential package-car drivers allegedly for safety reasons. The DOT hearing standard, however, only applies to drivers of vehicles over 10,000 pounds; by contrast, UPS required drivers of vehicles both above and below that threshold to pass DOT hearing standards.

In its reasoning, the Ninth Circuit found that the district court relied on incorrect standards in evaluating plaintiffs' claim. Because the hearing standard at issue was facially discriminatory, the court concluded that a burden-shifting protocol, like that used by the district court, is unnecessary. For such cases, the court must determine whether the plaintiff was a "qualified individual" who can perform the "essential functions" of the job, whether the plaintiff was discriminated against "because of" his or her disability, and whether the employer properly established a "business necessity" defense. In order to show that a plaintiff is a qualified individual who can perform the essential functions of the job, the court noted that "essential functions" are different from "qualification standards," and that courts are not bound by the employer's established "qualification standards" in determining what the essential functions are. The court, therefore, seemed to distinguish between primary duties and marginal ones, as well as between basic job skills and heightened qualifications. Where an employer disputes the plaintiff's ability to perform the essential functions, the employer has the burden to put forth evidence establishing those functions and the plaintiff's inability to perform them. The Ninth Circuit borrowed from a "direct threat" case under the ADA, Branham v. Snow, 392 F.3d 896 (7th Cir. 2004), for the principle that the employee is not required to prove an employer's safety-based qualification standard invalid. Rather, a plaintiff only has to prove

that he or she "meets the basic qualifications" of the job. The plaintiff meets his burden of showing that he or she is a "qualified individual by proving that "he can perform the job's essential functions either without a reasonable accommodation or with such an accommodation." 511 F.3d at 994.

With respect to the business necessity defense, the Ninth Circuit overruled Morton v. United Parcel Service, Inc., 272 F.3d 1249 (9th Cir. 2001), in its use of the traditional Title VII and ADEA BFOQ test in the ADA context. Looking to the text of the ADA, the court stated that "an employer bears the burden of showing that the qualification standard is (1) 'job-related,' (2) 'consistent with business necessity,' and (3) that 'performance cannot be accomplished by reasonable accommodation.'" *Id.* at 995. Noting that there is no BFOQ defense within the ADA, the court determined that to show "job relatedness," "an employer must demonstrate that the qualification standard fairly and accurately measures the individual's actual ability to perform the essential functions of the job." The court also noted that the standard for this showing is higher "[w]hen every person excluded by the qualification standard is a member of a protected class," and in such cases, "an employer must demonstrate a predictive or significant correlation between the qualification and performance of the job's essential functions." *Id.* at 996. Employers seeking to prove that a disputed qualification is "consistent with business necessity" "must show that it 'substantially promote[s]' the business's needs." *Id.* Noting that this business necessity standard is quite high, the court stated that such evaluations should consider "the magnitude of possible harm as well as the probability of occurrence." *Id.* Finally, in order to show that "performance cannot be accomplished by reasonable accommodation, the employer must demonstrate either that no reasonable accommodation currently available would cure the performance deficiency or that such reasonable accommodation poses an 'undue hardship' on the employer." *Id.* at 996-97.

Accordingly, the court remanded the case to the district court to consider the facts under the newly-adopted standards. The court also determined that plaintiffs had standing under the Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), three-part test.

C. ADA Amendments Act of 2008

The ADA Amendments Act of 2008, was signed into law on September 25, 2008 and will become effective January 1, 2009. The most important provision of the Amendments expands the definition of "disability," providing that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." The Amendments specifically supersede Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (requiring courts to balance corrective and mitigating measures against alleged disabilities) and

Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) (holding that individuals must demonstrate that their alleged disability prevents or severely restricts them from "doing activities that are of central importance to most people's daily lives"). The Amendments also provide that episodic impairments can still be disabilities when they substantially limit a major life activity when active.

These Amendments will expand the class of people and conditions covered under the ADA and are designed to overcome some of the stringent obstacles to plaintiffs' meeting their burdens of proof under the ADA based on the overruled Supreme Court authorities; they may lead to an increase in ADA-related litigation or to a greater probability that ADA claims will survive employers' summary judgment motions.

VI. EQUAL PROTECTION

1. Engquist v. Oregon Department of Agriculture, 128 S.Ct. 2146 (2008).

In this case, a former Oregon Department of Agriculture employee won a jury verdict on her "class of one" equal protection claim, which alleged that she was fired for arbitrary, vindictive, and malicious reasons. After the Ninth Circuit reversed the judgment, the Supreme Court, in a 6-3 opinion by Chief Justice Roberts, affirmed on the grounds that "class-of-one" equal protection claims do not apply to the public employment context. The Court based its holding on the view that, although the Equal Protection Clause "'protect[s] persons, not groups,'" equal protection doctrine targets "governmental classifications that 'affect some groups of citizens differently than others.'" 128 S.Ct. at 2150, 2152. A claim by a "class of one" plaintiff who alleges wholly arbitrary or irrational treatment does not implicate discrimination based on a group characteristic and therefore does not state a viable claim against a governmental employer.

The Court distinguished Village of Willowbrook v. Olech, 528 U.S. 562 (2000), which involved a property owner who challenged a village demand for an easement, based on the employment context of Engquist. The Court found that where the government acts as an employer, rather than as a regulator (as it did in Olech), it possesses broader powers and greater leeway in dealing with its citizen employees. The Court also distinguished between cases in which the government clearly departs from a clear standard and cases in which the government acts within its discretionary authority, as in its capacity as an employer. In addition, the court relied on two First Amendment cases, Pickering v. Board of Education of Township High School Dist. 205, Will Cty. and Connick v. Myers, for the principles that in determining the rights of public employees: (1) the court must always balance the constitutional rights of employees "against the realities of the employment context"; and

(2) the court must consider "whether the asserted employee right implicates the basic concerns of the relevant constitutional provision." 128 S.Ct. at 2151. The Court seemed moved by the concern that allowing such class-of-one cases in the government employment context would eviscerate at-will employment, as well as the concern that allowing such cases to go forward would potentially turn government employees' grievances into constitutional matters for federal court review.

The dissent, written by Justice Stevens, presented a strikingly different version of the facts, highlighting that the plaintiff, the jury, and even the State agreed that there was absolutely no rational basis for firing the plaintiff. The dissent would have confined class-of-one claims "to cases involving a complete absence of any conceivable rational basis for the adverse action and the differential treatment of the plaintiff." 128 S.Ct. at 2160. The dissent did not share the majority's concern about the erosion of at-will employment, stating that under the dissent's proposed scope of class-of-one claims in the employment context, most claims would be dismissed well in advance of trial. Finally, the dissent accused the majority of using a "meat-axe" to "create a new substantive rule excepting state employees from the Fourteenth Amendment's protection against unequal and irrational treatment at the hands of the State." *Id.* at 2158.

VII. REHABILITATION ACT

1. Sheely v. MRI Radiology Network, 505 F.3d 1173 (11th Cir. 2007).

In this case, the Eleventh Circuit held that individuals suing for violation of Section 504 of the Rehabilitation Act of 1974, 29 U.S.C. § 794, which requires recipients of federal funds to provide access to disabled persons, can obtain noneconomic compensatory damages for emotional distress. Here, the plaintiff was a blind individual who attempted to take her guide dog with her as she accompanied her minor child for an MRI exam. In finding that the Rehabilitation Act provides for non-economic compensatory damages, the court looked first to the statutory language, which stated that the same remedies available under Title VI (which prohibits racial discrimination by recipients of federal funds) shall be available for the Rehabilitation Act. The court then looked to Supreme Court precedent in Title VI cases which held that noneconomic compensatory damages are available for Title VI. Borrowing from those cases, the court held that such damages are similarly available for the Rehabilitation Act. The court reasoned that "[w]hen an entity accepts funding from the federal government, it does so in exchange for a promise not to discriminate against third-party users of its services. A foreseeable consequence of discrimination is emotional distress to the victim, and emotional damages have long been available for

contract breach in the public accommodations context. Thus, where one of the benefits the government has bargained for is the funding recipient's promise not to discriminate, the recipient cannot claim to lack fair notice that it may be liable for emotional damages when it intentionally breaches that promise." 505 F.3d at 1204.

The court also determined that the action was not rendered moot after defendant voluntarily ceased the alleged misconduct – banning guide dogs from MRI exam rooms – because the defendant did not meet its heavy burden of showing that the allegedly wrongful behavior would not recur in the future. The court elaborated at length on the "stringent" standard for determining that mere cessation of a challenged activity renders the challenge moot, and identifies a number of factors to be considered in applying that standard. 505 F.3d at 1183-1187. Applying those factors to this case, the court noted that defendant's voluntary cessation seemed to be motivated more by a desire to avoid liability than a "genuine change of heart," and the case was therefore not moot.

Although Sheely was a disability access case, the Rehabilitation Act's prohibitions also apply to discrimination against disabled persons in employment. Therefore, its holding would appear to make non-economic compensatory damages available in Rehabilitation Act cases involving employment claims. In addition, its extended discussion of the stringent standards for finding the plaintiffs' claims moot (505 F.3d at 1186) is not based on authority specific to the Rehabilitation Act and would appear applicable to issues of mootness, or the necessity of injunctive relief for allegedly discontinued discriminatory practices, in other statutory settings such as Title VII, Section 1981, and the ADEA.

VIII. CLASS ACTIONS: JURISDICTION, CERTIFICATION, AND SETTLEMENTS

A. Certification

1. Dukes v. Wal-Mart, Inc., 509 F.3d 1168 (9th Cir. 2007), petition for rehearing *en banc* pending.

In December 2007, a panel of the Ninth Circuit withdrew and superseded its landmark opinion issued in February 2007 (474 F.3d 1214) affirming the district court's certification under Rule 23(b)(2) of a proposed class of approximately 1.5 million women who collectively claimed that Wal-Mart engaged in sex discrimination in pay and promotions. The new opinion arrived at largely the same result on the class certification issue, emphasizing the broad discretion conferred on the district court, 509 F.3d 1175-1176, and finding that the trial court did not abuse its discretion in certifying the class based on significant evidence presented by plaintiffs, including expert opinions supporting the existence

of company-wide gender stereotyping by Wal-Mart, statistical data suggesting widespread gender disparities in pay and promotions, and individual anecdotes of sex discrimination.

The new opinion diverged, however, from the initial opinion in several important respects relating to standards of proof and procedure in certifying class actions. First, the Court excluded those class members who were no longer Wal-Mart employees at the time the complaint was filed from pursuing injunctive or declaratory relief. Relying principally on Walsh v. Nev. Dep't of Human Res., 471 F.3d 1033 (9th Cir. 2006), the court found that employees who no longer work for an employer at the time a claim is filed would not have standing to pursue injunctive or declaratory relief. Distinguishing such former employees from former employees who still worked for the employer *at the time of filing*, the court reasoned that the latter category would still possess an interest in "put[ting] an end to the practices they complain of 'even in the absence of a possible monetary recovery,'" and therefore had standing to serve as class representatives. 509 F.3d at 1189. The court therefore remanded the case to the district court to determine the appropriate scope of the class observing however that it was satisfied that in this case the primary relief sought was injunctive (a 23(b)(2) requirement). Plaintiffs have filed a rehearing petition on the issue of whether ex-employees are categorically barred from pursuing injunctive relief.

Second, the panel stepped back from its earlier opinion's initial explicit declaration that a lower Daubert standard applies at the class certification stage, now finding that it was "enough that [the expert] presented properly-analyzed, scientifically reliable evidence tending to show that a common question of fact . . . exists with respect to all members of the class." 509 F.3d at 1179. The court also suggested that the use of the Daubert test would be inappropriate at the class certification stage because Wal-Mart's opposition to plaintiffs' expert testimony went to the substance of the testimony and prematurely debated merits issues, rather than methodology used. Such questions, the court found, should be reserved for the jury.

Third, the Court side-stepping attempting to resolve methodology disputes over the analyses presented by the parties' statistical experts, particularly with regard to the proper geographical scope for analyses and aggregated vs. disaggregated data analysis provided reliable results. These questions the Court found common ones to be resolved in proceedings at the merits stage. 509 F.3d at 1181-1182.

Fourth, the Court strongly endorsed its prior holding that "subjective decision-making is a 'ready mechanism for discrimination' and that courts should scrutinize it carefully" in discrimination cases. *Id*. at 1183. The Court noted that plaintiffs' evidence of a "centralized

company culture and policies … providing a nexus between the subjective decision-making and the considerable statistical evidence demonstrating" adverse impact in compensation and promotions. *Id.*

Fifth, the Court held that neither plaintiffs' request for very substantial back pay on behalf of the class nor class-wide punitive damages necessarily, or in this case, prevented the district court from properly certifying the class action under Rule 23(b)(2) because plaintiffs' claims for injunctive and declaratory relief predominate and the district court allowed class members to opt-out of the claim for punitive damages. *Id*. at 1186-1189.

Finally, the panel altered its earlier reasoning for dismissing Wal-Mart's due process claim that its rights would be violated by use of a class action at trial because it would be deprived of the right to raise defenses to each individual class member's claims. Altering its rationale but not its disposition of Wal-Mart's due process argument, the Court relied Hilao v. Estate of Ferdinand Marcos, 103 F.3d 767 (9th Cir. 1996), in which the Ninth Circuit rejected due process challenges to a trial plan for a large class action in which the district court randomly selected a smaller number of claimants for individual examination, with results of those individual examinations to be extrapolated to determine compensatory damages for the class as a whole. The panel found that "[b]ecause we see no reason why a similar procedure to that used in Hilao could not be employed in this case," 509 F.3d at 1192-93, the district court should be able to manage such a large class without infringing defendant's due process rights.

Defendants' petition for rehearing en banc of all the issues it lost is pending.

2. McClain v. Lufkin Indus. Inc., 519 F.3d 264 (5th Cir. 2008).

See discussion at pages 3 and 14-15, above, on jurisdictional and merits issues. As to class certification, while plaintiffs had prevailed on their disparate impact claims in the district court, they appealed the district court's refusal to certify the class on their 42 U.S.C. § 1981 disparate treatment claims under Rule 23(b)(2). (The district court also dismissed their Title VII disparate treatment class claims under the Fifth Circuit's Allison decision; plaintiffs did not appeal from that ruling.) The Fifth Circuit affirmed, expressing concern that plaintiffs had renounced compensatory damages and limited their monetary claims to back pay, and announced that "if the price of a Rule 23(b)(2) disparate treatment class both limits individual opt outs and sacrifices class members' right to avail themselves of significant legal remedies," a district court would be correct in denying class certification. The Fifth Circuit's opinion appears to overlook the fact that the district court had ordered pre-trial notice to class members that allowed them to opt out.

3. Parra v. Bashas', Inc., 536 F.3d 975 (9th Cir. 2008).

In this case, filed by Hispanic grocery store employees who claimed national origin discrimination in violation of Title VII and § 1981, the district court granted certification of proposed class with respect to working conditions, but denied certification as to claims of pay discrimination on the grounds that defendant had eliminated the pay disparities by the time of its order. The Ninth Circuit granted review under Rule 23(f) of the district court's partial denial of class certification, and reversed.

The Ninth Circuit cited Staton v. Boeing Co., 327 F.3d 938 (9th Cir. 2003), in which it upheld a district court's finding commonality for a much broader class of employees, as well as Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998), for the propositions that in making Rule 23(a)(2) commonality determinations, the Rule "has been construed permissively and not all questions of fact and law need to be common to satisfy this rule …. Where the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists." 536 F.3d at 978-79. Although the extent of the pay disparity between class members and their white comparators differed, the court emphasized that "Plaintiffs here establish commonality even though their individual factual situations differ because they all seek a common legal remedy for a common wrong." Id. at 979.

Moreover, the appellate court held that the district court erred in only looking at the current pay scales, which had been adjusted to eliminate pay disparities, when determining whether to grant class certification. The Ninth Circuit ruled that the district court should have based its decision on the pay scales in effect during the time that the discrimination allegedly occurred. Finally, the court dismissed defendant's argument that "the difficulty in redressing the harm and calculating the various pay disparities for the different employment positions precludes certification." *Id.*

4. Ellis v. Costco Wholesale Corp., 240 F.R.D. 627 (N.D. Cal. 2007), petition for review of order granting class certification pending.

In this case, the Ninth Circuit agreed to review Costco's interlocutory appeal from a district court order certifying a Rule 23(b)(2) class action for discrimination against women in promotions. Defendant's petition raises a host of potentially significant challenges to various aspects of the district court's certification order, including (1) whether, under Ledbetter, a statistical analysis can include data on promotions more than 300 days before the class representative's EEOC charge was filed; (2) the proper organizational and geographical scope of the statistical analysis; (3) the use of "social framework" analysis and statistical

"benchmarking" comparisons to demonstrate commonality; (4) how to determine whether monetary relief predominates for Rule 23(b)(2) purposes; (5) whether a 23(b)(2) class action can be certified when plaintiffs seek classwide punitive damages; and (6) whether classwide proceedings to determine compensatory and punitive damages would violate the employer's due process and Seventh Amendment rights.

B. Interlocutory Appeals of Class Certification Orders

1. Gutierrez v. Johnson & Johnson, 523 F.3d 187 (3d Cir. 2008).

In this case alleging class-wide discrimination in compensation and promotion under Title VII and § 1981, the Third Circuit confronted issues about the nature and rigidity of FRCP 23(f)'s ten-day time limit for requesting permission to appeal an order by a district court granting or denying class action certification. Two days after the district court declined to certify the plaintiff class, plaintiffs sent a letter to the district court stating that both parties had reached an agreement for an extension of time to file a motion to reconsider and that "Plaintiffs understand that this extension is sought and may be granted without prejudice to Plaintiffs' right to seek leave of court to appeal the Order [denying certification]." The district court granted the extension seven days later (still within the 10 day period). Four months later, the district court reconsidered and denied plaintiff's motion to reconsider granting class certification. Within ten Rule days of the district court's denial of the motion to reconsider, plaintiffs filed a Rule 23(f) petition with the Third Circuit, seeking interlocutory appeal of the denial of class certification.

The Third Circuit dismissed plaintiff's petition as untimely. The court emphasized that the ten-day period under Rule 23(f) begins when the district court enters its order denying class certification. Calling this requirement "strict and mandatory," the court also outlined a "narrow exception" to the time limit, under which, when a party timely files a motion to reconsider within that ten-day period, the ten-day limit for seeking an interlocutory appeal is tolled. Since plaintiffs did not file their motion to reconsider within ten days of the district court's initial denial of class certification, the court held their interlocutory appeal untimely. The Third Circuit rejected plaintiffs' contention that their letter, filed two days after the district court's initial denial of certification, tolled their time for appeal, finding that "[a]t best, the letter is . . . a 'notice of their intent to seek reconsideration.'" *Id.* at 195. The court also considered and rejected plaintiffs' arguments that Johnson & Johnson had somehow waived its challenge to the timeliness of the Rule 23(f) petition by failing to object to the district court's approval of the extension of time requested by plaintiffs.

Although the court also concluded that 23(f) is not jurisdictional, but rather "closer in nature to [] rule-based, claims-processing time limits," thereby allowing, in certain cases, the "doctrine of unique circumstances" to toll the 10-day time limit, it refused to apply the doctrine of unique circumstance to this case, noting the "narrow manner in which this Court has interpreted" that doctrine. *Id.* at 198-199.

IX. DAMAGES AND ATTORNEYS' FEES

A. Calculation of damages

1. McClain v. Lufkin Indus. Inc., 519 F.3d 264 (5th Cir. 2008), cert denied, -- S.Ct. --, 2008 WL 2715699 (Oct. 6, 2008).

See also discussion at pages 3, 14-15, and 38, above.

In this Title VII case, the district court, following a bench trial, awarded damages based on the defendant's promotion practices which disparately impacted African-American employees. On appeal, the court vacated and remanded the district court's damage award, as well as the award of injunctive relief and attorneys' fees. The court determined that the district court was correct in not engaging in an individualized calculation of damages and in ruling that a formula-based approach should be used. However, the court vacated and remanded the district court's calculation of damages in order to remove from consideration the class of Foundry workers (given its finding that the disparate impact claims did not cover workers at the Foundry plant), and held that the particular formula adopted by the district court – based on average pay disparities between class members and their white comparators on a group basis – was error. Instead, the court held, damages must be based on "value" of the "shortfall" number of promotions not received by class members.

The court also vacated and remanded the district court's injunction for vagueness and lack of detail, and vacated and remanded the court's award of attorneys' fees because the court offered no reason or findings for slashing plaintiffs' request for fees.

B. Punitive Damages

1. Abner v. Kansas City Southern Railroad Co., 513 F.3d 154 (5th Cir. 2008).

In this case, the Fifth Circuit fell in line with the majority of other circuits holding that punitive damages may be awarded without accompanying compensatory damages or backpay in Title VII cases. The court first based its holding on the plain language of Title VII, which specifically provides for punitive damages and for a cap on those damages. 42 U.S.C. § 1981a. The court observed that nothing in the text limits

punitive damages to those cases in which plaintiffs are also awarded compensatory damages. The court also cited the Congressional intent behind Title VII to increase the remedies available to victims of discrimination. The court was unconcerned with the potential for indiscriminately high jury awards because it reasoned that the cap on punitive damages would guard against such awards. Moreover, the high threshold of culpability for punitive damages would also prevent damages from becoming excessive. The Fifth Circuit therefore affirmed the award of $125,000 in punitive damages to each plaintiff, coupled with $1 in compensatory damages.

This decision may encourage increased litigation under Title VII in cases for which compensatory damages are not very high. In reaction to such suits, courts might seek to raise the bar on the culpability required to warrant punitives.

2. Goldsmith v. Bagby Elevator Co., 513 F.3d 1261 (11th Cir. 2008).

Based on holdings described in Section I.B.2, pages 19-20, above, the Eleventh Circuit upheld an award of $500,000 in punitive damages for racial discrimination and retaliation under § 1981 (and Title VII to the extent its damages cap permitted that award) together with $54,321 in compensatory damages – a 9.2 to 1 ratio. The court observed that under the Supreme Court's Gore decision, the "dominant consideration in the evaluation of a punitive damages award is the reprehensibility of the defendant's conduct," based on a number of factors listed at 513 F.3d 1283, and added that "[E]vidence tending to prove a company policy or practice of discrimination can support a sizeable punitive damages award." *Id.* Finding the defendant's "flagrant disregard of [plaintiff's] federal rights" to be "exceedingly reprehensible" and also evidence of a pattern of discriminatory conduct, the court held the punitive damages award not excessive and therefore not violative of defendant's due process rights.

Under the principles embraced in this decision, plaintiffs' attorneys may argue that evidence of discrimination against other employees, whose relevance or admissibility might otherwise be disputed (see Section IV.B.1, page 27, above), must be considered as probative on the issue of the plaintiffs' entitlement to a punitive damages award, and the amount of the award.

C. Prejudgment Interest

1. Trout v. Secretary of the Navy, 540 F.3d 442 (D.C. Cir. 2008).

The D.C. Circuit ruled that a class of female employees who prevailed against the Navy in their Title VII employment discrimination suit was not entitled to prejudgment interest on liability for backpay and

attorneys' fees incurred litigating to obtain interest for the period before November 21, 1991, the enactment date of the Civil Rights Act of 1991, which included a provision for awarding prejudgment interest. The underlying litigation lasted twenty years and resulted in a consent decree, approved in 1893, which provided for other relief but not pre-1991 interest. The parties then continued to litigate the interest issue, leading to this decision.

Rejecting plaintiffs reliance on Republic of Austria v. Altman, 541 U.S. 677 (2004), a case giving retroactive effect to the Foreign Sovereign Immunities Act of 1976, the D.C. Circuit noted that Altman does not apply because the Supreme Court in Altman expressed no disagreement with Landgraf v. USI Film Prods., 511 U.S. 244 (1994), which set a default rule of no retroactive effect of congressional enactments absent an express statement to that effect. Finding no such express statement in the 1991 Act, the court therefore relied on the Landgraf no-retroactivity rule and on Hensley v. Eckerhart, 461 U.S. 424 (1983), for the proposition that parties are not entitled to attorneys' fees for unsuccessful claims that are distinct in all respects for the party's successful claims. The court found that, despite plaintiffs' success in the Title VII case as a whole, the prejudgment interest issue was "not inextricably intertwined with the sex discrimination litigation, it was not necessary to obtain or protect any relief awarded, nor was it necessary to preserve the integrity of the Consent Decree as a whole." 540 F.3d at 448, and therefore affirmed the district court's refusal to award prejudgment interest and attorneys' fees related to litigating the issue.

D. Paralegal Fees

1. Richlin Security Service Co. v. Chertoff, 128 S.Ct. 2007 (2008).

In this case the Supreme Court held that the reimbursement of attorney's fees, expenses, and costs pursuant to the Equal Access to Justice Act (EAJA) included paralegal fees, which can be recovered at "prevailing market rates." The plaintiff, a successful litigant in an action against the Government, filed an application with the Department of Transportation's Board of Contract Appeals for attorney's fees, expenses, and costs, including paralegal fees. The Board held that the plaintiff was only entitled to recover paralegal fees at the cost to the firm and determined, based on paralegal salaries in the Washington D.C. area as reflected on the internet, that $35 per hour was a reasonable cost to the firm. The Federal Circuit affirmed.

In reversing the Federal Circuit, the Supreme Court relied on a plain reading of the EAJA, 5 U.S.C. § 504(a)(1), and drew from its jurisprudence relating to the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. The Court placed special emphasis on Missouri

v. Jenkins, 491 U.S. 274 (1989), which held that "attorney's fee" in § 1988 can include paralegal fees as well. The Court's review of the legislative history was inconclusive, and the Court was unpersuaded by the Government's policy argument that, given the EAJA's cap of all attorney and agent fees at $125 per hour, allowing market-based paralegal awards would incentivize litigants to shift an inefficient amount of attorney work on paralegals. The Court underscored that despite potential policy concerns, the plain language of § 504 unambiguously awarded "reasonable attorney or agent fees . . . [at] prevailing market rates." Finally, the Court rejected the Government's reliance on sovereign immunity, stating that it must be applied subject to traditional tools of statutory construction. Because the court borrowed from and did not distinguish § 1988 case law, the Court's decision that attorneys' fees and costs provide for reimbursement of paralegals' fees at the prevailing market rate likely also applies to the employment context.

E. Approval of Attorneys' Fees in Settlements

1. In re High Sulfur Content Gasoline Products Liability Litigation, 517 F.3d 220 (5th Cir. 2008).

The Fifth Circuit vacated and remanded the district court's approval of the allocation of $6.875 million in attorney fees to more than six dozen plaintiffs' lawyers via an ex parte hearing without supporting data. The court found that the district court abdicated its responsibility to closely scrutinize the attorneys' fee allocation as it did nothing to validate the accuracy of the proposed fee allocation. The court opined that "[o]n a broad public level, fee disputes . . . ought to be litigated openly. . . . [P]ublic confidence [in our judicial system] cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." 517 F.3d at 230. The court found, moreover, that the court's order violated Federal Rules of Civil Procedure 62(a) (imposing a ten-day automatic stay on the enforcement of judgments) and 23(h) (requiring a fair hearing process for setting fees).

Although not an employment discrimination case, this appellate decision, along with other trial court decision in the wage and hour law area, suggests a trend that courts reviewing class action settlement including agreed upon attorneys' fees awards may increasingly scrutinize the basis for the awards, and require that basis to be disclosed on the record.

X. ENFORCEMENT OF ARBITRATION CLAUSES

1. Preston v. Ferrer, 128 S.Ct. 978 (2008).

The Supreme Court, perhaps signaling its intent to broaden the reach of the Federal Arbitration Act (FAA), held that the FAA supersedes state laws that confer exclusive jurisdiction to a state judicial or administrative agency. In this case, an entertainment lawyer sought enforcement of an arbitration clause to settle a contract dispute between himself and Ferrer, also known as "Judge Alex" on Fox television. Ferrer asserted that the contract was invalid under the California Talent Agencies Act (TAA), which vests exclusive original jurisdiction over disputes in the California Labor Commissioner. The Supreme Court decided that disputes relating to the TAA may still be arbitrable, citing the national policy of enforcing arbitration agreements. The Court relied heavily on Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006), which enforced an arbitration agreement despite plaintiffs' contention that the contracts were illegal under state law and void *ab initio*. The Court also cited Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, in which it held that administrative agency enforcement of a statute does not interfere with private parties' obligation comply with their arbitration agreements. Although Ferrer attempted to rely on EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) (holding that an arbitration agreement does not bar the EEOC from independently enforcing statutory requirements), the Court distinguished Waffle House, noting that the governmental agency was acting as an advocate there, whereas in Preston the governmental agency is acting as an impartial arbiter.

XI. CASES TO WATCH

1. Crawford v. Metropolitan Government of Nashville and Davidson County, TN, 211 F.App'x 373 (6th Cir. 2006), *cert. granted*, 128 S.Ct. 1118 (2008).

See case description at pages 20-21, above regarding the Sixth Circuit's narrow interpretation of the practices protected by Title VII's retaliation provision. Oral argument was heard on October 8, 2008. According to reports, the tenor of the questioning suggested that the Supreme Court would reverse the Sixth Circuit.

2. 14 Penn Plaza LLC v. Pyett, 498 F.3d 88 (2d Cir. 2007), *cert. granted,* 128 S.Ct. 1223 (2008).

In this case, the second Circuit affirmed a district court's denial of a motion to compel arbitration (in accordance with a collective bargaining agreement) of an ADEA claim raised by employees against their employer and building owners. The Second Circuit held, based on the Supreme

Court's opinion in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) and its own decision in Rogers v. New York University, 220 F.3d 73 (2nd Cir. 2000), that mandatory arbitration clauses are unenforceable to the extent that they waive the right to a federal forum for statutory causes of action. The Second Circuit's disposition of this case may be in tension with the Supreme Court's recent opinion in Preston v. Ferrer, see case description at page 44, above. Distinctions that may prove important in reconciling the Court's past and recent decisions, and in deciding this case, include that between individually – accepted and collectively-bargained arbitration obligations, statutory and contractual bases for claims, and the arguably unique importance accorded to enforcement of employment discrimination claims. Oral argument is scheduled for December 1, 2008.

3. Hulteen v. AT&T Corp., 498 F.3d 1001 (9th Cir. 2007) (en banc), *cert. granted*, 128 S.Ct. 2957 (2008).

The Ninth Circuit, in an *en* banc opinion, found that an employer commits a Title VII violation each time it applies a pension policy that calculates pregnancy leave differently than other temporary disability leave. Reversing a panel decision in the case, it found that Ledbetter imposed no barrier to plaintiff's Title VII claims sine although the pension policies in question and the pregnancy leave taken by plaintiffs transpired prior to the enactment of the PDA, they were applied when plaintiffs retired decades later.

Oral argument is scheduled for December 10, 2008. The Supreme Court's disposition of this case will provide insight into whether the PDA has retroactive effect.

4. Dukes v. Wal-Mart, Inc., 509 F.3d 1168 (9th Cir. 2007), petitions for rehearing en banc pending.

An *en banc* rehearing of the panel decision (see pages 36-38, above) could lead to an important decision on any or all of several issues of general importance regarding certification of employment discrimination class actions, proof of discrimination, class action trial procedures, and available remedies.

5. Ellis v. Costco Wholesale Corp., 240 F.R.D. 627 (N.D. Cal. 2007), petition for review of order granting class certification pending.

If the Ninth Circuit grants the petition seeking review of the district court's class certification order described at page 39-40, above, it would have occasion to address several important issues regarding class certification in employment discrimination actions. On April 16, 2008, the court withdrew Ellis from submission pending action on the petition for rehearing en banc in Dukes v. Wal-Mart, Inc.